



## RULEMAKING ISSUE (Affirmation)

SECY-85-333

October 21, 1985

For: The Commissioners

From: William J. Dircks  
Executive Director for Operations

Subject: PROCEDURAL AMENDMENTS TO 10 CFR 60 DEALING WITH SITE CHARACTERIZATION AND THE PARTICIPATION OF STATES AND INDIAN TRIBES

Purpose: To obtain Commission approval of a notice of final rulemaking.

Category: This paper involves several policy questions.

Background: The Commission published proposed procedural amendments to 10 CFR 60 dealing with site characterization and the participation of States and Indian tribes on January 17, 1985 (50 FR 2579). The staff received comments from fifteen organizations on a large number of issues. The final amendments presented here were developed following consideration of these comments, as well as consideration of comments received from the ACRS Waste Management Subcommittee.

Summary: The final rulemaking recommended by this paper will conform the

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procedures for licensing high-level waste geologic repositories in 10 CFR 60 to those specified by the Nuclear Waste Policy Act.

Discussion:

Licensing procedures which set forth a regulatory framework for licensing high-level radioactive waste (HLW) geologic repositories (10 CFR 60) were promulgated in final form on February 25, 1981 (46 FR 13971). In publishing the proposed procedures, the Commission recognized that provisions of Part 60 dealing with participation might have to be changed in the future should the passage of pertinent legislation take place (44 FR 70408). This did, in fact, occur with the passage of the Nuclear Waste Policy Act of 1982 -- 42 U.S.C. 10101 et seq. (NWPA). The NWPA sets forth in considerable detail the roles and responsibilities of NRC, the Department of Energy (DOE), States and Indian tribes, and the general public during the process of siting and development of HLW geologic repositories. The NWPA requires that DOE consult and cooperate with States and tribes at many specified points throughout the repository siting and development process. DOE is required to issue its site characterization plans (SCP's) for public comment, hold meetings to obtain public comment, and provide funding for States and tribes to participate in, and inform their residents about, the process. Additional procedural steps are required of DOE between the time DOE identifies a potential site, and the submission by DOE of an SCP. The contents of the SCP are specified by the NWPA, and are different from those given in the original Part 60.<sup>1</sup> A major difference is that the SCP would no longer contain

<sup>1</sup>Section 113(b)(1)(A) of the NWPA allows NRC to require submission by DOE of "any other information" but this is not an unlimited grant of authority. Such other information, must be germane to "a general plan for site characterization activities to be conducted at such candidate site."



site selection information; this information would instead be presented by DOE in environmental assessments (EA's) which DOE is required to prepare for each site.

In proposing procedural amendments to Part 60 to the Commission (SECY-84-263), the staff stated that amendments were needed to (1) provide a framework for State, tribal, and public participation consistent with the NHPA, (2) avoid duplication of effort, and (3) conform the licensing procedures to the site selection process specified by the NHPA. The staff also identified some changes which it believed desirable to better reflect NRC's pre-licensing consultation and guidance process as it has evolved since the licensing procedures were promulgated. The staff pointed out that some of the proposed changes to Part 60 could be expected to be the focus of particular interest by States and tribes. These were identified as (a) the deletion from the SCP of NRC review of DOE's site selection process, (b) a perception that the proposed changes would represent a significant diminishing of opportunities for State and tribes to participate in the NRC pre-licensing process, and (c) the nature of NRC review of DOE's environmental assessments.

In the course of preparing the proposed amendments, the staff actively sought comment from States and tribes. Several meetings were held with States and tribes, at which the proposed amendments were discussed, and a number of comment letters were received. The staff documented its effort to seek comment in Enclosures B and C to SECY-84-263. Following the submission of SECY-84-263 to the Commission on June 26, 1984, additional comments were received from Minnesota, Nevada, Texas, and the Environmental Policy Institute. The staff identified four significant issues contained in these comments and analyzed them for the Commission in SECY-84-263A, November 8, 1984. These issues were (1) NRC review of DOE's site screening and selection

process, (2) the decoupling of Part 60 and Part 51 revisions which are needed to reflect the NHPA, (3) the elimination of the draft site characterization analysis, and (4) concern about the basis for standing of States and tribes in a licensing hearing. All but (4) had been discussed in SECY-84-263. As a result of the analysis of the four issues, the staff concluded that these additional comments did not provide any new information which would lead it to change its recommendation to the Commission contained in SECY-84-263.

A total of 15 organizations commented on the proposed rule. While many specific, detailed points were raised, most of the discussion centered on a few underlying issues. Once again, NRC review of DOE's site screening and selection process, the decoupling of Part 60 and Part 51 revisions which are needed to reflect the NHPA, and the lack of a draft SCA received heavy comment. In addition, many comments focused on the lack of any provision in the proposed amendments requiring DOE to refrain from sinking shafts for the site characterization process until a reasonable time had elapsed for review and comment on the SCP's.

#### Draft Site Characterization Analysis

There were several comments about the deletion of the draft site characterization analysis (SCA). Under the rule as proposed to be amended, NRC would issue a single, final SCA on DOE's SCP and would invite public comment on its SCA, for consideration in the ongoing staff review and commentary on the DOE program. However, NRC would not issue both a draft and final SCA. Commenting States believe that they have substantial expertise which NRC should consider in preparing its SCA. Some States want to have the benefit of NRC's expertise while preparing their own comments. It was noted that the Director's invitation to

State/tribes for comments on DOE's site characterization plan was discretionary. Concern was also expressed that NRC will not have to respond to State/tribe comments on the SCA, and may not actually address issues expressed in those comments. Some commenters believe that the opportunities and procedures for public and State involvement in the repository siting and development process under the NWPA are not substantially different from those contemplated when the previous regulations were promulgated. From this they conclude that there is no reason for NRC to change its procedures by eliminating the draft SCA on DOE's SCP.

The staff agrees that there is a need for the States and tribes, as well as other members of the public, to have an opportunity to participate effectively in the review of the SCP. Prior to passage of NWPA, the provisions of Part 60 afforded the only assurance that they would have this opportunity. The new law provided new guarantees for public participation. Specifically, avenues were provided for commenting directly to DOE on its site screening decision and site characterization plans. In the staff's view, these changes were significant and raised the question whether the review procedures in Part 60 were still necessary, or even appropriate.

With respect to the need for NRC awareness of State and tribal views, we believe there are effective means for obtaining such views and the benefit of State and tribal expertise without circulation of a draft SCA for comment. In the first place, the preparation of the SCP will have been preceded by the extensive informal communications between DOE and NRC - all of which will have been documented in the public record. These include, especially, the many technical meetings at which the States and tribes may participate. The technical meetings afford an opportunity for the States and tribes to bring their concerns about relevant issues to the attention of NRC as well as DOE.

Second, the staff has always welcomed the submission of comments from any interested parties, at any time, and will continue to do so. Third, as provided in the rule, NRC expects to review and consider comments made in connection with public hearings held by DOE on its SCP. Fourth, the rule would provide for the solicitation by NRC of comments on the published SCA; while this would not require a detailed analysis of any particular comment, it would help to assure that NRC would not overlook any matter of substance which ought to be brought to the attention of DOE. Finally, under a change that is reflected in the final rule that is recommended here, NRC would provide opportunity before publication of the SCA, for the host State and affected Indian tribes to present their views on the DOE SCP and their suggestions with respect to comments thereon which may be made by NRC. The avenues for receiving State and tribal views, as summarized above, will be sufficient to enable NRC to review and comment to DOE on its site characterization plans as contemplated by the NWPA.

Some commenters argued that the draft SCA should be kept because it would condense the numerous technical issues and discussions, which will be quite extensive and will take place at a wide range of locations and times, in a way that would make it practicable for them to be involved and to comment effectively. However, the principal issues should have been addressed in the documentation of these technical meetings. Specifically, the meeting minutes or transcripts are placed in central locations (viz. public document rooms) to facilitate public access and review. Moreover, the issues will still all be addressed or "condensed" in the SCP (and the SCA as well), where all parties will have an opportunity to consider them. The staff's analysis would not be



needed in order for other reviewers to be able to comment effectively on the SCP.<sup>2</sup>

Moreover, as indicated, there are plenty of opportunities for NRC to be made aware of the issues of concern, so that they would be dealt with in the SCA. But, most importantly, NWPA contemplates that the States and affected Indian tribes will present their criticisms to DOE directly. Under the statute, the Commission, States, and affected Indian tribes have a parallel reviewing function. This is different from the scheme outlined earlier in Part 60, and the difference should be reflected in the language of the rule.

<sup>2</sup>Some commenters argue that the elimination of the draft SCA implies that NRC might not actually address issues that commenters wish to raise. As already noted, however, comments will be solicited on the SCA that is actually prepared, so that any actual oversights can be addressed. The proposed rule (§60.18(f)) provided that the Director would publish a notice requesting public comment on the SCA. This was intended to provide greater assurance to NRC that it had not overlooked any issue of substance and that its analysis of the SCP has addressed the issues in a reasonable and understandable way. The staff expected that all comments received would be reviewed, but that no documented record of such review would be made. A consideration of the comments received in response to the proposed rule suggests that the language might give rise to expectations that NRC would analyze all comments on the SCA more formally, and that any failure to do so (or any inadequate analysis of comments raised) might give rise to a lawsuit to require NRC to carry out a fuller analysis. The Commission could eliminate this contingency by amending §60.18 to omit the requirement for public comment on the published SCA. The staff does not recommend that action, however, as it regards the opportunity for public comment to be a valuable contribution to effective NRC review. The staff maintains that the language would not require the undertaking of a formal analysis.

Site Selection Information

There were comments concerning the deletion of site screening and selection information from the SCP contents. Some commenters favored the deletion, more opposed it. Unfavorable comments were based on a perceived lack of any NRC review of DOE's site screening and selection process. However, the NRC has played a role in this process. This role has involved the review of site data to identify licensing issues at the earliest possible stage; review of environmental assessments which provide the basis for site selection decisions, review of other site specific documents; and concurrence in the siting guidelines. Also, we expect to review and comment on DOE's scoping documents and activities for implementing NEPA in the repository program which are to be developed pursuant to CEQ rules, and to comment on DOE's EIS. The issue of concern in connection with these amendments is not whether the Commission should be involved in the site screening and selection process; but what should be the required content and the scope of NRC review of the SCPs. It is clear to the staff, from the NWPA, that the site selection issues previously dealt with in Part 60 were to be separated from the site characterization plans and dealt with, instead, in the environmental assessments. The regulation was filling a gap by requiring site selection information in the SCP. That gap no longer exists.

Shaft Sinking

Some commenters suggested that the regulation be amended to require that DOE not proceed to characterize sites by sinking shafts until NRC and State review and comment upon the SCP are complete. The NWPA does appear to call for the SCP to be the

time to take up shaft related issues. It is not unreasonable to interpret the NWPA to mean that DOE should wait. Thus, we are in general agreement with the commenters' view of the NWPA requirements on this matter. As stated in the preamble to the proposed rule, "The Commission believes that Congress intended that DOE should provide the plans sufficiently far in advance so that comments may be developed and submitted back to DOE early enough to be considered when shaft sinking occurs, and at all times thereafter." However, the staff believes that this question is essentially a matter of statutory construction of the obligations of DOE under Section 113(b) of the NWPA and that the appropriate course is to leave it to DOE in the first instance to construe and apply the law. There is no compelling reason for the Commission to incorporate its interpretations of such a provision in its own regulations. DOE has stated<sup>3</sup> that shaft sinking will not occur until sufficient time has elapsed to allow for review and comment on the SCP's.<sup>4</sup>

#### Simultaneous Promulgation of Amendments

Some commenters recommend that all revisions to Part 60 and Part 51 to conform them to the NWPA should be promulgated simultaneously. In particular, they recommend that the revisions concerning NEPA requirements accompany the revisions currently being promulgated. They believe this is necessary to assure that

<sup>3</sup>Mission Plan, DOE/RW-0005, June 1985, Vol. I, pg. 59 and Vol. II, pg. 128.

<sup>4</sup>States have recently expressed continued concern on this matter. For example, in a July 18, 1985 meeting on Generic Exploratory Shaft-Design and Construction, representatives of Texas and Utah, provided further explanation of the need for a requirement that DOE wait to receive and consider comments on the SCP before shaft sinking, and of their concern with the NRC/DOE staff arrangements for resolution of shaft-related issues prior to the SCP. They pointed out that the States are not yet prepared to participate in this early resolution process. They have believed that, according to the NWPA, these issues would be discussed in the SCP and would be the subject of meaningful discussion in the comment on the SCP. They are concerned that they do not now have the resources or technical expertise to participate fully in early resolution of such matters.

a comprehensive and integrated approach is taken and to eliminate any confusion regarding NWPA and NEPA requirements. They argue that much of Part 60 now rests on NEPA authority so that failure to include NEPA in the currently proposed revision casts a cloud over the Commission's view of its authority to carry out early site reviews. This issue was raised earlier and was discussed in SECY-84-263A. The Commission has not put off considering its responsibilities under NEPA as modified by the NWPA. In developing these proposed regulation changes, we have specifically evaluated whether it was necessary to take any steps during the site screening stages to assure meeting our ultimate NEPA responsibilities. The issues in this amendment are separable from other NWPA mandated matters, including the NEPA concerns which will be addressed in the Part 51 amendments.

#### Changes in Final Amendments

The staff made a number of changes in the final amendments in response to comments received. However, substantive changes were limited to these; (1) providing for public comment on NRC responses to DOE's semi-annual reports on site characterization, and (2) providing opportunity for the host State and affected Indian tribes for each site to be characterized to present their views to NRC during preparation of the SCA.

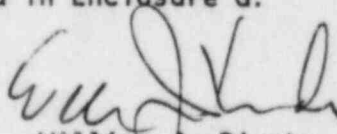
Commission resource needs to implement the provisions of 10 CFR 60 have been reflected in programmatic budget requests. Thus, no significant new resource expenditures will be required by issuance of the amendments.



Recommendations: That the Commission:

1. Approve for publication final amendments to 10 CFR 60 dealing with site characterization and the participation of States and Indian tribes, and the accompanying Statement of Considerations, as set forth in the draft Federal Register notice in Enclosure A.
2. Certify that the revised rule will not have a significant economic impact on a substantial number of small entities. This certification is necessary in order to satisfy the requirements of the Regulatory Flexibility Act, 5 U. S. C. 605 (a).
3. Note:
  - (a) In accordance with section 121 (c) of the Nuclear Waste Policy Act, no environmental review has been performed in connection with this action.
  - (b) The comments received in response to the proposed rule are contained in Enclosure C. The staff's analysis of these comments is contained in Enclosure B. The proposed Federal Register notice (Enclosure A) refers to the latter document as "the Commission's analysis."
  - (c) Sections 60.62 and 60.63 of this rule amend information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44. U. S. C. 3501 et seq.). Office of Management and Budget approval of the information collection requirements in these amendments has been obtained (OMB No. 3150-0127, expiration date 11/30/87).

- (d) The Chief Counsel for Advocacy of the Small Business Administration will be informed by the Division of Rules and Records of the Certification regarding economic impact on small entities.
- (e) The Subcommittee on Energy and the Environment of the House Interior and Insular Affairs Committee, the Subcommittee on Nuclear Regulation of the Senate Committee on the Environment and Public Works, the Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Senate Committee on Government Affairs, and the Subcommittee on Energy and Power of the House Interstate and Foreign Commerce Committee will be informed by a letter similar to Enclosure D.
- (f) The Office of Public Affairs has determined that it is not necessary to issue a public announcement for these amendments. However, a copy of this Commission paper package is being placed in the Public Document Room.
- (g) A regulatory analysis is contained in Enclosure E.
- (h) A comparative text of the proposed amendments is included in Enclosure G.



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Enclosures:

- A - Federal Register Notice "Disposal of High-Level Radioactive Wastes in Geologic Repositories: Amendments to Licensing Procedures
- B - Procedural Amendment Comments - Comment Summary and Staff Analysis
- C - Public Comment Letters
- D - Draft Congressional Letter
- E - Regulatory Analysis
- F - Federal Register Notice - Proposed Rule
- G - Comparative Text
- H - Staff Response to Comments of the ACRS

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, November 8, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, November 1, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ENCLOSURE A



NUCLEAR REGULATORY COMMISSION

10 CFR PART 60

Disposal of High-Level Radioactive Wastes  
in Geologic Repositories:  
Amendments to Licensing Procedures

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations applicable to the disposal of high-level radioactive wastes in geologic repositories. These amendments deal with procedural aspects of site characterization and the participation of States and Indian tribes. Among other things, the rules set forth requirements applicable to the Department of Energy for submitting site characterization plans. For the most part, the amendments to licensing procedures are changes made to reflect the provisions of the Nuclear Waste Policy Act of 1982.

EFFECTIVE DATE: [Insert date 30 days after publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Clark Prichard, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 427-4586.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 25, 1981, the Nuclear Regulatory Commission (NRC) promulgated licensing procedures for the disposal of high-level radioactive waste (HLW) in geologic repositories (46 FR 13971). The enactment of the Nuclear Waste Policy Act of 1982 (NWPAA), 42 U.S.C. 10101 et seq., brought about a need to revise some of the procedures in 10 CFR 60. The NWPAA set forth in considerable detail the procedures to be followed during the process of siting and development of HLW geologic repositories, and the respective roles of NRC, the Department of Energy (DOE), and States and Indian tribes. These amendments contain the changes to 10 CFR Part 60 that are needed to conform the licensing procedures in the rule to the provisions of the NWPAA. In addition, the amendments contain some changes considered desirable in light of experience gained with the pre-licensing consultation process since the promulgation of the procedural part of 10 CFR Part 60.

On January 17, 1985 the Commission published proposed procedural amendments to 10 CFR Part 60 for public comment (50 FR 2579). The proposed amendments contained revisions to (1) the content of the site characterization plan (SCP), (2) NRC review of the SCP, and the issuance by NRC of a site characterization analysis (SCA), (3) means and timing of State and Indian tribe consultation with NRC and participation in NRC reviews, and (4) notice and publication by NRC with respect to site characterization documents. The Commission received a number of comments on the proposed amendments, all of which have been carefully considered. The principal issues raised by these comments are discussed below.

COMMENTS

A total of 15 organizations commented on the proposed rule, addressing a variety of concerns. Five of these issues call for extended response in this statement. These issues are: whether NRC should issue a draft site characterization analysis; the deletion of site selection information from the contents of the SCP; whether DOE should be required to receive and consider comments on the SCP before starting to sink a shaft; whether all amendments of 10 CFR Part 60 and Part 51 to conform with the Nuclear Waste Policy Act, especially those related to NEPA requirements and the present amendments, should be promulgated at the same time; and whether host States should automatically be afforded party status in licensing proceedings. Summaries of the comments received on these issues are presented below. Copies of all the comments, and the Commission's analysis of them, are available in the Commission's Public Document Room.

a. Draft Site Characterization Analysis

There were several comments about the deletion of the draft site characterization analysis. Under the proposed rule, the NRC would have issued an SCA, a final set of comments on DOE's SCP and would have invited public comment on its SCA for consideration in the ongoing staff review and commentary on the DOE program but would not have issued both a draft and a final SCA. Some commenters agreed with elimination of the draft SCA. However, most commenters requested that NRC continue to issue its analysis in both a draft and final form. Commenting States and tribes believe that they have substantial expertise which NRC should

consider in preparing its analysis on the DOE SCP. Some States wanted to see NRC's draft SCA to have the benefit of NRC's expertise while preparing their own comments. Some commenters emphasized a belief that any schedule delays resulting from issuing a draft SCA would not be important. Some commenters believed that the opportunities and procedures for public and State involvement in the repository siting and development process under the NWPA are not substantially different from those contemplated when the previous regulations were promulgated. From this they concluded that there is no reason for NRC to change its procedures by eliminating the draft analysis on DOE's SCP's.

The Commission understands the concerns of the States, tribes and public that their views be heard and considered. The Commission intends to be fully aware of State, tribe and public views before, during, and after the site characterization plan review. The States and tribes will be routinely informed of the information made available to NRC and NRC's comments thereon. The States and tribes are able to participate at NRC/DOE technical meetings. As is now being done, the NRC staff will continue to have discussions with State and tribe representatives and will respond to written submissions from the States and tribes. The NRC will also follow closely the NWPA mandated opportunities for State, tribe and public interaction with DOE to be aware of the concerns which are expressed by the States and tribes in these forums.

The need for opportunities for State, Indian tribe, and public involvement is addressed extensively by the NWPA. The procedures established by the statute provide means for informing NRC of issues of concern. Given these specific procedures, and taking into account the scheduling provisions of the NWPA, the publication of a draft SCA is no



longer warranted. It is not required by law. It is important to note, however, that there will still be an opportunity to comment on NRC's SCA as the rule as amended requires the solicitation of such comments. NRC will make further comments to DOE if the State and public comments on NRC's SCA provide substantial new grounds for making recommendations or stating objections to DOE's site characterization program. (It should be noted, however, that NRC does not contemplate a formal comment analysis.)

To furnish additional assurance to the host State and affected Indian tribes that their views will be considered in NRC's preparation of its SCA, a provision has been added to the final regulation providing an opportunity, before publication of the SCA by NRC, for those parties to present their views on the DOE SCP and suggestions with respect to NRC comments thereon.

b. Site Selection Information

Some commenters opposed the deletion of information concerning DOE's site screening and selection process from the SCP contents. Some commenters also commented unfavorably on a perceived lack of any NRC review of DOE's site screening and selection process. A few commenters supported the deletion of such information from the SCPs.

The Commission has carefully reviewed the arguments presented by the commenters who stated that site selection information should still be included in the SCPs. The Commission continues to believe that such information is neither appropriate nor required in an SCP.

In regard to the generalized concern that NRC should be involved in the site selection process, it is noted that the NRC has played an important role in this process and will continue to do so. The sites

under consideration for nomination have been the subject of continuous scrutiny by the NRC staff to identify licensing issues at the earliest possible stage. Available data are examined on a regular basis and site specific documents such as the environmental assessments are carefully reviewed. There are also activities specified by the NWA which afford the NRC an opportunity to directly influence the site selection process. These are NRC concurrence in DOE's siting guidelines and review and comment on the site characterization plans. NRC expects that, under the EIS scoping process pursuant to CEQ rules, DOE will keep NRC fully and currently informed of its plans for implementation. We also expect to review and comment on DOE's scoping documents and activities for implementing NEPA in the repository program which are to be developed pursuant to CEQ rules, and to comment on DOE's EIS.

Thus, the issue of concern in this rulemaking is not whether the Commission should be involved in the DOE site screening and selection process generally. It is, more specifically, the scope of the information to be included in the DOE submission. The new statute, while generally conforming to the earlier NRC regulation, omitted the provisions dealing with NRC review of site selection matters. The Commission construes this action as an indication that the site selection issues previously dealt with in Part 60 were to be separated from the site characterization reports and dealt with, instead, in the environmental assessments. Under the NWA, the Commission's role in the review of DOE's site characterization plans is to determine whether they are appropriate in light of the Commission's regulations. Attention will be directed toward the adequacy of the characterization of a particular

site; and this is different from, and not dependent upon, the considerations that led to the selection of that site.

c. Shaft Sinking

Some commenters suggested that the regulation should be amended to require that DOE may not proceed to characterize sites by sinking shafts until NRC and State review and comment upon the SCP are complete. One commenter suggested that the regulation be clarified to specify that completion of NRC review is not a condition precedent for shaft sinking. The Commission is generally in accord with the commenters who regard NHPA as requiring that DOE defer the sinking of shafts at least until such time as there has been an opportunity for pertinent comments on shaft sinking to have been solicited and considered by DOE. As stated in the preamble to the proposed rule, "The Commission believes that Congress intended that DOE should provide the plans sufficiently far in advance so that comments may be developed and submitted back to DOE early enough to be considered when shaft sinking occurs, and all times thereafter." The question, therefore, is not whether the Commission agrees with the objective of those commenters to defer shaft sinking until after comments on the SCP have been received by DOE, but rather whether this requirement should be incorporated into the Commission's rules. What is involved is essentially a construction of the obligations of DOE, as a matter of statutory interpretation, under section 113(b) of NHPA. Unless there is a compelling reason for the Commission to incorporate its reading of such a provision in its own regulations, the appropriate course is to leave it to DOE in the first instance to construe and apply the law.

The Commission finds no such compelling reason. It relies, in part, on the opportunities for information exchange which are available to it under its established working arrangements (including the Procedural Agreement, 48 FR 51876, described in the preamble to the proposed rule). One of the objectives of these arrangements is to enable NRC to review and comment in a timely fashion on those issues that may have a bearing upon DOE's decision to proceed with, or delay, the sinking of repository shafts. Many issues related to the shaft sinking have long lead times. These issues are being taken up by the NRC prior to the SCP under the aforementioned open working arrangements. Moreover, the Commission is aware that DOE itself has indicated its intention to wait until it has completed a review of comments before proceeding to sink shafts. The Commission observes that DOE's failure to await, and to take into account, pertinent NRC comments might result in later licensing difficulties.

d. Simultaneous Promulgation of Amendments

Some commenters recommended that all revisions to Part 60 and Part 51 to conform them to the NWPA should be promulgated simultaneously. In particular, they recommended that the revisions concerning NEPA requirements accompany the revisions currently being promulgated. They believe that this would assure that a comprehensive and integrated approach is taken and any confusion regarding NWPA and NEPA requirements would be eliminated. They argue that much of Part 60 now rests on NEPA authority so that failure to include NEPA in the currently proposed revision casts a cloud over the Commission's view of its authority to carry out early site reviews.



The Commission has not put off considering the responsibilities under NEPA as modified by the NHPA. In developing these changes to the regulation, the Commission has specifically considered whether any procedures might be needed at the site screening or characterization stage, so as to assure that the Commission would be able to meet its ultimate NEPA responsibilities. The Commission concludes that they are not.

The Commission's Part 51 regulations govern the Commission's responsibilities for conducting environmental reviews associated with its licensing and regulatory functions. Section 121(c) of NHPA, 42 U.S.C. 10141, clearly states that the requirements and criteria set forth in Part 60 relate to the Commission's responsibility under the Atomic Energy Act and the Energy Reorganization Act and do not require a NEPA EIS. The Part 51 changes, on the other hand, will relate to the Commission's NEPA obligations at the time DOE applies for a license.

It appears that, under NHPA, NRC prelicensing review of NEPA issues was, in fact, not intended to be extensive. Aside from its concurrence in the siting guidelines, the statutory scheme calls for NRC participation to commence with the filing of the site characterization plans by DOE. Furthermore, unless DOE fails to follow the procedures for identifying sites to be characterized, as specified in NHPA, there would be no basis or authority to insist, for NEPA purposes, that particular sites be excluded or that other sites be selected for characterization.

In light of the Commission's understanding with respect to its responsibilities, it is important to proceed with the present action without awaiting other changes that will be proposed in the light of NHPA. This is especially the case so that the changes related to site

characterization can be implemented in a timely fashion as DOE prepares its site characterization plans.

The Commission acknowledges that the authority citation for Part 60 includes a reference to NEPA; that is appropriate because the regulation specifies NEPA licensing findings, 10 CFR 60.31(c), 60.41(d), and contemplates the inclusion, in a construction authorization and a license, of conditions to protect environmental values, 10 CFR 60.32(a), 60.42(a). These sections in essence, merely require that the construction and operation of a repository comply with NEPA requirements. They do not represent a reliance on NEPA authority as a significant underpinning for Part 60. Part 51 of NRC regulations, which deals with NEPA implementation, will however need to be changed - specifically to (1) define the alternatives that must be discussed in an environmental impact statement, (2) exempt the promulgation of NRC licensing requirements and criteria from environmental review under NEPA, and (3) set out procedures that will be followed by the Commission in determining whether or not to adopt the DOE EIS. The alternatives are, for the most part, prescribed by NWPA. The exemption of licensing requirements from environmental review is also an explicit feature of that Act. The procedures for adoption of the DOE environmental impact statement will be governed by NWPA and the regulations of the Council on Environmental Quality. These changes to Part 51 will be needed in order to conform NRC's licensing process to applicable law. Nothing in the present action impairs the Commission's ability to make the required changes to Part 51 or otherwise to meet its NEPA obligations. Thus, in developing this current amendment the Commission has specifically considered whether any procedures might be needed during the current site screening process to

assure meeting its ultimate NEPA responsibilities. The Commission concludes that they are not. Nothing in the upcoming Part 51 changes will affect early site screening involvement. Accordingly, this rule is separable from the amendments to be proposed to Part 51. It is needed now by DOE, and there would be no justification for delay in promulgating it.

e. Party Status for Host State

The point was raised that a host State is entitled to full party status at the outset in NRC licensing proceedings and should have the rights of such a party. An absolute right of participation in NRC licensing proceedings should be declared by 10 CFR Part 60.

Under section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239, a person "whose interest may be affected" is entitled to be admitted to a licensing hearing as a party. Under this statutory provision, there can be no question that the host State has a legal right to be a party. Nevertheless, as in any judicial or administrative proceeding, certain rules of practice are essential in order for the party's interest in a matter, its contentions with respect thereto, and its claims for relief, to be made a matter of record.

Rights of participation in NRC licensing proceedings are referenced in 10 CFR §60.63. The tests of standing are set out in §2.714. These tests are clearly met for host State participation. The standing tests would be met for affected Indian tribes as well. (It is also noted that States and arguably affected Indian tribes can participate under 10 CFR §2.715 without having to take a position on issues by

supplementing their intervention petition with contentions as required by §2.714.) There is thus no substantial basis of concern with respect to the issue raised by the commenters. Once the State/tribe is admitted as an intervenor, it would enjoy the full rights of a party. These include, with respect to all matters affecting its interest, the rights to introduce evidence, put on witnesses, cross-examination, full notice and service of all pleadings, full rights of discovery, and standing to appeal. Non-host States may also participate in licensing proceedings as parties to the extent they meet the tests of standing set out in 10 CFR Part 2, or as interested States.

#### CHANGES TO THE PROPOSED AMENDMENTS

The final rule contains the following substantive changes from the proposed rule as published on January 17, 1985.

##### Authority Citation

Section 14(a) of Public Law 95-601, 42 U.S.C. 2021a would require that DOE notify the Commission as early as possible after commencement of planning for a particular repository. The Commission was directed to notify States in turn. As implied by the preamble to the proposed rule, the Commission considers these requirements to have been superseded by NWPA. The authority citation has been modified accordingly.

##### Exclusion of Defense Waste Facilities

The Commission's licensing authority extends to two different classes of high-level waste disposal facilities: repositories used primarily for civilian waste (including spent nuclear fuel) and



facilities for defense wastes. Energy Reorganization Act of 1974, Sec. 202, 42 U.S.C. 5842. NWPA applies only to some of these facilities - namely, those used at least in part for civilian wastes (i.e., not exclusively for defense wastes). Sec. 8(c), 42 U.S.C. 10107. A commenter suggested that the pre-NWPA procedures should expressly be retained for defense-only facilities, as they were not covered by NWPA and the statute accordingly did not support any change in NRC requirements. The point has merit. However, in accordance with the procedures set out in Section 8(b) of NWPA, the President has now determined that the development of a repository for the disposal of defense HLW is not required. There is thus no longer any need for regulations dealing specifically with a defense-waste-only repository. To reflect this conclusion, and clarify the scope of the regulations, Section 60.1 is being revised so as to limit the application of the part to facilities "sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982." Also, the reference in §60.17(a)(4) to a geologic repository that is not subject to the Waste Policy Act has been deleted.

#### Authority Reference for Site Characterization

One commenter noted that the reference to former 10 CFR §51.40, in connection with the requirement that DOE is to conduct a program to characterize multiple sites, has been superseded by the NWPA. In response to that comment, §60.15(c) has been changed to indicate that Sec. 113 of the NWPA (42 U.S.C. 10133) is the basis for the site characterization program requirement. The proposed amendments had simply renumbered this section from §60.10 to §60.15 without change.

Authority for Early Site Review by NRC

In response to the comment that the NRC should not rely on the DOE-NRC Procedural Agreement as authority for early site review, the footnote to §60.18 is revised to delete the reference to the DOE-NRC Procedural Agreement. The Commission relies upon the statutes listed in the authority citation.

Public Comment on NRC Comments to DOE on Site Characterization

One comment stated that issues arising during site characterization could be more readily brought to the Commission's attention by establishing a notice and public comment process for the NRC semi-annual comments to DOE on site characterization. Just as the Commission will solicit comments on its comments on DOE's initial SCP, it wants to allow for public comment on any Commission comments on DOE's semi-annual reports. Section 60.18(i) has therefore been changed to include a provision that the Director shall invite public comment on comments which the Director makes to DOE upon review of the DOE semi-annual reports or on any other comments which the Director makes to DOE on site characterization.

Obtaining Host State and Affected Indian Tribe Views on the SCP

Although the Commission continues to find preparation of the draft SCA to be unnecessary, some recognition of its intention to welcome the views of host States and affected Indian tribes is warranted. Accordingly, §60.18(b) has been changed to provide an opportunity for the host State and affected Indian tribes for each site to be characterized

to present their views on the DOE SCP and their suggestions with respect to NRC comments thereon.

#### Consultation and Site Review

As stated in the notice of proposed rulemaking, prior provisions pertaining to participation of Indian tribes have been incorporated in the substantive provisions applicable to States. Further editorial changes (i.e., references to "tribes") have been made to accomplish this purpose in §60.62(c). The final rule, in §60.2 also sets out the full text of the statutory definition of "affected Indian tribe".

#### ENVIRONMENTAL IMPACT

Pursuant to Section 121(c) of the Nuclear Waste Policy Act, this rule does not require the preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969 or any environmental review under subparagraph (E) or (F) of Section 102(2) of such act.

#### PAPERWORK REDUCTION ACT STATEMENT

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget-Approval No. 3150-0127.

#### REGULATORY FLEXIBILITY ACT CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule relates to the licensing of only one entity, the U.S. Department of Energy, which does not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act.

#### LIST OF SUBJECTS IN 10 CFR PART 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposal.

#### ISSUANCE

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the Nuclear Waste Policy Act of 1982, and 5 U.S.C. 553, the Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Part 60.

#### PART 60 - DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

1. The authority citation for Part 60 is revised to read as follows:



AUTHORITY: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); sec. 10, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); sec. 121, Pub. L. 97-425, 96 Stat. 2228 (42 U.S.C. 10141).

For the purposes of Sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.71 to 60.75 are issued under Sec. 1610, 68 Stat. 950, as amended (42 U.S.C. 2201o).

2. Section 60.1 is revised to read as follows:

§60.1 Purpose and scope.

This part prescribes rules governing the licensing of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982. This part does not apply to any activity licensed under another part of this chapter.

3. Section 60.2 is revised by removing the definitions of "Indian tribe" and "Tribal organization" and inserting, in the appropriate alphabetical location, a definition of the term "affected Indian tribe" to read as follows:

§ 60.2 Definitions.

As used in this Part --

\* \* \* \* \*

"Affected Indian tribe" means any Indian tribe - (a) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located; (b) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: Provided, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe.

\* \* \* \* \*

§60.10 [Redesignated as §60.15]

4. Section 60.10 is redesignated as § 60.15. In new §60.15, paragraph (c) is revised to read as follows:

§ 60.15 Site characterization

\* \* \* \* \*

(c) As provided by Sec. 113 of the Nuclear Waste Policy Act (42 U.S.C. 10133), DOE is also required to conduct a program of site characterization, including in situ testing at depth, with respect to alternate sites.

\* \* \* \* \*

§ 60.11 [Removed]

5. Section 60.11 is removed.

6. Sections 60.16 through 60.18 are added to read as follows:

§ 60.16 Site characterization plan required.

Before proceeding to sink shafts at any area which has been approved by the President for site characterization, DOE shall submit to the Director, for review and comment, a site characterization plan for such area.

§ 60.17 Contents of site characterization plan.

The site characterization plan shall contain --

(a) A general plan for site characterization activities to be conducted at the area to be characterized, which general plan shall include:

(1) A description of such area, including information on quality assurance programs that have been applied to the collection, recording, and retention of information used in preparing such description.

(2) A description of such site characterization activities, including the following --

(i) The extent of planned excavations;

(ii) Plans for any onsite testing with radioactive or nonradioactive material;

(iii) Plans for any investigation activities that may affect the capability of such area to isolate high-level radioactive waste;

(iv) Plans to control any adverse impacts from such site characterization activities that are important to safety or that are important to waste isolation; and

(v) Plans to apply quality assurance to data collection, recording, and retention.

(3) Plans for the decontamination and decommissioning of such area, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities, if such area is determined unsuitable for application for a construction authorization for a geologic repository operations area;

(4) Criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act of 1982, to be used to determine the suitability of such area for the location of a geologic repository; and

(5) Any other information which the Commission, by rule or order, requires.

(b) A description of the possible waste form or waste package for the high-level radioactive waste to be emplaced in such geologic repository, a description (to the extent practicable) of the relationship between such waste form or waste package and the host rock at such area, and a description of the activities being conducted by DOE with respect to such possible waste form or waste package or their relationship; and

(c) A conceptual design for the geologic repository operations area that takes into account likely site-specific requirements.

§ 60.18 Review of site characterization activities.<sup>1</sup>

(a) The Director shall cause to be published in the Federal Register a notice that a site characterization plan has been received from DOE and that a staff review of such plan has begun. The notice shall identify the area to be characterized and the NRC staff members to be consulted for further information.

(b) The Director shall make a copy of the site characterization plan available at the Public Document Room. The Director shall also

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1In addition to the review of site characterization activities specified in this section, the Commission contemplates an ongoing review of other information on site investigation and site characterization, in order to allow early identification of potential licensing issues for timely resolution. This activity will include, for example, a review of the environmental assessments prepared by DOE at the time of site nomination.



transmit copies of the published notice of receipt to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe. The Director shall provide an opportunity, with respect to any area to be characterized, for the State in which such area is located and for affected Indian tribes to present their views on the site characterization plan and their suggestions with respect to comments thereon which may be made by NRC. In addition, the Director shall make NRC staff available to consult with States and affected Indian tribes as provided in Subpart C of this part.

(c) The Director shall review the site characterization plan and prepare a site characterization analysis with respect to such plan. In the preparation of such site characterization analysis, the Director may invite and consider the views of interested persons on DOE's site characterization plan and may review and consider comments made in connection with public hearings held by DOE.

(d) The Director shall provide to DOE the site characterization analysis together with such additional comments as may be warranted. These comments shall include either a statement that the Director has no objection to the DOE's site characterization program, if such a statement is appropriate, or specific objections with respect to DOE's program for characterization of the area concerned. In addition, the Director may make specific recommendations pertinent to DOE's site characterization program.

(e) If DOE's planned site characterization activities include onsite testing with radioactive material, the Director's comments shall include a determination regarding whether or not the Commission concurs

that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under § 60.22 of this part.

(f) The Director shall publish in the Federal Register a notice of availability of the site characterization analysis and a request for public comment. A reasonable period, not less than 90 days, shall be allowed for comment. Copies of the site characterization analyses and of the comments received shall be made available at the Public Document Room.

(g) During the conduct of site characterization activities, DOE shall report not less than once every six months to the Commission on the nature and extent of such activities and the information that has been developed, and on the progress of waste form and waste package research and development. The semiannual reports shall include the results of site characterization studies, the identification of new issues, plans for additional studies to resolve new issues, elimination of planned studies no longer necessary, identification of decision points reached and modifications to schedules where appropriate. DOE shall also report its progress in developing the design of a geologic repository operations area appropriate for the area being characterized, noting when key design parameters or features which depend upon the results of site characterization will be established. Other topics related to site characterization shall also be covered if requested by the Director.

(h) During the conduct of site characterization activities, NRC staff shall be permitted to visit and inspect the locations at which such activities are carried out and to observe excavations, borings, and in situ tests as they are done.

(i) The Director may comment at any time in writing to DOE, expressing current views on any aspect of site characterization. In particular, such comments shall be made whenever the Director, upon review of comments invited on the site characterization analysis or upon review of DOE's semiannual reports, determines that there are substantial new grounds for making recommendations or stating objections to DOE's site characterization program. The Director shall invite public comment on any comments which the Director makes to DOE upon review of the DOE semiannual reports or on any other comments which the Director makes to DOE on site characterization.

(j) The Director shall transmit copies of the site characterization analysis and all comments to DOE made by the Director under this section to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe. When transmitting the site characterization analysis under this paragraph, the Director shall invite the addressees to review and comment thereon.

(k) All correspondence between DOE and the NRC under this section, including the reports described in paragraph (g), shall be placed in the Public Document Room.

(l) The activities described in paragraphs (a) through (k) above constitute informal conference between a prospective applicant and the staff, as described in § 2.101(a)(1) of this chapter, and are not part of a proceeding under the Atomic Energy Act of 1954, as amended. Accordingly, neither the issuance of a site characterization analysis nor any other comments of the Director made under this section constitute a commitment to issue any authorization or license or in any way affect the

authority of the Commission, the Atomic Safety and Licensing Appeal Board, Atomic Safety and Licensing Boards, other presiding officers, or the Director, in any such proceeding.

7. Subpart C is revised to read as follows:

SUBPART C - PARTICIPATION BY STATE GOVERNMENTS AND INDIAN TRIBES

§ 60.61 Provision of information.

(a) The Director shall provide to the Governor and legislature of any State in which a geologic repository operations area is or may be located, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made by the Commission with respect to the site characterization, siting, development, design, licensing, construction, operation, regulation, permanent closure, or decontamination and dismantlement of surface facilities, of such geologic repository operations area.

(b) For purposes of this section, a geologic repository operations area shall be considered to be one which "may be located" in a State if the location thereof in such State has been described in a site characterization plan submitted to the Commission under this part.

(c) Notwithstanding paragraph (a) of this section, the Director is not required to distribute any document to any entity if, with respect to such document, that entity or its counsel is included on a service list prepared pursuant to Part 2 of this chapter.



(d) Copies of all communications by the Director under this section shall be placed in the Public Document Room, and copies thereof shall be furnished to DOE.

§ 60.62 Site review.

(a) Whenever an area has been approved by the President for site characterization, and upon request of a State or an affected Indian tribe, the Director shall make NRC staff available to consult with representatives of such States and tribes.

(b) Requests for consultation shall be made in writing to the Director.

(c) Consultation under this section may include:

(1) Keeping the parties informed of the Director's views on the progress of site characterization.

(2) Review of applicable NRC regulations, licensing procedures, schedules, and opportunities for State and tribe participation in the Commission's regulatory activities.

(3) Cooperation in development of proposals for State and tribe participation in license reviews.

§ 60.63 Participation in license reviews.

(a) State and local governments and affected Indian tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter.

(b) In addition, whenever an area has been approved by the President for site characterization, a State or an affected Indian tribe may submit to the Director a proposal to facilitate its participation in



the review of a site characterization plan and/or license application. The proposal may be submitted at any time and shall contain a description and schedule of how the State or affected Indian tribe wishes to participate in the review, of what services or activities the State or affected Indian tribe wishes NRC to carry out, and how the services or activities proposed to be carried out by NRC would contribute to such participation. The proposal may include educational or information services (seminars, public meetings) or other actions on the part of NRC, such as establishing additional public document rooms or employment or exchange of State personnel under the Intergovernmental Personnel Act.

(c) The Director shall arrange for a meeting between the representatives of the State or affected Indian tribe and the NRC staff to discuss any proposal submitted under paragraph (b) of this section, with a view to identifying any modifications that may contribute to the effective participation by such State or tribe.

(d) Subject to the availability of funds, the Director shall approve all or any part of a proposal, as it may be modified through the meeting described above, if it is determined that:

(1) The proposed activities are suitable in light of the type and magnitude of impacts which the State or affected Indian tribe may bear;

(2) The proposed activities (i) will enhance communications between NRC and the State or affected Indian tribe, (ii) will make a productive and timely contribution to the review, and (iii) are authorized by law.

(e) The Director will advise the State or affected Indian tribe whether its proposal has been accepted or denied, and if all or any part

of proposal is denied, the Director shall state the reason for the denial.

(f) Proposals submitted under this section, and responses thereto, shall be made available at the Public Document Room.

§ 60.64 Notice to States.

If the Governor and legislature of a State have jointly designated on their behalf a single person or entity to receive notice and information from the Commission under this part, the Commission will provide such notice and information to the jointly designated person or entity instead of the Governor and legislature separately.

§ 60.65 Representation.

Any person who acts under this subpart as a representative for a State (or for the Governor or legislature thereof) or for an affected Indian tribe shall include in the request or other submission, or at the request of the Commission, a statement of the basis of his or her authority to act in such representative capacity.

Dated at Washington, DC, this \_\_\_\_\_ day of \_\_\_\_\_, 1985.

For the Nuclear Regulatory Commission.

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Samuel J. Chilk,  
Secretary of the Commission.

ENCLOSURE B

PROCEDURAL AMENDMENT COMMENTS  
COMMENT SUMMARY AND STAFF ANALYSIS

COMMENT NO. 1

Comment Summary

There were several comments about the deletion of the draft site characterization analysis. Under the rule as proposed to be amended NRC will issue a single, final set of comments on DOE's SCP and will invite public comment on its comments but will not issue both a draft and a final set of comments. Some commenters agree with the elimination of the draft comments. Most commenters requested that NRC continue to issue its comments in both a draft and final form. Commenting States believe that they have substantial expertise which NRC should consider in preparing its comments. Some States wanted to see NRC's draft comments to have the benefit of NRC's expertise while preparing their comments. Some commenters emphasized a belief that any schedule delays resulting from issuing draft comments would not be important. Some commenters believe that the opportunities and procedures for public and state involvement in the repository siting and development process under the NWPA are not substantially different from those contemplated when the previous regulations were promulgated. From this they conclude that there is no reason for NRC to change its procedures by eliminating the draft comments on DOE's SCP's.

Response:

The Commission understands the concerns of the States and public that their views be heard and considered. The Commission intends to be fully aware of State and public views before, during, and after the site characterization plan review. The States will be routinely informed of the information made available to NRC and NRC's comments thereon. The States are able to attend NRC/DOE technical meetings. As is now being done, the NRC staff will continue to have discussions with State representatives and will respond to any written submissions from the States. The NRC will also follow closely the NWPA mandated opportunities for State and public interaction with DOE to be aware of the concerns which are expressed by the States in these forums.

We note that no commenter has suggested that the NRC has any statutory duty to publish its comments on the site characterization plans in draft for public comment. The NRC believes that the NWPA has assured enough additional opportunities for State and public involvement and changed the timing of the SCP's such that the NRC can be adequately informed of State and public views without publishing its comments in draft and thus the expenditure of NRC resources required to publish draft comments is no longer warranted. It is important to note that there will still be an opportunity to comment on NRC's comments on the SCP. The rule as amended requires the solicitation of such comments. Further, this single NRC issuance of comments will occur at

approximately the same point in time as the issuance of a draft would have occurred. Thus, to the extent that States want to rely on NRC expertise, NRC's comments will be available to them at the same time as they would have had a draft been issued. Effectively the only difference will be that NRC will not republish its comments. However, NRC will make further comments to DOE if the State and public comments on NRC's comments provide substantial new grounds for making recommendations or stating objections to DOE's site characterization program.

To provide additional assurance to the host State and affected Indian tribes that their views will be considered in NRC's preparation of its comments, a provision has been added to the regulation stating that before publishing its comments on an SCP the NRC staff will provide an opportunity for the host State and affected Indian tribes for the site to present their views on the DOE SCP and to review and discuss planned NRC comments on the SCP.



## COMMENT NO. 2

Comment Summary:

There were a large number of comments on the deletion of site screening and selection information from the SCP and the perceived lack of any NRC review of DOE's site screening and selection process. Most of the comments opposed the deletion of site screening and selection information from the SCP and more generally commented unfavorably on the perceived lack of any NRC review of DOE's site screening and selection process. The commenters primary arguments were:

NRC's obligations to protect health and safety under the Energy Reorganization Act and the Atomic Energy Act require that NRC review the DOE site selection process and engage in a comparative analysis of sites. Moreover, NRC's NEPA responsibilities, including consideration of site selection issues, remain unchanged. Under NEPA, NRC has a responsibility to use its expertise to evaluate and compare the choices as the list of sites is winnowed down. The obligation to consider alternatives is contained in NRC licensing standards and, accordingly, the issues should be addressed at the earliest possible time.

NWPA requires NRC to "oversee" DOE's site selection decisions. The authority to require DOE to submit "other information" in the site characterization plan is sufficient to enable NRC to obtain and review site selection information. Moreover, NRC will need to make a comparative evaluation of sites in order to satisfy EPA assurance requirements promulgated in accordance with NWPA.

Response:

The prior rule required submission in the SCP of information concerning the criteria used to arrive at the candidate area, the method by which the site was selected for characterization, and the decision process by which the site was selected for characterization. The site characterization analysis was to contain a discussion of the items of information requested and an opinion by the Director that he has no objection to the DOE's site characterization program, if such an option is appropriate, or specific objections to DOE's proceeding with characterization of the named site. The NRC was to examine DOE's site selection process bearing in mind that each site selected for characterization should have no obvious deficiency relative to meeting the technical criteria of 10 CFR Part 60. (44 FR 70409)

The information submitted on the site selection process would have included information on the screening process by which DOE's "potentially acceptable" sites were arrived at as well as information on the process for selecting three of these sites for characterization.

The NWPA established a process in which the siting guidelines and the environmental assessments were prepared prior to the SCPs, and information on the site selection process was not included in the specified contents of the

SCPs. With information on the site selection process no longer required in the SCP's, NRC's review of the site selection process takes place in its concurrence in the siting guidelines and review of DOE's draft environmental assessments. DOE's general process for site selection is now specified by the NWPAs. The criteria for selection of sites and details of the selection process are contained in the siting guidelines in which NRC has concurred. However, it should be noted that the guidelines were not used in the screening process to arrive at the nine "potentially acceptable" sites which DOE identified. The procedure of starting the site selection process for the first repository with the nine sites which DOE had chosen from the site investigations conducted prior to the NWPAs was incorporated into the screening procedures specified in the guidelines. The Commission accepted this procedure in the guideline concurrence action. Thus the guideline screening procedures were applied only to selection of five of the nine sites for nomination. The schedule of events set forth in the NWPAs required DOE to identify "potentially acceptable" sites before the guidelines had been developed. These sites were required to be identified within 90 days of the passage of the Act before the guidelines were to be developed. In reviewing and concurring in the guidelines the Commission did not review the screening process by which DOE arrived at the nine "potentially acceptable" sites. Information about this screening process would have been included in the SCP's but, under the proposed revision, is no longer provided to NRC in the SCP's. Although the NWPAs make no provisions for NRC review of DOE's identification of "potentially acceptable" sites for the first repository, some commenters believe that NRC should continue to require this screening information in the SCP's.

Several of these comments express the opinion that the Commission should play an important role in DOE's site screening and selection process. In fact, the Commission has been doing just that, and it will continue to do so. Each of the sites under consideration for nomination and selection for the first repository has been the subject of continuous scrutiny by NRC staff. Public meetings have been held to inform NRC with respect to relevant issues at these sites, NRC onsite representatives follow developments at the respective sites closely, pertinent literature and data are examined on a regular basis, and site-specific documents such as the environmental assessments are the subject of detailed scrutiny and comment. All of these NRC activities are designed to identify potential licensing issues at the earliest possible stage. By communicating concerns in this fashion, it is hoped that DOE will thereby be able to make its screening and selection decisions in a more informed manner.

In addition, there are a number of activities specified by NWPAs which afford NRC an opportunity to have influence in the site selection process. One of these is the provision that the guidelines for selection must have the concurrence of the Commission. In fact, when guidelines were submitted, the Commission insisted upon several changes before it was prepared to concur therein. The opportunity to review and comment upon DOE's site characterization plans will afford a further opportunity to communicate our views regarding the suitability of a site to DOE, and it is to be expected that our comments will have some influence in the DOE decisionmaking process.

Finally, NRC will have a role in commenting upon the environmental impact statement to be prepared by DOE and, in this context, will have an opportunity to express views with respect to the selection of the site which DOE proposes to develop.

The issue, therefore, is not whether the Commission should be involved in the DOE site screening and selection process generally. The question is much narrower. It concerns the scope of NRC review of DOE's site characterization plans. Before NWPA was enacted, the NRC regulations did provide for information regarding site selection to be included in the DOE submission. The new statute, while generally conforming to the regulation, omitted the provision dealing with NRC review of site selection matters. The Commission must now decide how this deliberate legislative action is to be given effect. In short, the Commission has concluded that the activities described above provide appropriately for NRC involvement in site selection. There will be ample opportunity for our views to be made known to DOE, and it is to be expected that they will heed any well-founded concerns that we may express. But it is not the Commission's role, under any of the statutes cited by the commenters, to select a site. That is the responsibility of DOE, along with the other parties identified by NWPA. It is decidedly our responsibility to make our concerns about the licensability of particular sites known to DOE as early as possible. In our view, the regulation will serve this need well.

The Commission's duty, under the first statute cited by the commenters, the Atomic Energy Act, is to protect health. It has long been the Commission's position that the process of multiple site characterization provides a workable mechanism by which DOE will be able to develop a slate of candidate sites that are among the best that can reasonably be found and from which DOE will select its preferred site. The provisions of NWPA now require that DOE adhere to such a process. It is not the role or responsibility of the Commission to oversee the compliance of DOE with its statutory obligations. Rather, consistent with its customary practice, the Commission would consider only whether a license application meets prescribed criteria. In the case of a geologic repository, this will include an examination, among other things, of the isolation characteristics of the site. The application will not be granted unless these characteristics enable the Commission to make the findings, with respect to health and safety, that are required by Part 60. If the site in question does measure up to the standards established by rule, issuance of a construction authorization or license, as the case may be, would be in order. The same issue arose in connection with the Commission's original licensing procedures, see 46 FR 13973; as was then stated, the Commission perceives no reason to adopt a different philosophy here.

The Commission agrees that it is appropriate, under the Energy Reorganization Act, to consider aspects of the geologic repository, in some manner, in advance of the submission of a license application. But such consideration is needed only insofar as it is relevant to the licensing findings that the Commission will be called upon to make. Accordingly, the Commission is actively engaged in the review of information developed by DOE with respect to any site that may

be the subject of a license application, but the purpose of NRC's ongoing review is to analyze the prospective site in terms of its conformance with licensing standards.

Under NEPA, the Commission does have a responsibility, of course, to consider alternatives to a proposed action. But the Nuclear Waste Policy Act largely defines the alternatives that are to be considered - namely, the sites which have been characterized and as to which the Secretary of Energy has made a preliminary determination of their suitability for the development of a repository. Although the Commission is directed to adopt the environmental impact statement prepared by DOE "to the extent practicable," it will not be able to do so unless that EIS is an adequate statement to satisfy NEPA. (On the other hand, the Commission can make the environmental findings specified in 10 CFR Part 60 if the EIS, together with any needed supplements, is adequate.) Accordingly, NRC included in its review of the environmental assessments for the first repository a consideration of any issues arising under NEPA which were likely to result in the DOE's EIS being determined judicially not to be adequate. Moreover, NRC will comment on the draft EIS to be prepared by DOE with respect to a site recommended for development to the President. The focus of NRC comments is upon the reasonableness of DOE's statements and conclusions, for DOE's EIS can only be found to be adequate if it satisfies the so-called "rule of reason." It is anticipated that amendments to 10 CFR Part 51 (pertaining to implementation of NEPA), currently in preparation, will specifically provide for NRC comment upon the DOE draft EIS. Although the scope of the review need not, and will not, be as comprehensive as the commenters consider to be desirable, it will be consistent with the statutory framework as understood by the Commission. Further consideration of the issue will be in order when proposed amendments to Part 51 are issued for public comment.

Whatever the ultimate resolution of the scope of NRC review of NEPA issues may be, it is largely beside the point at this time. The present rulemaking deals with the contents of site characterization reports. It is clear to the Commission that the site selection issues previously dealt with in Part 60 were to be separated from the site characterization reports and dealt with, instead, in the environmental assessments. The proposed amendments are designed to conform to NWPA. Accordingly, it is entirely proper to amend former section 60.11 to bring it into line with NWPA. While it is true that the Commission may require submission by DOE of "any other information," this is not an unlimited grant of authority. Such other information, under the introductory clause of section 113(b)(1)(A), must be germane to "a general plan for site characterization activities to be conducted at such candidate site." The physical attributes of the site, as they may be understood, are of course essential to a review of the site characterization activities to be carried out. But it is difficult to conclude that the manner in which a particular site was selected, in preference to others, is relevant to an analysis of the proposed program to characterize it. Under the NWPA, this information belongs in the environmental assessment and not the site characterization report. The



Commission will therefore retain its original position, as set out in the rule previously proposed.

It is not necessary to speculate upon the effect of any "assurance requirements" that may be issued by the Environmental Protection Agency. The EPA Standard has now been issued, and the assurance requirements contained therein do not apply to facilities subject to NRC licensing.



## COMMENT NO. 3

Comment Summary:

The procedures of existing 10 CFR Part 60 should be retained for the licensing of repositories for defense high level waste. The NWPA based changes being proposed should be applied only to commercial high level waste repositories.

Response:

The primary reason for amending 10 CFR Part 60 at this time is to conform the provisions of Commission regulations to current law. To emphasize this point, section 60.1 is being revised to provide that Part 60 applies to the licensing of DOE to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area "sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982." Under this language, a repository used exclusively for wastes generated by defense activities of DOE would not be covered by Part 60 - since the procedures prescribed by NWPA do not apply to such defense facilities. Sec. 8(c), 42 U.S.C. 10107(c).

The commenter is correct in noting that the proposed amendments would eliminate the existing rules for a defense waste facility without providing an alternative structure. Furthermore, in the commenter's view, since NWPA does not apply to such a facility, it does not necessitate any change in the Commission's licensing procedures with respect thereto. However, in accordance with the procedures set out in Sec. 8(b) of NWPA, the President has now determined that the development of a repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities only is not required. As provided by law, the Secretary of Energy will now proceed to arrange for the use of a repository that is subject to 10 CFR Part 60 for the disposal of such waste. There is thus no longer any need for regulations dealing specifically with a defense-waste-only repository.

One element of the commenter's concern relates to defense high-level wastes that would be disposed of in some facility other than a geologic repository. Both before and subsequent to enactment of NWPA, such a facility would be licensable by NRC under Section 202(4) of the Energy Reorganization Act. Licensing would not have been undertaken under Part 60, however, since those regulations apply, by their terms, exclusively to systems "intended to be used for, or may be used for, the disposal of radioactive wastes in excavated geologic media." The changes being made therefore have no bearing upon the issues of concern to the commenter with respect to such other facilities.

## COMMENT NO. 4

Comment Summary:

The rule does not explicitly require DOE to receive, review, or consider the comments by NRC on the site characterization plan before proceeding to sink a shaft to characterize a site. Some commenters suggested that 10 CFR Part 60 be amended to require that DOE may not proceed to characterize sites by sinking shafts until NRC and State review and comment upon the SCP are complete. One commenter suggested that the rule be clarified to specify that completion of NRC review is not a condition precedent for shaft sinking.

Response:

The Commission is generally in accord with the commenters who regard NHPA as requiring that DOE defer the sinking of shafts at least until such time as there has been an opportunity for pertinent comments to have been solicited and considered by DOE. As stated in the preamble to the proposed rule, "The Commission believes that Congress intended that DOE should provide the plans sufficiently far in advance so that comments may be developed and submitted back to DOE early enough to be considered when shaft sinking occurs, and at all times thereafter." The question, therefore, is not whether the Commission agrees with the objective of those commenters, but rather whether it should be incorporated into the Commission's rules. What is involved is essentially a construction of the obligations of DOE, as a matter of statutory construction, under section 113(b) of NHPA. Unless there is a compelling reason for the Commission to incorporate its interpretation of such a provision in its own regulations, the appropriate course is to leave it to DOE in the first instance to construe and apply the law.

The Commission finds no such compelling reason. It relies, in part, on the opportunities for information exchange which are available to it under its established working arrangements (including the Procedural Agreement described in the preamble to the proposed rule). One of the objectives of these arrangements is to enable NRC to review and comment in a timely fashion on those issues that may have a bearing upon DOE's decision to proceed with, or delay, the sinking of repository shafts. Moreover, the Commission is aware that DOE itself has indicated its intention to wait until the completion of a review and comment period before proceeding to sink shafts. Notwithstanding these considerations, should DOE proceed to sink shafts prematurely, and in violation of NHPA as interpreted by the commenters, its actions could be challenged by the filing by a State, affected Indian tribe, or other aggrieved party, under section 119, of a petition for review.

## COMMENT NO. 5

Comment Summary:

The terms "Indian tribe" and "tribal organization" which are currently defined and used in the rule should not be replaced with the term "affected Indian tribes" which is defined and used in the NWPA. The proposed change would limit participation by Indians and preclude participation by tribes not currently designated as "affected".

Response:

In proposing to make this change, the Commission believed it was complying with the statutory direction of Congress by defining the parties to receive special consideration as they were defined in the NWPA. After reviewing the comments on this proposed revision, the Commission remains persuaded that this is an appropriate course.

This is not to say, however, that the Commission does not recognize that as a practical matter, it may be appropriate to engage in consultations with tribal organizations other than those designated as "affected" under Section 2(2) of the Nuclear Waste Policy Act. The principal purpose of the provisions for state and tribal participation in NRC pre-application reviews is to assist the staff in identifying potential licensing issues early, so that both NRC and DOE can fully prepare for a thorough review during the formal proceeding after an application is submitted. Because tribal organizations other than affected tribes may raise pertinent issues and may later successfully petition for leave to intervene in the formal proceeding, it would be prudent not to rule out consultation with tribal organizations during site characterization.

## COMMENT NO. 6

Comment Summary:

The rule should state that the SCA will be provided to DOE within 150 days after NRC receives an SCP and that comments related to shaft sinking will be provided within 90 days.

A new section should be added putting into Part 60 the NWPAs schedule requirements for NRC review of the license application. This would emphasize NRC's dual obligations to conduct its licensing proceedings in a full, fair and open manner, but also to reach its decisions in a timely manner.

Response:

The Commission does not believe it is advisable to codify the timetables for these reviews. We interpret the timeframes in the NWPAs to be directory rather than mandatory. NRC estimates that the review of an SCP of high quality and completeness will require 5 months. While NRC will endeavor to complete reviews of the SCPs and license application as promptly as is consistent with a thorough review, the time required for review is highly dependent on the quality and completeness of the DOE submittals.

The providing of separate comments related to shaft sinking after 90 days would not be practical. The staff effort involved in the preparation and release of such separate comments would significantly delay the release of the complete set of comments on the SCP. It is possible that such separate comments could not be released much more quickly than could the entire set of comments.

We recognize that many potential licensing questions related to shaft construction (a critical path activity) must be addressed well before the start of shaft construction and, in some instances, even before SCP issuance. The NRC's ability to provide timely comments and guidance to DOE on shaft-related activities is contingent on DOE scheduling effective interchange with NRC before commitments and decisions are made on these activities, so that DOE can consider and develop satisfactory resolution of any NRC comment in a manner not to delay DOE's schedule.

In any event, codifying such schedule provisions might leave the sufficiency of an otherwise proper proceeding or review in question and subject to legal challenge.

## COMMENT NO. 7

Comment Summary:

The regulation should include the provisions of NWPA §112 (f) which provide an exception under certain conditions to the requirement that DOE submit a site characterization plan before proceeding to sink shafts at an area. (Essentially a "grandfather" clause for site characterization at BWIP).

Response:

The NRC does not believe it is necessary to include this provision in the regulation. It was never ascertained whether this provision would have been adequate to permit DOE to continue characterization activities at BWIP. In any event, DOE has chosen to discontinue characterization activities there until after an SCP has been submitted. The siting guidelines which DOE has promulgated as regulations would probably now foreclose the use of this exemption.



## COMMENT NO. 8

Comment Summary:

Language of proposed rule in Section 60.18 (e) does not make it clear that NRC concurrence is a legal prerequisite to the use of radioactive material in characterization.

Response:

When the Commission adopted 10 CFR Part 60, it determined that it lacked jurisdiction over the use of radioactive material by DOE for purposes of site characterization. 46 FR 13974-75. This conclusion is expressly stated in the regulations. 10 CFR § 60.7(a). The Commission does not regard NWPAs as having expanded its licensing jurisdiction. As before, NRC may neither allow nor prohibit DOE's use of radioactive materials in site characterization.

The Nuclear Waste Policy Act does confer new authority upon NRC, but it is limited in scope. This is the authority to concur that DOE's use of radioactive material "is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a repository at such candidate site." Sec. 113(c)(2)(A), 42 U.S.C. 10133. The language of the proposed rule appropriately implements this provision.

## COMMENT NO. 9

Comment Summary:

A host State is entitled to full party status at the outset in NRC licensing proceedings and should have the rights of such a party, not those of a mere intervenor. An absolute right of participation in NRC licensing proceedings should be declared by 10 CFR Part 60.

Response:

Under section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239, a person "whose interest may be affected" is entitled to be admitted to a licensing hearing as a party. Under this statutory provision, there can be no question that the host State has a legal right to be a party in the proceeding. Nevertheless, certain rules of practice are essential in order for a person who seeks to be a party to be admitted to the proceeding.

Rights of participation in NRC licensing proceedings are referenced in 10 CFR Part 60. The tests of standing are set out in § 2.714. These tests are clearly met for host State or affected Indian tribe participation. There is thus no substantial basis of concern with respect to the issue raised by the commenters. Once the State/tribe is admitted as an intervenor, it would enjoy the full rights of a party. These include, with respect to all matters affecting its interest, the rights to introduce evidence, put on witnesses, cross-examination, full notice and service of all pleadings, full rights of discovery, and standing to appeal. Non-host States may also participate in licensing proceedings to the extent they meet the tests of standing set out in 10 CFR Part 2.

In addition, section 2.715 provides for the participation of an interested State (as well as counties and municipalities) in NRC proceedings even if it chooses not to litigate particular contentions in the proceeding. In this role the State has an opportunity to introduce evidence, interrogate witnesses, and advise the Commission without taking a position on any issue; it may also file proposed findings and petition for Commission review of a Licensing Board decision. 10 CFR 2.715(c) extends this opportunity to participate as a interested State not only to the State in which a facility will be located, but also to those other States that can demonstrate an interest.

## COMMENT NO. 10

Comment Summary:

To avoid any impression that all site investigation and characterization activities should allow for the precise identification of licensing issues, add "to the extent that relevant information becomes available as a result of such activities" to footnote 1 to § 60.18.

Response

We agree that all site investigations need not necessarily allow for precise licensing issue identification. But, we do not believe that this is implied by the footnote. The commenter may have misinterpreted the intent of the footnote. The footnote was merely intended to provide additional information with respect to NRC involvement in reviewing DOE prelicensing activities, using the review of DOE's environmental assessments as an example.

## COMMENT NO. 11

Comment Summary:

Proposed 60.63(b) would allow States/tribes to submit proposals for participation in site reviews "at any time". To maintain an efficient licensing process this should be changed to "timely".

Response:

In the current Part 60, there is a requirement that a State/tribe proposal must be submitted at any time prior to docketing of an application or up to 120 days thereafter. The change to "at any time" in the proposed amendments is in recognition of the possibility of productive and timely proposal being submitted outside such a time frame.

NRC review and acceptance of proposals, covered in 60.63(d), will be on the basis that they make a timely and productive contribution to the review.

## COMMENT NO. 12

Comment Summary:

The proposed changes to Subpart C of 10 CFR 60 were not necessary. NRC seems to be withholding information and consultation with States/tribes until a fairly late stage in the process of site selection.

Information to be provided by NRC under 60.61 is triggered by the submission of the SCP. Consultation in site review is triggered by the Presidential approval of a site for characterization. By this time, NRC and DOE will have conducted technical meetings and the EA's will have been developed by DOE and reviewed by NRC. Part 60 should contain provisions to allow formal State/tribe interaction with NRC to begin earlier.

Response:

NRC policy is to encourage interaction with States/tribes to the maximum extent possible within the limits of the Commission's authority. NRC actions taken so far in the process of site selection--inviting State/tribe participation in the concurrence on the siting guidelines, for example--bear this out. There is no basis to the assertion that NRC is withholding information. The proposed amendments reflect changes in the schedule for activities made by the NWPA. The law sets the point at which formal interaction between NRC and States/tribes begins at the site characterization stage. The proposed amendments do not represent a major change from the schedule for State/tribe participation under the current Part 60.



## COMMENT NO. 13

Comment Summary:

10 CFR 60 and all NRC materials should write "Tribes" with a capital "T" because the word "Tribes" is capitalized in the U. S. Constitution.

Response:

The style for capitalization has changed since the Constitution was written. In proper modern English usage, the "t" in tribes is not capitalized unless used as part of the name of a specific tribe. (Reference: US GPO Style Manual, January, 1973 page 48). We note that the NWPA does not capitalize "t" in tribes.

## COMMENT NO. 14

Comment Summary:

The Director's invitation for State/tribe comment on the SCP should not be discretionary, but mandatory. Section 60.18 (c) of the rule should state that the Director "shall" request comment.

Response:

The proposed amendments provide that the Director's invitation to comment on the SCP by States and tribes be on a discretionary basis. The staff believes that this should be retained. The Director should have the discretion to determine, in a particular instance, whether it would be advantageous to solicit and consider public comments on DOE's site characterization plan before issuance of a site characterization analysis. The extent to which early reviews have afforded an opportunity for interested persons to identify issues of concern, the need for additional expertise that might not be fully available at NRC, and the impact upon achievement of the scheduling directives of NWPA, are some of the factors that might be considered.

COMMENT NO. 15

Comment Summary:

A public document room should be established in the town nearest the site.

Response:

NRC presently makes every reasonable effort to assure public access to information. NRC has the discretion to establish public document rooms anywhere to facilitate public access to information. Under 60.63 proposals for the establishment of public document rooms will be considered by NRC. There is no need to specify in Part 60 requirements for the location of public document rooms.

## COMMENT NO. 16

Comment Summary:

The commenter was concerned that the criteria for acceptance of proposals in Section 60.63 (d), that the proposed activities be timely, would be used to limit State/tribe participation. Experiences to date with the repository program and expectations regarding pressures exerted on decision makers as the program progresses create a concern that "timely" will be the focal point of the criteria, rather than "productive".

Response:

The Commission acknowledges State (tribe) concerns that the NWPA schedule for activities could create these pressures and place a strain on State and tribe resources. NRC presently is making every effort to keep States and tribes well-informed on activities so as to allow States and tribes time to plan for the types of participation which they may desire. However, the Commission must also acknowledge that there is a schedule for repository licensing, and that the timeliness of proposals has to be a factor in NRC consideration of them.

## COMMENT NO. 17

Comment Summary:

A footnote should be added to Section 60.15 (c) to indicate that the reference to Section 51.40 has been superseded by the NWPA Section 114 (f).

Response:

The Commission agrees that the reference to § 51.40, which has heretofore been removed from the regulations, is no longer correct. It has accordingly been deleted from the final rule. The correct citation for the requirement that DOE is required to conduct a program of characterization with respect to alternative sites is NWPA itself (in particular, § 113, 42 U.S.C. 10133). In response to the comment, therefore, the final rule refers to the statute rather than to the superseded regulation.



## COMMENT NO. 18

Comment Summary:

Mine safety considerations might require more shafts than are strictly necessary for site characterization, and the existing limitation in Section 60.15 (d) (2) on the number of exploratory boreholes and shafts should be revised to accommodate this need.

Response:

The issue is outside the scope of the present rulemaking. The Commission notes, however, that if safety considerations do dictate the sinking of additional shafts, it would not be "practical" to limit the number of exploratory boreholes and shafts to a smaller number. In other words, the needed flexibility already is provided by the rule in Section 60.15 (d) (2) by the statement that "the number of exploratory boreholes and shafts shall be limited to the extent practical ---." (emphasis supplied)

## COMMENT NO. 19

Comment Summary:

In Sections 60.15 and 60.17 the term "area to be characterized" has been used instead of the statutory term "candidate site." Both NRC and DOE should adhere to the statutory terminology to the greatest extent possible, in order to avoid the confusion that would result from the use of different names for identical concepts.

Response:

The term "site" is used in 10 CFR Part 60 to refer to the location of the controlled area - a very definite area with limits related to the isolation characteristics of a particular geologic repository. "Candidate site," as defined in the NWPA refers to a region of considerably greater extent. NRC believes that the introduction of the term "candidate site" into Part 60 would increase, rather than reduce, the likelihood of confusion, since in that event the word "site" would be applied both to the small and definite location of the "controlled area" and to the much larger and vaguer area comprehended in NWPA by the term "candidate site."

## COMMENT NO. 20

Comment Summary:

Section 60.18 (e), which concerns NRC's finding of necessity for onsite testing with radioactive materials, should state that NRC will concur in the use of radioactive tracers if certain criteria are met, and that the removal of these trace amounts at the end of site characterization shall not be required.

Response:

When the Commission adopted 10 CFR Part 60, it determined that it lacked jurisdiction over the use of radioactive material by DOE for purposes of site characterization. 46 FR 13974-75. This conclusion is expressly stated in the regulations. 10 CFR § 60.7(a). The Commission does not regard NHPA as having expanded its licensing jurisdiction. As before, NRC may neither allow nor prohibit DOE's use of radioactive materials in site characterization.

The Nuclear Waste Policy Act does confer new authority upon NRC, but it is limited in scope. This is the authority to concur that DOE's use of radioactive material "is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a repository at such candidate site." Sec. 113(c)(2)(A), 42 U.S.C. 10133. While NRC concurrence may be a legal prerequisite to DOE's use of radioactive material in characterization, this limitation is derived from the statute itself and not from any regulatory action, such as licensing, on the part of the Commission. The Commission merely makes a finding of necessity. Thus, it is not appropriate for NRC to specify residual quantities of radioactive material which would be "allowed".

While the statutory provisions of NHPA Section 113 (c) (2) (B) refer to the responsibilities of DOE, and it is not appropriate for NRC to construe the obligations of another agency, it is not apparent to the NRC that these provisions were intended to apply to tracer amounts of materials. We believe that this provision in the Act was intended to prevent DOE from creating a de facto unlicensed repository by bringing in large amounts of HLW or spent fuel under the guise of testing which was in fact unnecessary.

## COMMENT NO. 21

Comment Summary:

The provision for NRC inspection of site characterization activities contained in Section 60.18 (h) should be qualified to specify inspections in accordance with the Procedural Agreement.

Response:

The cited paragraph is a restatement of language contained in existing 10 CFR § 60.11(g), with editorial changes only. The Nuclear Waste Policy Act did not alter the relationship between the Commission and DOE during site characterization. Accordingly, it is appropriate to retain the regulatory language that had previously been approved. Moreover, the Procedural Agreement is merely a mechanism for implementing NWPA and not an independent source of regulatory authority. An explicit reference to the Procedural Agreement in the text of § 60.18 could be misunderstood as implying that that instrument was a basis for the regulation.

## COMMENT NO. 22

Comment Summary:

The SCP's should contain socioeconomic, transportation, environmental and institutional information at the same level as for the technical elements. This part of the SCP's should also be updated and reviewed by NRC every 6 months.

Response:

The Commission believes that any information which it requires, other than the items specifically called for under § 113(b)(1)(A)(i-iv), should be pertinent to its review of "site characterization" activities at the site in question. The term "site characterization," as defined in Sec. 2(21) of NWPA, refers to activities "undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken." This definition is so closely patterned after the earlier definition in 10 CFR Part 60 as to imply that the Commission's usage was being adopted. There is no statement in the reports on the draft legislation to indicate the contrary.

In using the term "site characterization," the Commission has consistently focused upon those tests that must be undertaken to provide the kinds of geologic information which will be needed in order for DOE to be able to prepare a license application, and for the Commission to make licensing findings with respect thereto with reasonable assurance. Since the activities that are the subject of the instant comment are not "site characterization" within the established meaning of that term, the Commission must decline to require their submission in the site characterization plans.

The Commission does not mean to imply that the information is not important. However, under the Waste Policy Act, that information is required to be obtained and circulated under a variety of mechanisms other than the site characterization plan. These include the environmental assessments for the several candidate sites, the environmental impact statement that is prepared after site characterization has been completed, and the information that is developed by DOE under the cooperative arrangements entered into with the States and affected Indian tribes.

Moreover, the Commission recognizes the value, for NEPA purposes, of current information from DOE with respect to the topics indicated in the comment. However, under CEQ regulations, DOE is already required to engage in an early and open scoping process for determining the scope of the issues to be addressed in an environmental impact statement and for identifying the significant issues related to a proposed action. This process, coupled with



the consultation provisions of Section 117 the of NWPA, addresses the concerns of the commenter. It is neither necessary nor appropriate for the Commission to assert its regulatory authority so as to require DOE to fulfill its duties under these other provisions of law.

## COMMENT NO. 23

Comment Summary:

All revisions to Part 60 and Part 51 to conform them to the NHPA should be promulgated simultaneously. In particular, the revisions concerning NEPA requirements should accompany the revisions currently being proposed. This would assure that a comprehensive and integrated approach is taken and that any confusion regarding NHPA and NEPA requirements is eliminated. Much of Part 60 now rests on NEPA authority so that failure to include NEPA in the currently proposed revision casts a cloud over the Commission's view of its authority to carry out early site reviews. It may also skew the scope of environmental assessment review by precluding reviews of alternatives and comparative analysis.

Response:

The Commission has not put off considering the responsibilities of the Commission under NEPA as modified by the NHPA. In developing these proposed regulation changes, the Commission has specifically evaluated whether it was necessary for the Commission to take any steps during the site screening stages to assure meeting its ultimate NEPA responsibilities. The Commission concludes that NRC pre-licensing review should not be exhaustive, and in this regard it differs from the commenters. In light of the Commission's understanding with respect to NRC's responsibilities, it would be important and appropriate to proceed with the present action without awaiting other changes that will be proposed in the light of the NHPA. In view of the need to publish those changes related to the site characterization plans prior to the rapidly approaching time when DOE prepares those plans, it was necessary to consider these changes first and separately. These issues are separable from other NHPA-mandated matters, including NEPA concerns. The NEPA related amendments to NRC rules (1) will define the alternatives that must be discussed in an environmental impact statement, (2) will exempt the promulgation of NRC licensing requirements and criteria from environmental review under NEPA, and (3) will set out the procedures that will be followed by the Commission in determining whether or not to adopt the DOE EIS. The alternatives are, in principal part, defined by NHPA. The exemption for environmental review of the promulgation of licensing rules is also explicitly stated by that Act. The procedures for adoption of the DOE environmental impact statement are mandated generally by NHPA and regulations of the Council on Environmental Quality. All of these matters are readily separable from the proposed amendments. Furthermore, the Commission does not anticipate that the 10 CFR Part 51 amendments will address the commenters' concerns over the pre-licensing review of the DOE site selection process. Therefore, publication of the rule need not be deferred.

## COMMENT NO. 24

Comment Summary:

The NRC should make clear that its licensing authority is not constrained or restricted by the NWPA. The responsibilities of NRC as expressed by 10 CFR Part 60 are essentially unchanged by the NWPA.

Response:

The responsibilities of NRC as expressed by 10 CFR Part 60 are indeed essentially unchanged by the NWPA. The specific proposed changes to 10 CFR 60 are not explicitly required by the NWPA, but are what the Commission considers are necessary to make its regulations consistent with NWPA requirements and provisions.

## COMMENT NO. 25

Comment Summary:

Contrary to page 16 of SECY-84-263, NWPA Section 117 does provide new rights to states to receive information, and to be able to comment on such information and have such comment considered and acted upon by the Commission.

Response:

The Commission agrees that to some extent Section 117 of the NWPA may have established new rights for the States to receive information, comment on such information, and have such comments considered. Since the proposed regulation incorporates the language of Section 117, the States are assured that NRC's regulatory program will accommodate any such rights notwithstanding the discussion of Section 117 in the statement of considerations.

## COMMENT NO. 26

Comment Summary:

In Section 60.17 (a) (2) (iv) the phrase "any adverse impacts from site characterization that are important to safety" has been substituted for the statutory phrase "any adverse, safety related impacts from such site characterization activities---." Though it is not clear what the difference is between these two phrases, less confusion will be caused if the statutory phrase is used.

Response:

The comment only quotes a portion of the phrase that was substituted. Omitted were the words "or that are important to waste isolation". The statement of considerations explains that the change was made to clarify our interpretation of the statute which is that DOE should address both those aspects of the site that could (1) be significant with respect to radiological safety prior to permanent closure or (2) affect the ability of the repository to satisfy the performance objectives pertaining to waste isolation. 10 CFR Part 60 contains a definition of the words "important to safety". To meet the intent of the statute the term "important to safety" is the appropriate term which must be used. We note that this comment was made on an advance draft and was not repeated in the comments on the proposed rule which was accompanied by the statement of considerations explanation.



## COMMENT NO. 27

Comment Summary:

The term "semi-annual reports" in Section 60.18 (g) is incorrect as the NWPA and the proposed rule require reports "not be less than once every 6 months". It is inappropriate that the Commission waive its expectation for more than the minimum reporting from DOE.

Response:

As the comments noted, the rule does require that "DOE shall report not less than once every six months" as required by the NWPA. Referring to such reports as semi-annual does not prevent DOE from making more frequent submissions if appropriate.

## COMMENT NO. 28

Comment Summary:

The rule relies on the Procedural Agreement for authority instead of on statutes. Relying on the Procedural Agreement does not give the Commission the foundation it needs to carry out early site review activities; the Commission has authority to perform such review activities under the Atomic Energy Act. Part 60 should not be based upon the Procedural Agreement.

Response:

NRC does not rely upon the Procedural Agreement as its authority to perform early site review activities. The authority is the Atomic Energy Act, the Energy Reorganization Act, and the Nuclear Waste Policy Act. The Procedural Agreement is merely the mechanism that has been developed to implement these statutes. Part 60 is not based on the Procedural Agreement, but upon the statutes cited above. See Authority citation. In response to the comment, however, the Commission has deleted the one reference to the Procedural Agreement from the proposed rule. See the revised footnote to §60.18.

It is important in this regard to observe carefully the procedural framework that is laid out in NWPA. While there are some opportunities for early NRC participation, notably in connection with its concurrence in the DOE siting guidelines, the statute does not otherwise provide for NRC review until DOE has proceeded to the site characterization stage. It is at that point that the law calls for NRC to carry out its first site-specific review. In developing regulations, NRC should adhere as closely to NWPA as possible. It is therefore preferable to require submissions from DOE only at the times indicated by that law. See also response to Comment no. 2.

## COMMENT NO. 29

Comment Summary:

Issues could be more readily brought to the Commission's attention by establishing a notice and public comment process for the NRC review of the semi-annual SCP updates.

Response:

There is nothing that requires NRC to comment on the semi-annual reports on site characterization, and there will not necessarily be an NRC response to the DOE document. The DOE semi-annual reports will go to States and tribes as well as NRC, and States and Tribes may comment directly to DOE on them. A notice and public comment procedure would be too cumbersome and create the potential for unproductive delays. However, the rule could provide for public comment on the NRC responses to DOE by having the Director invite comments, and this has been added to the rule.

## COMMENT NO. 30

Comment Summary:

NRC should retain in Part 60 provisions requiring NRC notification to local governments.

Response:

The NWPA gives States the responsibility for informing local residents of any activities of the State, DOE, or NRC with respect to the site (Section 116(c)(1)(b)(iv)). In light of the procedures established by the NWPA, the proposed amendments to Part 60 which would limit NRC notification to States and Indian tribes are entirely proper.

The NWPA calls for notification of "Governors, State legislatures, and tribal councils." The notification procedures for Part 60 should conform to this. No change is needed.

## COMMENT NO. 31

Comment Summary:

To offer explicit, comprehensive comments on § 60.15 through 60.18, knowledge of the mechanics and schedule of interaction between NRC and DOE in the site characterization process is necessary. One or more NRC/DOE/State/Indian meetings should be held to develop the mechanics of the SCP interactions.

Response:

There is no reason why explicit, comprehensive comments cannot be offered at this time on these proposed rule sections. The NWPA and this rule define the general process for interaction. Distribution of preliminary drafts of the proposed rule, prior meetings with the states and Indian tribes, and the comments on these proposed rules have given the interested parties opportunity for input into developing this general process.

At a later date, a meeting of the interested parties may well be appropriate to work out the details of the mechanics and schedules.



## COMMENT NO. 32

Comment Summary:

The Statement of Considerations should state that staff decisions (such as the denial of a State participation proposal) can always be appealed to the Commission.

Response:

It is appropriate to leave the procedures for seeking Commission review informal, as is the case for most administrative actions that have been delegated to Staff. Should the staff decision prove to be unsatisfactory, the aggrieved State could elect to try to persuade the Commission to review the action. Alternatively, it would have the option of seeking judicial review without having first to exhaust other remedies. (Adoption of the commenter's proposal could result in an aggrieved party's being required to appeal to the Commission whether it wished to do so or not.)

## COMMENT NO. 33

Comment Summary:

Since DOE is not fully cooperating with States, the Commission's reduction of opportunities for interaction may foreclose effective State participation in decisions concerning the repository. Thus, NRC should not reduce opportunities for State consultation

Response:

Notwithstanding the formal changes in Commission responsibility, NRC encourages consultation with interested parties, so that information would be available routinely with respect to NRC's views. The commenter's concern with respect to DOE's cooperation, or lack thereof, is not a matter properly to be addressed by the Commission. Procedures for such cooperation have been set out in Sections 116 and 117 of NWRPA. If the implementation of these procedures is unsatisfactory, there are opportunities for judicial review and legislative oversight. It is not the Commission's role, however, to regulate DOE's interaction with the States and Indian tribes.

## COMMENT NO. 34

Comment Summary:

NRC should fund State involvement in repository planning because States have had difficulty obtaining funds from DOE.

Response:

The Commission explained, in the preamble to the proposed rule, that it believed Congress intended that DOE should assume the Federal responsibility for funding State involvement in repository planning. The commenter does not take issue with this view. If, as appears to be agreed, NWPA vests DOE with this responsibility, the appropriate action for the Commission is to eliminate any inconsistent or contrary provisions from its regulation. The concern of the State appears to be its lack of confidence in DOE's exercise of its funding authority. As in the case of other comments of this nature, discussed above, this is a matter for the affected States to work out with DOE; it is not something which the Commission is authorized to resolve or remedy. It remains true that the Commission may, in appropriate circumstances, turn to a State for particular services required by NRC in order to be able to carry out its own licensing functions effectively. But, as was explained at the time the proposed rule was issued, this is best characterized as a standard procurement activity rather than as part of the regulatory scheme for implementation of NWPA.

## COMMENT NO. 35

Comment Summary:

The rule should provide a mechanism to involve the Department of Interior in site screening and selection. A procedural agreement similar to that between DOE and NRC should be executed between DOE and the Department of Interior.

Response:

This rule is not an appropriate vehicle to provide a role for the Department of Interior in the site screening and selection process. The DOE has the primary responsibility for executing the site screening and selection process. If the Department of Interior wished to become involved in this process, they should discuss this involvement directly with DOE. This amendment to the licensing procedures is being undertaken to reflect the requirements of the NWPA. A procedural agreement between DOE and DOI would also, of course, have to be negotiated directly with DOE.

## COMMENT NO. 36

Comment Summary:

The type of information and level of analysis required in the SCP should be specified in greater detail in the rule.

Response:

The Commission recognizes that the level of detail called for in SCP is not defined precisely in the regulations. There must be sufficient detail for the Commission and other statutory reviewers to be able to comment in an informed manner. The Commission believes that requiring more detail in the rule would not be practical given the different types of sites. See, also, the discussion in the preamble to the proposed rule (50 FR 2585).

NRC has issued a draft revision of a regulatory guide (Proposed Revision 1 to Regulatory Guide 4.17 - Standard Format and Content of Site Characterization Plans for High-Level Waste Geological Repositories, February, 1985) which suggests the types of information to be provided in the SCP and a uniform format for presenting the information.



## COMMENT NO. 37

Comment Summary:

Since NWPA Section 113(c)(4) requires the reclamation of a site determined to be unsuitable for a repository, NRC should require DOE to plan for such reclamation.

Response:

Section 113 includes two related provisions. Paragraph (c)(4), cited by the commenter, requires "reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities." Paragraph (b)(1)(A)(iii) calls for DOE to submit, as part of its site characterization plan, "plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities" if a site is determined to be unsuitable. Thus, DOE must mitigate adverse impacts and submit plans for doing so as part of its site characterization plan. Also, under the law, DOE must "reclaim the site" and submit plans for "decontamination and decommissioning" of the site as part of its site characterization plan. As a matter of statutory interpretation, it would seem that the proper construction would equate the concepts of "reclamation" and "decontamination and decommissioning." Accordingly, it is to be expected that DOE would in fact describe its plans for site reclamation as part of its site characterization plan. The Commission would not need this information, however, since the site concerned would not be one subject to NRC licensing authority (since, by definition, it had been determined not to be suitable for a repository). The proposed rule is thus consistent with NWPA and appropriate to serve NRC regulatory needs, and it will not be changed.

## COMMENT NO. 38

Comment Summary:

It appears that NRC/DOE proposes to limit general public involvement to compliance with NEPA only and to minimize State, Indian tribe, and other Federal agency involvement. According to § 60.18 (a) NRC is proposing to no longer afford the public an opportunity to consult with staff and discuss issues of concern during staff review.

Response:

The commenter is incorrect in thinking that the proposed rule is a joint NRC/DOE proposal. This is an NRC regulation. DOE is the license applicant and has commented on the proposed rule the same as other interested parties. Public involvement is not limited to NEPA compliance and in fact is now expanded by the combination of the NWPA and the proposed rule. By looking only at § 60.18 (a) the commenter has incorrectly concluded that the proposed rule deletes the opportunity for States and tribes to consult with the staff during the review of the SCP. Such consultation is provided for in Section 60.62.

## COMMENT NO. 39

Comment Summary:

The rule should require DOE to submit site characterization plans before large-scale disturbances occur. Only "preliminary activities," which should be defined, should be exempt from the site characterization plan review.

Response:

Section 114(b) of NWPA states that DOE's is to submit its plan for site characterization activities "before proceeding to sink shafts." This is the language that appeared in the proposed rule. The commenter would apparently wish to have the Commission construe this provision in a manner that would obligate DOE to make its submission before undertaking activities, other than preliminary activities, related to site characterization. Indeed, this could be meritorious, since DOE would then avoid expenditures which might subsequently turn out, in the light of comments made by the Commission, the States, and affected Indian tribes, to have been improvident. The difficulty with implementing this comment, however, is that the statute is explicit. The requirement is that the submission be made "before proceeding to sink shafts" and so long as DOE complies with this provision, the Commission can demand no more.

## COMMENT NO. 40

Comment Summary:

States and tribes should be notified of meetings between NRC and DOE held under the procedural agreement between NRC and DOE in accordance with the spirit of Section 117(a) of the NWPA.

Response:

NRC agrees with the desirability of notifying States and tribes of meetings between NRC and DOE and has been providing such notification. NRC will continue to provide notification of such meetings, of the subjects to be discussed, and of the opportunity to participate at an appropriate level. No change in 10 CFR 60 is necessary.

ENCLOSURE C



PUBLIC COMMENT LETTERS

- 1) Nevada
- 2) Edison Electric Institute
- 3) Environmental Policy Institute
- 4) Connecticut
- 5) Scientists and Engineers for Secure Energy
- 6) National Congress of American Indians
- 7) ---- mis-docketed
- 8) Natural Resources Defense Council
- 9) Ecology Alert
- 10) Minnesota
- 11) Texas- Frishman
- 12) Texas-Smith
- 13) Coeur d'Alene Tribe of Idaho
- 14) DOE
- 15) Yakima Indian Nation
- 16) DOI
- 17) Yakima Indian Nation\*
- 18) Utah
- 19) Nevada\*

\* These letters restate earlier comments and request meeting  
with Commission

ENCLOSURE C



NUCLEAR WASTE PROJECT OFFICE

OFFICE OF THE GOVERNOR  
Capitol Complex  
Carson City, Nevada 89710  
(702) 885-3744

March 4, 1985

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

ATTENTION: Docketing & Service Branch

Dear Sir:

Enclosed please find the Comments of the State of Nevada regarding amendments to 10 CFR 60, Disposal of High-Level Radioactive Waste in Geologic Repositories: Amendments to Licensing Procedures, SECY-84-263.

Should there be any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert R. Loux".

ROBERT R. LOUX  
Director

RRL\*jm

Encls.

ACKNOWLEDGED  
MAR 8 1985  
Acknowledged by card.....

COMMENTS OF THE STATE OF NEVADA  
REGARDING PROPOSED 10 CFR PART 60-DISPOSAL OF HIGH-LEVEL  
RADIOACTIVE WASTE IN GEOLOGIC REPOSITORIES:  
AMENDMENTS TO LICENSING PROCEDURES  
50 FED. REG. 2579-2590, JANUARY 17, 1985.

The State of Nevada commented previously on NRC proposals to amend 10 CFR 60. On August 17, 1984, Robert Loux corresponded with Mr. Robert Browning responding to the July 2, 1984, request by Catherine F. Russell, State-Tribal Coordinator, NNWSI, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, that the State of Nevada submit comments on a staff version (SECY 84-263) of a proposed rulemaking amending 10 CFR Part 60. The version published at 50 F.R. 2579-2590 is essentially identical to the earlier staff version on which Nevada's comments were submitted. The change of the word "must" to the word "shall" in proposed sections 60.17(a) and 60.18(g) and (k), and the minor change of wording in section 60.18(e), appear to be the only changes in the text (other than spelling). Inasmuch as so little change has occurred, Nevada renews all of its comments offered previously. For use of reference they are enclosed herewith.

**Section 60.18**

Section 60.18(e) would now require that the Director, when commenting upon the DOE's site characterization plan "include a determination regarding whether or not the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under section 60.22 of this part." The earlier staff version provided "the Director's comments shall include a

determination, if appropriate, that the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under section 60.22 of this part." We assume that this change is responsive to Nevada's earlier comment that "the Commission is charged with the responsibility to make an independent determination whether the use of radioactive material is necessary to provide adequate environmental data for a repository construction authorization." However, Nevada does not believe that the language as changed makes clear that the NRC's concurrence in DOE's use of radioactive materials in characterization is a legal prerequisite to its use.

Proposed section 60.18 otherwise remains essentially unchanged.

Comments made by NRC staff at the Commission's meeting of December 11, 1984 raise Nevada's concern that the commission's actual practice regarding review of DOE's site characterization plan will be different than that proposed in section 60.18.

At page 35 of the transcript of the Commission's meeting, the following colloquy occurred:

"Commissioner Asselstine: I assume that the way that is going to work is, you are going to get site characterization plans for those individual sites, and they might not come all in at once.

"Mr. Browning: That's right, that's why that is shown as not a particular point the way the EA's are.

"Commissioner Asselstine: Okay. But the sequence will always be that you will get the site characterization-.

Mr. Browning: Before the shaft-.

"Commissioner Asselstine:—they will be reviewed. Any comments or concerns will be resolved. Then you go to actually doing the characterization.

"Mr. Browning: Yes. What we'll probably have to do is to focus in on those comments and concerns that relate to sinking of the shaft and



give special attention to those as opposed to necessarily resolving all our comments on the site characterization plan, some of which may not have anything to do with this shaft sinking.

"Commissioner Asselstine: Okay."

Section 113(b)(1) of the Nuclear Waste Policy Act requires that the site characterization plan be submitted to the Commission and the state in which the candidate site is located for their review and comment "before proceeding to sink shafts . . . ." Section 113 (b)(2) also requires that public hearings be held on site characterization plans before DOE proceeds to sink shafts at any candidate site. NRC's proposed section 60.18 does not clearly state that the NRC's review and comment upon the site characterization plan must be complete before DOE may proceed to sink shafts at a repository site as Nevada thinks the Act requires. Mr. Browning's comment at the December 11, 1984 NRC meeting suggests that the NRC might be prepared to allow DOE to begin site characterization while some NRC concerns remain outstanding. Proposed 10 CFR 60 should be amended to clarify that DOE may not proceed to characterize sites by sinking shafts until NRC and state review and comment upon the characterization plan are complete.

#### Section 60.63

Proposed section 60.63 still fails to declare overtly that a state within which a nuclear waste repository is proposed to be placed will be a full party to the license proceeding. The proposed section merely refers to participation in accordance with subpart G of part 2 of 10 CFR. That subpart provides for state intervention in licensing proceedings but does not declare that a state would be a full party to the licensing proceeding. The text preceeding the proposed rule at 50 F.R. 2584 states that "affected states and Indian tribes will be entitled to participate in the licensing proceedings." Yet the language of proposed 10 CFR 60.63 makes no such declaration.



Nevada contends that, as a state entitled to participate in repository site selection and development, it is entitled to full party status at the outset in NRC licensing proceedings. As such a party, not a mere intervenor, the state should be entitled to equivalent procedural rights as the Department of Energy at all stages. This would, of course, include the right to introduce evidence, put on witnesses, cross examination, full notice of all pleadings, full rights of discovery, and standing to appeal.

The proposed rule leaves a state's party status open to later determination. That determination should be made now: party status guaranteed by rule.

COMMENTS OF THE STATE OF NEVADA  
REGARDING AMENDMENTS TO 10 CFR PART 60—DISPOSAL OF HIGH-LEVEL  
RADIOACTIVE WASTE IN GEOLOGIC REPOSITORIES:

Amendments to Licensing Procedures,

SECY-84-263.

The State of Nevada submits these Comments in response to the July 2, 1984 request by Catherine F. Russell, State/Tribal Coordinator, NNWSI, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, United States Nuclear Regulatory Commission. These Comments are made with the understanding that staff is proposing a rulemaking, amending § 10 CFR Part 60. The State of Nevada does not waive or relinquish the right to participate in and comment freely in that rulemaking by the submission of these informal comments and reserves the right to raise any issue therein.

Regulatory Amendment Consequent of Passage of the Nuclear Waste Policy Act.

Earlier this year the Commission sought comments on proposed regulatory reforms concerning its general rules of practice contained in 10 CFR Part 2, some of which changes were necessary as a consequence of the passage of the Nuclear Waste Policy Act. In the proposal to which these comments are addressed the staff proposes amendments to the licensing procedures of 10 CFR Part 60 as a consequence of the passage of the Nuclear Waste Policy Act. The Nuclear Waste Policy Act creates new responsibilities for the Nuclear Regulatory Commission and new rights and responsibilities for affected states. In order that the Commission correctly integrate the Nuclear Waste Policy Act into its regulatory framework in a way which provides the states and other interested parties with their full rights under the Act, the Commission should promulgate all new rules reflecting the

passage of the Nuclear Waste Policy Act in one rulemaking, thereby guaranteeing a single, integrated approach and preventing potential contradiction, misunderstanding and confusion. As the discussion below will reveal, both Part 60 and Part 2 are relevant to a state's role in the repository licensing process. That process may or may not be best conducted under the current general rules of Part 2.

#### State Rights to NRC Information—Consultation.

At page 16 of Enclosure A to SECY-84-263, the staff states as follows:

"Under the Waste Policy Act, the Commission is directed to provide 'timely and complete information regarding determinations or plans made with respect to site characterization, siting, development, design, licensing, construction, operation, regulation, or decommissioning' of a repository, Sec. 117, 42 U.S.C. 10137, but this affords no rights to States and Indian tribes beyond those already in law. H.R. Rep. 97-785, Part I at 74."

This basic assumption is incorrect. It is based upon an incomplete reading of the authority on which it relies. Under § 117(a)(1) of the Nuclear Waste Policy Act, 42 U.S.C. 10137(a)(1), a state containing a potentially acceptable site is entitled to complete information from the NRC, as well as from DOE and "other agencies involved." Section 117 does provide new rights to the states which did not exist before the enactment of the Nuclear Waste Policy Act.

The authority upon which the staff relies is found at page 74 of the Report of the Committee on Energy and Commerce on HR 6598, which contained the language now found in § 117 of the Act as passed. The complete relevant text is as follows:

#### "Consultation With States and Indian Tribes

Section 117(a)(1) directs the Secretary, the Commission and all other involved agencies to provide the governor and the state legislature and, where appropriate, the governing body of any Indian tribe affected, timely and complete information regarding determinations or plans made with respect to the siting, design, construction, operation or regulation of a repository. While it is expected that the appropriate state and Indian officials will be informed of pending decisions in time

for these officials to provide their comments and be afforded the opportunity to have their views heard prior to the time when a decision becomes final, it is not intended that this provision give the appropriate state and Indian officials any additional rights to information beyond those already provided in law to parties and the states regarding the licensing decisions of the Nuclear Regulatory Commission prior to the public announcement of such decisions. It is expected that the Commission will provide the appropriate state and Indian officials with timely access to information regarding determinations or plans available to the Commission with respect to an application to construct or operate a repository. This provision does not vest these state and Indian officials with any new statutory cause of action against the Commission regarding the internal deliberations of the licensing board, the appeals board or the Commissioners regarding matters which are under consideration or which are in dispute, or impose any requirement that the Commission and its hearing boards must consult with the appropriate state or Indian officials prior to deciding an issue which is within the licensing authority of the Commission."

It is clear from a complete reading of the relevant report language that the Committee on Energy and Commerce intended that the rights granted to states under § 117(a)(1) be limited only to the extent that they do not grant to states access to the deliberations of a licensing board, appeals board or the Commission. "[I]nformation regarding determinations or plans made with respect to site characterization, siting, development, design, licensing, construction, operation, regulation, or decommissioning" may at times be within the internal deliberations of such boards or the Commission but generally speaking and certainly at this early stage, would not be.

The State of Nevada is concerned that it be entitled, not only to receive complete information, but to comment upon that information within an NRC procedural framework which allows the consideration of and action upon that comment. Unless such a framework exists, the statutory grant of a right to complete and timely information becomes meaningless.

A relevant case in point is the proposed amendment to 10 CFR Part 60 deleting the requirement that the Site Characterization Report (plan) be made



available to state and Tribal officials and to the public because it is duplicative of the statutory requirement that the Department of Energy do the same. See discussion at page 14, Enclosure A, SECY-84-263. Though Nevada would certainly agree that current 10 CFR § 60.11(c) is duplicative of the statutory requirement, § 60.11(d), and (e) are not. Section 60.11(e), in particular, requires not only at least a 90 day comment period, but that the Director's final site characterization analysis "take into account comments received and any additional information acquired during the comment period." The State of Nevada is concerned that the Commission not forego its role of listening to the states and heeding their comment, in deference to the Department of Energy. As the State of Nevada became so completely aware in the process of NRC concurrence in DOE Siting Guidelines, the Commission has a capability of listening to states and considering their comment which the Department of Energy may not have because of its mission orientation with respect to repository development.

### The Licensing Process.

#### Relevant Statute and Rules.

It is basic that the NRC's grant of a license to construct a high-level nuclear waste repository is controlled by § 114(d) of the Nuclear Waste Policy Act, 42 USC 10134, and by "the laws applicable to such applications," i.e., the Atomic Energy Act and the Energy Reorganization Act of 1974. Though it does not now specifically so provide, one would assume that 10 CFR Part 2, subpart G, Rules of General Applicability, would apply to repository licensing proceedings. Of course, 10 CFR Part 60 would apply, and prior NRC decisions and case law construing both are relevant.



Assuming this to be the complete body of law describing how NRC repository licensing would occur, numerous questions now exist about a host state's role in the licensing process.

#### Host State as a Party in License Proceeding.

Neither 10 CFR Part 60, in its current or proposed form, nor 10 CFR Part 2, subpart G declare overtly that a state within which a nuclear waste repository is proposed to be placed will be a full party to the license proceeding. Because the Nuclear Waste Policy Act describes the significance of state participation in waste facility licensing, a host state would certainly meet judicial standards of standing and would be an eligible intervening party as that concept is utilized in 10 CFR § 2.714(f) as proposed in 49 F.R. 14698 earlier this year. 10 CFR Part 2, subpart G would control standards for state participation in license proceedings under the proposal contained at page 12, Enclosure G, SECY-84-263. This proposal is not, however, adequate in the eyes of the State of Nevada. Any state which contains a potentially acceptable site for the construction of a repository should be declared a full party in the future license proceeding by rule. As such a party, not a mere intervener, the state should be entitled to equivalent procedural rights and amenities as the Department of Energy. This would, of course, include the right to introduce evidence, put on witnesses, cross examination, full notice and service of all pleadings, full rights of discovery, and standing to appeal.

At page 18, Enclosure A SECY-84-263, the proposal states that "Affected states and Indian tribes will be entitled to participate in the licensing proceedings." It would seem that the staff agrees with the obvious conclusion that states are entitled to be full parties. Yet the proposed rule leaves a state's party status to later determination. That determination should be made now, a party status guaranteed by rule.

One problem with the deferral of the determination of host state party status is the exclusion of a potential host state from meaningful interaction with the Department of Energy and Nuclear Regulatory Commission in prelicensing matters. For instance, the NRC/DOE Procedural Agreement, Enclosure F, SECY-84-263, provides for a significant amount of interaction between the license applicant, DOE, and the licensing agency, NRC. The only role allowed states in this NRC/DOE interaction is the ability to attend technical meetings under paragraph 2.e. if a potential host state is to become prepared to adequately protect its interest in a repository licensing proceeding it must stand on an equal footing with the applicant, as a party with full right to participate in the prelicensing process along with the applicant and the licensing agency.

#### Site Characterization Plan.

As discussed at page 23, Enclosure A, SECY-84-263, "the proposed rule omits the mandatory draft site characterization analysis described in existing § 60.11. However, the proposed rule does provide that the Director may invite and consider comments on the DOE site characterization plan and that he may also review and consider the comments made in connection with the public hearings which DOE is required to hold." Proposed § 60.18(c) in fact requires the Director to review the site characterization plan and prepare a site characterization analysis. Though the Director is required to publish a notice that the analysis is available and allow 90 days for comments, there is no requirement that comments received from states or other interested parties to the site characterization analysis receive any substantive weight. Unless such a provision is included, a state cannot be assured that its comments will be heeded. While the Nuclear Regulatory Commission may be worthy of a state's trust that it will heed state comment, this requirement should be reduced to rule to insure state involvement.

The State of Nevada agrees with the statement, at page 14, Enclosure A, SECY-84-263, that "Congress intended that DOE should provide the [site characterization] plans sufficiently far in advance so that comments may be developed and submitted back to DOE early enough to be considered when shaft sinking occurs, and at all times thereafter."

#### Use of Radioactive Material in Characterization.

Section 113(c)(2)(A) of the Nuclear Waste Policy Act, 42 USC 10133, specifies that the Department of Energy "may not use any radioactive material at a candidate site unless the Commission concurs that such use is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a repository at such candidate site;". The discussion at page 24, Enclosure A, SECY-84-263, and the amendatory proposal at proposed § 60.18(e), page 8, Enclosure G, SECY-84-263, do not correctly apply the statutory requirement. The discussion at page 24, Enclosure A, suggests that the statutory language only confirms that DOE does not need a license to engage in site characterization using radioactive material. Though a full license, as that term is ordinarily used, may not be required, the NRC must "concur" with the Department of Energy that the use of radioactive material is necessary to provide data for preparation of the required environmental reports. Note that the same verb, "concur," is used in this context and in § 112(a), NRC statutory responsibility with respect to guidelines.

Proposed § 60.18(e) suggests that either the Commission's concurrence will be granted "if appropriate", or another reading, that the Commission will concur if the site characterization plan includes the use of radioactive material. Either reading is inconsistent with the requirements of the statute. The NRC is charged with an

independent determination whether the use of radioactive material is necessary to provide adequate environmental data.

#### Comments Regarding Proposed Text.

##### Section 60.17(a).

The term "area to be characterized" has been substituted for the statutory term "candidate site." Though Nevada is sensitive to the justification for this change, stated at page 19, Enclosure A, SECY-84-263, the introduction of this new term can only create controversy and uncertainty over its meaning. We suggest returning to the statutory language.

##### Section 60.17(a)(2)(iv).

The phrase "any adverse impacts from site characterization that are important to safety" has been substituted for the statutory phrase "any adverse, safety-related impacts from such site characterization activities . . . ." Though it is not clear at the outset what is the difference between these two phrases, less confusion will be caused if the statutory phrase is used.

##### Section 60.18(e).

See discussion above at pages 7 and 8.

##### Section 60.18(f), (j).

See discussion above at pages 6 and 7.

##### Section 60.18(g).

The term "semi-annual reports" is incorrect as the statute and proposed rule require that the Secretary report to the Commission and the governor or



legislature "not less than once every 6 months." It is inappropriate that the Commission waive its expectation for more than the minimum reporting from the Department of Energy.

Section 60.18(1).

The caveat contained in this subsection is appropriate and correctly stated. Note that the issue contained in this caveat is the same issue raised by the Energy and Commerce Committee report 97-785 discussed at page 3 above, rather than the issue for which that report is cited at page 16, Enclosure A, SECY-84-263.

Section 60.63(a).

The subsection as drafted does not grant potential host states full party status in licensing or proceedings or prelicensing activity. See discussion at pages 5 and 6 above.

Conclusion.

The Commission should utilize a total integrated approach to the enactment of rules consequent of the passage of the Nuclear Waste Policy Act. Those integrated rules should provide for full participation by affected states, defining their status as parties in any construction authorization proceeding at the outset. As part of the prelicensing activity, an affected state should be entitled to comment on proposed NRC action with the expectation that comments will be heard, and when meritorious heeded. For instance, the NRC's site characterization analysis should be finalized only after the opportunity for state comment. When regulations are adopted, new concepts should not be introduced by variance from statutory language, except where necessary to more greatly define statutory requirements.



# EDISON ELECTRIC INSTITUTE

The association of electric companies

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Washington, D.C. 20036-3691  
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March 14, 1985

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attention: Docketing and Service Branch

Re: 10 CFR Part 60: Disposal of High-Level Radioactive  
Waste in Geologic Repositories; Amendments to  
Licensing Procedures (50 Federal Register 2579)

Dear Mr. Secretary:

This letter is submitted on behalf of the Edison Electric Institute (EEI) and Utility Nuclear Waste Management Group (UNWGM) in response to the above-referenced notice. In general, we believe the proposed revisions to procedures pertaining to NRC reviews of license applications for the disposal of high-level radioactive waste in geologic repositories appropriately reflect the provisions of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq. ("NWSA" or "the Act"). We do have, however, the following specific comments.

First, as proposed, section 60.16 requires, without exception that, before proceeding to sink shafts at any area which has been approved by the President for site characterization, DOE must "submit to the Director, for review and comment, a site characterization plan for such area." Section 112(f) of the NWSA, 42 U.S.C. § 10132(f), however, provides an exception to this provision. In addition, and in accordance with the Act, the rule should be clarified to specifically state that, in any event, completion of the NRC's review is not a condition precedent for DOE's commencing to sink shafts. Accordingly, to provide consistency with the Act, section 60.16 should be revised to read as follows:

(a) Except as provided below in subsection 60.16(b), before proceeding to sink shafts at any area which has been approved by the President for site characterization, DOE shall submit to the Director, for the commencement of review and comment, a site characterization plan for such area.

(b) Nothing in this section, however, is to be construed as prohibiting DOE from continuing ongoing or presently planned site

MAR 14 1985  
Acknowledged by card.....

characterization at any site on DOE land for which the location of the principal borehole has been approved by the Secretary of DOE by August 1, 1982, except that: (1) the environmental assessment described in section 112(b)(1) of the Nuclear Waste Policy Act of 1982 shall be prepared and made available to the public before proceeding to sink shafts at any such site; and (2) DOE shall not continue site characterization at any such site unless such site is among the candidate sites recommended by the Secretary of DOE under the first sentence of subsection 112(b) for site characterization and approved by the President under subsection 112(c) of said Act; and (3) the Secretary shall conduct public hearings under subsection 113(b)(2) and have complied with requirements under section 117 of said Act within one year of the date of its enactment.

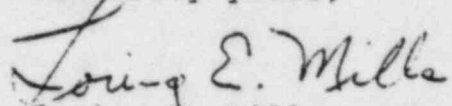
Second, footnote 1 to proposed section 60.18 indicates that "the Commission contemplates an ongoing review of ... information on site investigation and site characterization, in order to allow early identification of potential licensing issues for timely resolution." The footnote goes on to give, as an example of this activity, "a review of the environmental assessments prepared by DOE at the time of site nomination." Environmental assessments, however, are prepared at an early stage of the repository site-selection process. As a result, they should not be expected to provide early, detailed identification of potential licensing issues. Accordingly, to avoid any impression that all site investigation and characterization activities should, necessarily, allow for the precise identification of licensing issues, the words "to the extent that relevant information becomes available as a result of such activities" should be added to the end of the first sentence of the footnote.

Third, Section 60.63(b) allows a state or an affected Indian tribe to submit, "at any time," a proposal to the NRC to facilitate participation in the review of a site characterization plan and/or license application. Obviously, however, to assure an orderly and efficient licensing review, such proposals should be submitted in a timely fashion and not delayed until a point where they might be disruptive. Accordingly, the proposed rule should be modified to place a reasonable limit on when the proposal may be submitted; such as, for example, not later than the first prehearing conference in any proceeding. In addition, throughout sections 60.63(b) and (c), "NRC" is written as "NCR." These typographical errors should be corrected.

Secretary of the Commission  
March 14, 1985  
Page Three

We appreciate the opportunity to comment on the proposed rule. If you have any questions or if we can otherwise be of assistance, please let us know.

Sincerely yours,

A handwritten signature in cursive script that reads "Loring E. Mills".

Loring E. Mills  
Vice President,  
Nuclear Activities

LEM:jhd

ENVIRONMENTAL POLICY INSTITUTE

March 14, 1985 18 21:08

DOCKET

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
1717 H Street NW  
Washington, DC 20555

Attn: Docketing & Services Branch

Dear Mr. Secretary,

Attached are the comments of the Environmental Policy Institute concerning the Commission's proposed revisions to 10 CFR Part 60, "Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures."

These comments are in response to the Commission's notice for comment published in the Federal Register on January 17, 1985 (50 FR 2579).

Respectfully submitted,

*David Berick*  
David Berick, Director  
Nuclear Waste & Safety  
Project

2 Attachments

D-16  
Add: Charles Presbrey, 1130 SS  
James W. Y. 7664 MMBB  
William Regan, 123 SS

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PDR RR  
60 50FR2579 PDR

ACKNOWLEDGED BY CARD  
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March 14, 1985

In the matter of:

10 CFR Part 60

Disposal of High-Level Radioactive  
Waste in Geologic Repositories;  
Amendments to Licensing Procedures

COMMENTS OF THE ENVIRONMENTAL POLICY INSTITUTE ON PROPOSED  
AMENDMENTS TO 10 CFR PART 60 LICENSING PROCEDURES FOR GEOLOGIC  
REPOSITORIES

Introduction

The NRC proposes to amend its current regulations for licensing high-level waste repositories to bring them into conformance with the Nuclear Waste Policy Act (NWPA). While we acknowledge that some conforming changes are in order, such as the redesignation of the Site Characterization Report and changes in its content to conform to the requirements of Sec. 113 of the NWPA, the proposed changes far exceed those required for conformance. Furthermore, NRC has arbitrarily chosen to conform some provisions of Part 60, while effectively suspending others, such as those related to NEPA. Finally, NRC proposes adoption of rules and procedures, such as its review of the Department of Energy's (DOE) draft environmental assessments (EA's), which are based on a Procedural Agreement rather than statutory authority; a questionable basis for regulation and threatening to future interpretation.

NRC Arbitrarily Suspends Part 60 Requirements

The proposed rule identifies five "principal aspects" of NRC repository licensing procedures under review for conformance to the NWPA. NRC rather arbitrarily decides to address only two of the five in the proposed rulemaking. While it could be argued that NRC is merely "reviewing" the need for conformance in the remaining three areas, such as the definition of high-level waste, the proposed rule would actually suspend those aspects of Part 60 that are related to the National Environmental Policy Act (NEPA). As such, there would not be effective regulations pertaining to NEPA authority nor would NRC exercise such authority.

The severity of this action is heightened because NRC is also suspending regulations which are related to its NEPA authority, such as its review of the DOE's site screening activities, but which may also rest upon the NRC's Atomic Energy Act (AEA) authority to protect public health and safety.



We must also point out that NRC is currently reviewing the EA's in anticipation of filing comments coincidental to the March 20, 1985 close of the DOE public comment period. NRC is not considering a range of site screening issues related to NEPA and its overlapping health and safety authority (see 50 FR 2579-2590, also see Browning/Cunningham memo, "Role, Scope, and Issues in Environmental Assessment Review" dated October 10, 1984, attached). As such, NRC appears to have already implemented the suspension of key elements of the existing regulations in the absence of any notice and certainly prior to the promulgation of final regulations pursuant to this rulemaking. This raises serious questions concerning NRC compliance with the Administrative Procedures Act.

Aside from the APA question, NRC arbitrarily proposes to suspend its regulations related to NEPA and early review of DOE's site selection activities on substantive merits. As stated in a footnote in the preamble (footnote #1, 50 FR 2580), NRC intends to defer NEPA related aspects of conformance to a subsequent rulemaking since such issues require modification of Part 51. While reliance on revision of, and conformance to, Part 51 may have been a logical argument for deferral of NEPA-related issues when the NRC staff first circulated drafts of the proposed rule in mid-1983, the logic of this argument has long since faded. NRC revised Part 51 on March 12, 1984 (49 FR 9352).

With Part 51 and the NRC's basic NEPA policies revised a year ago, there is no reason not to incorporate such changes as may be necessary to high-level waste repositories in the current rulemaking. The fact that repositories were not specifically addressed in the Part 51 revisions only argues for the inclusion of such revisions now since the bulk of Part 51 issues have been addressed. By electing to use the Part 51-conformance argument for suspending NEPA and early site review related aspects of Part 60, NRC creates a Catch-22 situation. NRC can't review DOE's siting program, even in the environmental assessments (EA's), because there aren't any regulations, and there aren't any regulations because NRC's regulations have to be suspended because they address DOE's siting program.

Even if the need for a separate, protracted NEPA-related rulemaking were valid, which it is not, the Commission has arbitrarily suspended Atomic Energy Act-related regulation in the process. As the Commission acknowledged in issuing the current version of Part 60, the Commission has a "health and safety" responsibility for review of DOE's siting program and the suitability of DOE's sites that parallels the Commission's NEPA authority to require early site review. As stated in the preamble to Part 60,

"The Commission recognizes that, under the provisions of the Atomic Energy Act, a consideration of alternatives might indeed be appropriate, where necessary or desirable to protect health." (46 FR 139712, Feb. 25, 1981)

Unless the NRC reviews the methodology and other pertinent aspects of the DOE siting process, in the EA's if that is now where DOE and NWPA address such issues, than it cannot know if public health and safety is being compromised. NRC's refusal to review

"...the methodology used by DOE to compare sites or upon the relative merits of one site against one another..." (50 FR 2583)

is contrary to its early site review obligations to protect public health and safety.

As is clear from the draft EA's and background documents, DOE has selected sites on the basis of such criteria as the "ease of constructability" rather than public health and safety. A central feature of the DOE site selection process, the selection of sites based on the need for diverse geohydrologic provinces, is not provided for in the NWPA and is essentially a management decision to hedge against DOE's decision to screen sites based upon inadequate data. This DOE siting policy is contrary to the requirements of protecting public health and safety because there is no assurance that the sites chosen are those most suitable for protection of health and safety.

While we might agree with NRC's that the current requirements in Sec. 60.11 to include the method by which the site was selected and identification of alternative sites are required by the NWPA to be addressed by DOE in the EA's and NRC should also alter its Sec. 60.11 requirements to address them in that form (50 FR 2583), we completely disagree that this change somehow negates NRC's interest or obligation to address those issues. If issues, such as site selection methodology, are to be included in the EA's, as NRC proposes, all the more reason why NRC's review of the EA's should extend to those aspects of the EA. Instead, NRC proposes to exclude those aspects of review while categorically concluding that

"Such review is not necessary to fulfill any of its statutory responsibilities." (50 FR 2583)

This is an astounding statement given the fact that the current rule includes such requirements specifically to fulfill such statutory responsibilities, especially NEPA. In light of NRC's failure to confront what alteration there may be in its NEPA responsibilities as a result of the NWPA, we must conclude that NRC's NEPA responsibilities remain unchanged and that the current requirements for review of DOE site selection must remain intact. They may be transferred, by rule, to NRC review of the EA's, but they may not be arbitrarily suspended as proposed.

As explained more fully below, we do not believe that a procedural agreement with DOE may serve as a substitute for statutory authority for regulation or the exercise of that

authority. NRC had a statutory "interest" in DOE's siting program when the current regulations were promulgated. It either continues to have that authority and may regulate and review DOE's program under that authority or it does not. A procedural agreement does not, nor cannot, constitute regulatory authority.

Finally, it is our view that NRC's authority and responsibility under NEPA remains unaltered by the NWPA and that NRC authority under other statutes is similarly unsubordinated by the NWPA. To the extent that the NWPA does address NRC's authority, it underscores NRC's independent role as a regulator of DOE's high-level waste repositories.

#### NRC Proposes to Restrict Review and Comment on Site Characterization Analysis

NRC proposes to drastically alter its requirements for review and comment of the Commission's Site Characterization Analysis(SCA). Rather than release a draft SCA for public review and comment, NRC now proposes to issue a single, final SCA without benefit of comment. Comment on the SCA would be provided for in a 90-day comment period after publication, but NRC would not be required to take such comments into account as now required in Sec. 60.11(e).

The NRC rationale for dropping the draft SCA and terminating an opportunity for review and comment of the NRC analysis before is issued a a final report is questionable. The principal argument for such a change appears to be the "scheduling mandates of the Waste Policy Act"(50 FR 2584). The other "arguments" as to why this change should be made, such as the anticipated "extensive period of interaction between DOE and the states" and the number of technical meetings between DOE and NRC under the Procedural Agreement do not, contrary to NRC, provide a basis for dropping the draft SCA.

The purpose of the Draft SCA is not, as NRC implies, merely to allow states, Indian tribes and the public to gain access to information on the DOE program. The Draft SCA also allows the states, Indian tribes and the public access to information about the NRC program. As stated in the preamble to the current rule, NRC intended that the draft SCA be used to provide opportunity for public comment on the NRC staff analysis of the DOE site characterization report.

While it is understandable that the NRC staff does not wish to have its analysis subject to public review and comment, a series of technical meetings or DOE interaction with the states does not substitute for a formal opportunity to review and comment on a critical NRC document any more than those meetings or DOE hearings constitute a substitute for the site characterization plan(SCP) or the SCA itself. To the extent that NRC believes that the SCP and the SCA are essential component of its review of DOE site characterization activities, the opportunity to review and comment on that analysis is



similarly essential.

The dramatic changes cited by NRC in the DOE program are not, in fact, of such magnitude that they alter the original justification for the draft SCA. For example, NRC assumed, as noted in the preamble to the current rule, that DOE would provide an opportunity for public comment on its site characterization report prior to submittal to NRC (46 FR 13975, Feb. 25, 1981). Likewise, the current rule envisioned the preparation, by DOE, of an environmental impact statement for site characterization. The final rule was modified, by adding a footnote to Sec. 60.11, specifically to allow DOE to incorporate information in its EIS into the SCA including the compilation of State, Indian and public views.

The new procedures for "interaction" under the NHPA that NRC cites as justification for dropping the draft SCA are not substantially different from the level of "interaction" already contemplated at the time the current rule was promulgated and do not justify alteration of this part of the rule.

An argument must also be made that the very activities, such as the large number of technical meetings between DOE and NRC, cited by NRC as a reason to delete the draft SCA requirement, in fact, argue for retaining the requirement. Rather than "freezing" the comment and review process, as the NRC puts it, the draft SCA is simply needed to "condense" the numerous technical issues and discussions. These discussions, by NRC's admission, will be quite extensive, will take place at a wide variety of locations, and times. It is only reasonable to "sum up" or "condense" the product of those meetings, and their relevance to the DOE site characterization activities.

NRC must conduct this "summary" and drafting activity in any event in order to prepare its SCA. NRC would certainly be expected to benefit from public review and comment, including comment from those interested parties, who for reasons of time and resources cannot possibly be expected to attend the numerous and scattered technical and DOE meetings.

The draft SCA is also necessary to the preservation of an independent NRC regulatory role. Absent the draft SCA, even close observers of the technical meetings, will have little reason to believe that NRC's final conclusions were based on an independent evaluation and not swayed by "backroom" negotiations with DOE. As an organization which attended the NRC/DOE staff negotiations concerning modification of the DOE site selection guidelines in the spring of 1984, we believe an independent analysis and statement of position, prior to final issuance by NRC, is essential if any semblance of NRC independence is to be assured. In the case of the guidelines example, we do not believe that NRC staff independence was effectively preserved.

Lastly, the NRC raises the question of the NHPA schedule and implies that a 90-day comment period, and period for NRC response

to comment, would substantially interfere with the DOE's ability to comply with the NWPA schedule. We do not believe that this limited comment period, which addresses the adequacy of DOE's site characterization activities and thus the ability of DOE to meet all subsequent milestones, would impose such a delay.

The NWPA schedule, such as it is, is a variable process which DOE is supposed to articulate in its Mission Plan (under Sec. 301) and in its Project Decision Schedule (under Sec. 114(e)). The schedule is not a rigid one and the Act provides for extensions of timetables including those imposed by the Project Decision Schedule.

DOE has demonstrated its own indifference to the NWPA schedule in numerous ways. For example, Sec. 301(b) requires the submission of a final mission plan, to guide establishment of the overall program schedule, within 17 months of enactment or by July 1984. DOE has missed this deadline and is expected to be almost a year late in issuing this critical document. In another example, DOE essentially withheld issuance of its final site selection guidelines for five months, approximately 150 days, after NRC published its concurrence in the Federal Register. We do not believe that the integrity of NRC's high-level waste regulatory program nor the rights of public, states and Indian tribes to review and comment should be compromised to make up delays in DOE's schedule.

In any event, NRC's responsibilities and authority to protect public health and safety and the environment are insulated from the schedule. Among other considerations we refer the Commission to the colloquy between Rep. Swift and Rep. Udall during final House consideration of the NWPA on December 20, 1982. The colloquy states in part,

"By setting dates in this bill for DOE and NRC decisions we are setting statutory goals for the repository activities authorized in this legislation. Nothing in this bill, including the establishment of decision dates, is inconsistent with the statutory responsibilities of the Nuclear Regulatory Commission to protect the public health and safety and the environment."  
(Cong. Record, December 20, 1982, p. H 10523)

Consequently, the NWPA "schedule" does not justify deletion of the draft SCA requirement. NRC should also establish a notice and comment process for the semiannual site characterization reports (proposed Sec. 60.18(g)/current Sec. 60.11(g)) along the lines of the comments allowed on the SCA. This would provide all parties with an opportunity to bring issues to the Commission's attention involving ongoing site characterization activities at the same time the Commission was conducting its review.



### Timing of Site Characterization Plan at Issue

NRC correctly notes that the NWPA contemplates a number of steps in site selection and nomination which will precede the point at which a site characterization plan is to be submitted to NRC. Under the current Part 60, DOE is to submit its site characterization report "...as early as possible after commencement of planning for a particular geologic repository operations area." NRC implies that this point in time is dramatically different from that now required by the NWPA and doesn't help the matter by leaving out of the text the added distinction that the planning is specifically for "a particular geologic repository operations area." This misleading omission occurs twice, once in the NRC's discussion of changes to the site characterization report(50 FR 2582) and again concerning the characterization analysis(50 FR 2584). By so doing, NRC distorts the actual point in time originally envisioned in the current regulations for submission of the report and makes it appear that the current version of Part 60 requires submission at a substantially earlier period of time than the NWPA.

The definition of a "geologic repository operations area" is,

"...an HLW facility that is part of a geologic repository including both surface and subsurface areas, where waste handling activities are conducted."(Sec. 60.2(1))

NRC implies in the proposed rule(50 FR 2583-2584) that under the NWPA framework the submission of a site characterization report comes at a later point in the process, after extensive data gathering and agency interaction, than originally contemplated in Part 60. Examination of DOE's timeline for repository development in the April, 1984 Draft Mission Plan for the Civilian Radioactive Waste Management Program(see p. 3-A-39, Vol. I and pp. 2-22 to 2-26) indicates that planning for a particular repository operations area at a particular candidate site cannot begin until the site specific conceptual design stage. As DOE notes,

"The conceptual designs for repositories in basalt, salt, and tuff are in different stages of development. For salt, several generic designs are available for use. However, since specific sites have not been selected, site-specific conceptual designs will not commence until FY 85. For basalt, the description of the site-specific design system has been published and an up-dated complete conceptual design will be completed in FY 86. Preliminary repository concepts have been developed for tuff, a full conceptual design report planned for FY 85."(Mission Plan, Vol. II, p. 2-26)  
(Emphasis added)

We question whether this "planning" for a particular repository operations area, as distinct from site screening based upon conceptual design, occurs at a later point in time

than contemplated in the current version of Part 60. As noted in these comments, the current version of Part 60 contemplated that DOE would conduct a site selection process and complete an environmental impact statement on its proposed site characterization activities which would include that consideration of that site selection process. It does not appear to us that the current DOE program, in apparent compliance with the NWPA, varies substantially from that contemplated by the NRC in promulgating the current version of Part 60.

NRC has grossly exaggerated the impact of the NWPA on the DOE repository development process over that contemplated by the current Part 60. That the NWPA requires submission of the site characterization reports prior to characterization shaft sinking is simply not that different from current requirements. The fact that DOE's site screening process is more visible does not alter the principal requirement that it have a particular site before it can plan for a particular repository operations area.

Furthermore, the question of how many days, weeks, months, or procedural steps prior to sinking the shaft DOE should submit the plan is still at issue. NRC cannot, of course, simply accept the strict letter of the NWPA that DOE submit the plan the day before it begins drilling the shaft. The NRC staff, we should all agree, needs a significant period of time to review the plan prior to shaft sinking. The blanket adoption of NWPA language, in the proposed Sec. 60.16, that DOE submit the plan before sinking the shafts does not, in our view, provide ample delineation of when the plan should be submitted. It does not assure that it will be submitted at a point in the process which will assure time for NRC review prior to shaft sinking.

In its zeal to revise Part 60, NRC has made far too much of the requirement in the NWPA that DOE submit a characterization plan prior to sinking a shaft. The NWPA requirement is not substantially different from that contemplated by the current Part 60 and can just as readily be seen as a stricture on DOE that it not proceed with any aspect of site characterization, including shaft sinking, without submitting such a plan. NRC's proposed changes to Sec. 60.16 are not adequate to assure timely review by NRC of the plan prior to shaft sinking.

Likewise, the NRC's arguments that substantially more public and agency interaction and site screening are required by the NWPA prior to submission of the plan than contemplated by NRC are also exaggerated and not substantively different than contemplated in the current regulations. Therefore, the "scheduling" of the site characterization plan in the NWPA is not a basis for deleting the draft SCA requirement.

#### Procedural Agreement Cannot Substitute For Statutory Authority

The proposed rule is heavily dependent upon the Procedural Agreement between DOE and NRC as a basis for changing Part 60 and for imposing new procedures, such as review of the EA's. While

we cannot object to the Procedural Agreement as a means of implementing the Commission's regulatory authority vis-a-vis the DOE high-level waste program, the Agreement cannot substitute for statutory authority or even for regulations implementing that authority. The Procedural Agreement should be based upon Part 60 and not the reverse. NRC either has authority in this area or it does not and oblique arguments about the need for early identification of licensing issues hardly constitutes a basis for future interpretation of Part 60 and future Commission actions.

As stated earlier, we do not believe that the NWPA subordinated any prior NRC authority in this area and clearly intends to create an independent regulatory role for NRC. We point out that the current regulations, 10 CFR Part 60 were promulgated February 25, 1981, before any congressional action was taken on nuclear waste legislation in the 97th Congress which enacted the NWPA. All relevant committees were mindful of the regulations and in many cases central elements of the regulations were incorporated into the legislation as the NRC notes. We conclude that Congress essentially concurred in the NRC regulatory scheme as provided in the current rule.

#### Treatment of Defense Waste is Illogical and Inadequate

Although the NWPA presumes that defense and commercial high-level wastes will be commingled and placed in the same repositories, Sec. 8 of the Act provides for a Presidential exemption. As the NRC is no doubt aware, DOE has also proposed that some high-level wastes that are not "easily retrievable" be disposed of in a manner other than in geologic repositories. This policy is articulated in "scoping notice" for DOE's environmental impact statement (48 FR 14029, April 1, 1983) and in the draft DOE report prepared in support of the Sec. 8 decision (DOE/DP-0020(Draft)) "An Evaluation of Commercial Repository Capacity for the Disposal of Defense High-Level Waste" July, 1984). A provision is also incorporated in the 4th Working Draft of the final EPA high-level waste standards (May 21, 1984) providing for an exemption for disposal of certain high-level waste from defense activities from the EPA geologic disposal standards. Consequently, we believe that it is especially important that Part 60 explicitly apply to defense waste disposal.

Defense waste disposal outside of the NWPA, as noted by NRC, would not occur in the same manner as commercial waste. The step-by-step procedures in the NWPA which NRC cites as a basis for alteration of Part 60, including the site nomination process, would be absent in the development of defense facility. In point of fact, the process would be virtually identical to that envisioned by NRC when the current rule was promulgated, with the exception of the additional state and tribal consultation and cooperation requirements provided in Sec. 101 of the NWPA.

Logic would dictate that in the case of defense waste, where no NWPA changes occur in the DOE repository siting and



development process, Part 60 should remain unchanged. Instead, NRC concludes that it could "...still effectively discharge its health and safety responsibilities..." if the proposed NWPA-based regulations were applied. NRC does point out that this would not hold for NEPA-related responsibilities(50 FR 2568), but the only change NRC proposes is in the contents of the Site Characterization Report. No other changes from the proposed regulations, such as retention of the draft SCA, would be provided.

This proposed "fix" whereby NWPA-based changes would apply to a non-NWPA defense waste repository is wholly inadequate. NRC is simply proposing, apparently out of convenience, to apply inappropriate regulations to defense repositories; regulations NRC argues in the proposed rule must be substantively different from those currently applicable to defense waste facilities. Given the additional institutional strictures on defense activities, such as limitation on the access to early information about waste forms, since DOE is self-regulating, we are doubtful that the current Part 60 is adequate to provide timely information to NRC and to other parties. Application of the proposed regulations to defense facilities would only limit further the ability of NRC and other parties to gain timely information and participate effectively in the process.

#### Subpart C Changes Are Also Extreme and Unsupported

NRC argues that the NWPA has now required DOE to provide states and Indian tribes with full rights of consultation and cooperation and consequently the Commission's original concerns, expressed in Part 60, have been largely alleviated. What is not stated here, and should be, is that the Commission's own authority to consult with state governments and Indian tribes is substantially unaltered by the NWPA. For example, Sec. 117(c) which authorizes DOE to enter into written agreements with states and Indian tribes contains a specific caveat that they shall not affect the authority of the Commission. While we recognize that NRC has limited resources and may wish to limit its assistance to states and Indian tribes, the changes in Subpart C are unnecessary and unsubstantiated by the NWPA.

The participation provisions of Subpart C appear to be triggered at different points in the site selection process. Information, to be provided under Sec. 60.61, is triggered by the submission of a site characterization plan(see Sec. 60.61(b)). Consultation in site review is triggered by Presidential approval of a site for characterization under Sec. 60.62.

In both cases, it appears to us that the Commission is withholding information and consultation until a fairly late stage of the site selection process. By the time the SCP is submitted, DOE and NRC will have already begun site specific technical meetings will have conducted lengthy site selection activities. Because the amount of time which elapses between nomination and submission of the SCP is expected to be only a

matter of months, it would seem realistic to allow states to begin formal information exchanges and consultation at a minimum at the point when NRC and DOE technical exchanges begin.

Consultation with NRC should occur as early as practicable, probably at the point when a state is notified that it is a "potentially acceptable site" under Sec. 116 or when preliminary investigations are begun for a defense repository under Sec. 101 of the NWPA.

### Conclusion

On February 25, 1983, NRC promulgated standards governing the procedures for licensing geologic repositories (46 FR 13971-13987). NRC now proposes to revise those regulations. We believe that NRC has the burden of demonstrating why those regulations should be revised in any substantive manner. NRC has not demonstrated a legal or evidentiary basis for the proposed changes, which include the arbitrary suspension of key elements of the current regulations.

NRC's principal claim for the changes rests upon an exaggerated and misdirected interpretation of the NWPA which it reads as requiring major alterations in the DOE program not contemplated in the original regulations. Contrary to NRC's view, the changes required by the NWPA are not substantively different from those originally contemplated in the current regulations and do not require the magnitude of changes in NRC regulations which the NRC proposes. While minor corrections may be necessary to conform Part 60 to the NWPA, NRC's proposed rule far exceeds the degree of conformance appropriate.

The changes NRC proposes would drastically restrict the opportunity to review and comment on NRC staff determinations relating to the regulation of repositories. NRC would also arbitrarily suspend those aspects of the current regulations related to NEPA. NRC is currently reviewing the DOE's environmental assessments, which by NRC's admission contain the NEPA-related elements embodied in the current regulations, but is not considering those elements in its review.

NRC's comments on the EA's are expected to be provided to DOE by the close of the DOE public comment period on March 20, 1985. Consequently, NRC has effectively implemented the proposed rules related to early site review prior to their final promulgation. NRC has also suspended certain requirements of Part 60, especially those related to NEPA, without notice. We believe this raises critical questions concerning NRC's possible violation of the Administrative Procedures Act.



OCT 10 1984

MEMORANDUM FOR: Richard E. Cunningham, Director  
Division of Fuel Cycle, NMSS

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

SUBJECT: ROLE, SCOPE, AND ISSUES IN ENVIRONMENTAL  
ASSESSMENT REVIEW

As you requested in your memorandum of August 30, 1984, on participating in the October 12 meeting on transportation in Colorado, this memorandum discusses the role and scope of the NRC review of DOE's Environmental Assessments (EA's) and issues for the candidate repositories. The discussion of the role and scope is from our EA Review Plan which has been developed over the last several months and is now undergoing management review. We will advise you of any changes that occur before the October 12 meeting.

ROLE

The information presented and referenced by the EA's will contain data, interpretations, and assessments available to date on each of the potential repository sites being considered by DOE for nomination. This information is important to NRC reviews for preclicensing (Site Characterization Plans (SCP's)), licensing (License Application for construction authorization (LA)), and adopting to the extent practicable the Environmental Impact Statement (EIS) prepared by DOE.

The NWA does not require NRC review and comment on EA's or to otherwise participate in the nomination process beyond the Commission concurring on the siting guidelines. It is nevertheless the intention of the NRC to review and comment on the EA's (similar to other pertinent technical documents) in order to assess DOE's application of the siting guidelines. According to the siting guidelines, DOE will make findings in its EA's with respect to qualifying, disqualifying, favorable and adverse conditions that are presented in the guidelines. The NRC staff will review these findings and provide to DOE its views on the data, interpretations, and assessments that support DOE's findings. The staff will also comment on any potential licensing or EIS issue that DOE should consider in its nomination decision. Furthermore, in accordance with the NRC/DOE Procedural Agreement (Enclosure 1), comments on the EA's are a useful mechanism for the NRC staff to identify potential licensing and EIS issues that may be anticipated and that may need to be addressed in DOE's activities during site characterization.

WM Record File 109 WM Project 1  
Docket No. \_\_\_\_\_  
PDR ☒ \_\_\_\_\_  
LPDR ☐ \_\_\_\_\_  
Distribution: \_\_\_\_\_  
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(Return to W.M. 623-SS) \_\_\_\_\_

~~44-404673-1299~~

OCT 10 1984

Because the statute omits any reference to NRC in connection with the EA's or the nomination process, the NRC staff will not comment on DOE's judgment regarding the relative merits of one site against another; this responsibility lies with the DOE. The judgments DOE must make in comparing sites involve an intertwining of "technical judgments" (e.g., thermo-mechanical response of the host rock) and "value judgments" (e.g., trade-offs between potential effects on national parks as opposed to prime agricultural land use). Rendering value judgments on the relative merits of various sites is clearly the responsibility of the DOE during the screening process. This is not to say that the NRC staff would be silent on safety and substantive environmental concerns. However, in the absence of such concerns, the responsibility for weighing the relative merits of one site against another is DOE's.

The staff's decision not to comment on the relative merits of sites is consistent with the Commission's policy under the recently amended final rule, Licensing and Regulatory Policy and Procedures for Environmental Protection 10 CFR Part 51 (49FR9352, March 12, 1984). The statement of considerations in this final rule states, "As an independent regulatory agency, the NRC does not select sites or designs or participate with the applicant in selecting proposed sites or designs."

More specifically, NRC's review of the draft EA's has two general objectives which relate to NRC's responsibilities in prelicensing/licensing (i.e., safety evaluations) and adopting the EIS, namely:

- (1) Prelicensing/licensing: The NRC staff will identify and review potential licensing issues and associated data, interpretations, and performance assessments which may be important during site characterization, that might result in licensing problems and which should be addressed by DOE in the EA's.
- (2) Adopting the EIS: The NRC staff will identify and review potential EIS issues and associated data interpretations and assessments that might result in the NRC's being unable to adopt DOE's EIS and which should be addressed by DOE in the EA's.

The EA's, which follow the siting guidelines and NMPA requirements, will be somewhat complex in their structure; however, NRC's review responsibility and approach is simple. That is, for each draft EA submitted by DOE, NRC will review the findings and conclusions presented - to the extent they bear upon the foregoing responsibilities - and independently determine if they are substantiated. NRC will use this evaluation as a basis for identifying potential licensing issues for timely staff resolution.

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SCOPE

The following criteria define how the data, interpretations, and assessments that DOE used in applying the siting guidelines to the EA items in Enclosure 2 will be reviewed by NRC.

- (1) Adequate substantiation of assessments, interpretations, conclusions and findings.
  - (a) Adequate consideration of available data.
  - (b) Adequate consideration of alternative interpretations, assumptions, or performance assessments.
  - (c) Adequate consideration of uncertainties resulting from all sources including data collection, analyses, interpretations, and performance assessments.
  - (d) Internal consistency of information including data, interpretations, assumptions, and methods of analysis and evaluation.
  - (e) Adequate documentation in EA or references to support interpretations, assumptions, conclusions.
- (2) Potential licensing and EIS issues identified and adequately considered.

As far as issues that are likely to arise at the October 12th meeting, our feeling is they will be related to transportation of waste and spent fuel similar to those discussed at the meeting in Columbus, Ohio on August 1, 1984. The waste transportation issues most commonly identified are safety, routing (especially weather and grades on I-70 in Colorado), routing models and methodology (use of site specific and corridor state specific data), emergency responses, institutional responsibilities, impact on tourism and traffic (Enclosure 3). The Policy and Program Control Branch is currently preparing a paper on transportation issues in high level waste which they will forward to you as soon as it is available. If my staff can be of further assistance contact Bill Lilley of my staff.

Original Signed by  
Robert E. Browning

Robert E. Browning, Director  
Division of Waste Management, NMSS

Enclosures:

1. NRC/DOE Procedural Agreement
2. NRC's EA Review
3. Rocky Mountain News

\*\*\*\*SEE PREVIOUS CONCURRENCE\*

| OFFICE  | WMRP*      | WMRP*   | WMRP/C  | WMRP    | WMRP       |  |  |
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then sent to the IAEA Senior Advisory Group which reviews and modifies as necessary the drafts of all codes and guides prior to their being forwarded to the IAEA Secretariat and thence to the IAEA Member States for comments. Taking into account the comments received from the Member States, the Senior Advisory Group then modifies the draft as necessary to reach agreement before forwarding it to the IAEA Director General with a recommendation that it be accepted.

As part of this program, Safety Guide SG-011, "Operational Management of Radioactive Effluents and Wastes Arising in Nuclear Power Plants," has been developed. The working group consisting of Mr. E. Hladky from Czechoslovakia; Mr. A. Higashi from Japan; Mr. A. B. Fleishman from the United Kingdom; and Mr. L. C. Oyen (Sargent and Lundy Engineers) from the U.S.A., developed the initial draft of this guide from an IAEA collation. This draft was subsequently modified by the IAEA Technical Review Committee for Operation, and we are now soliciting public comment on a modified draft (Rev. 2, dated June 24, 1983). Comments received by the Director, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20535, by October 10, 1983, will be particularly useful to the U.S. representatives to the Technical Review Committee and the Senior Advisory Group in developing their positions on its adequacy prior to their next IAEA meetings.

Single copies of this draft Safety Guide may be obtained by a written request to the Director, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20535.

(9 U.S.C. 522(a))

Dated at Washington, D.C. this 19th day of August 1983.

For the Nuclear Regulatory Commission,  
Robert E. Misogoe,  
Director, Office of Nuclear Regulatory Research.

(PR Doc. 83-33075 Filed 8-24-83; 846 100)

BILLING CODE 7590-01-0

#### **NRC/DOE Procedural Agreement**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of NRC/DOE Procedural Agreement.

**SUMMARY:** The Nuclear Regulatory Commission and the Department of Energy have signed a Procedural Agreement identifying guiding principles

for interface during site investigation and site characterization of sites for a geologic repository under the Nuclear Waste Policy Act of 1982. The text of this agreement is published below.

**FOR FURTHER INFORMATION CONTACT:**  
Mr. Robert E. Browning, Acting Director,  
Division of Waste Management, Nuclear  
Regulatory Commission, Mail Stop 623-  
SS, Washington, DC 20535; (301) 427-  
4200.

Dated at Silver Spring, Maryland, this 16th day of August 1983.

For the Nuclear Regulatory Commission,  
Joseph O. Bunting,  
Chief, Licensing Process and Integration  
Branch, Division of Waste Management.

#### **Procedural Agreement Between the U.S. Nuclear Regulatory Commission and the U.S. Department of Energy Identifying Guiding Principles for Interface During Site Investigation and Site Characterization**

This Procedural Agreement outlines procedures for consultation and exchange of information which the Commission (NRC) and the Department (DOE) will observe in connection with the characterization of sites for a geologic repository under the Nuclear Waste Policy Act of 1982. The purpose of these procedures is to assure that an information flow is maintained between the two agencies which will facilitate the accomplishment by each agency of its responsibilities relative to site investigation and characterization under the Nuclear Waste Policy Act (NWPA). The agreement is to assure that NRC receives adequate information on a timely basis to enable NRC to review, evaluate, and comment on those DOE activities of regulatory interest in accordance with DOE's project decision schedule and thereby facilitate early identification of potential licensing issues for timely staff resolution. The agreement is to assure that DOE has prompt access to NRC for discussions and explanations relative to the intent, meaning and purpose of NRC comments and evaluations on DOE activities and so that DOE can be aware, on a current basis, of the status of NRC actions relative to DOE activities.

This Procedural Agreement shall be subject to the provisions of any project decision schedule that may hereafter be established by DOE, and any regulations that may hereafter be adopted by NRC, pursuant to law. In particular, nothing herein shall be construed to limit the authority of the Commission to require the submission of information as part of a general plan for site characterization activities to be

conducted at a candidate site or the submission of reports on the nature and extent of site characterization activities at a candidate site and the information developed from such activities.

#### **1. NRC On-Site Representatives**

As early as practicable, following area phase field work, NRC on-site representatives will be stationed at each site undergoing investigation principally to serve as a point of prompt informational exchange and consultation and to preliminarily identify concerns about such investigations relating to potential licensing issues.

#### **2. Meetings**

From the time this agreement is entered into, and for so long as site characterization activities are being planned or are in progress, DOE and NRC will schedule and hold meetings periodically as provided in this section. A written report agreed to by both DOE and NRC will be prepared for each meeting including agreements reached.

a. Technical meetings will be held between DOE and NRC technical staff to: review and consult on interpretations of data; identify potential licensing issues; agree upon the sufficiency of available information and data; and agree upon methods and approaches for the acquisition of additional information and data as needed to facilitate NRC reviews and evaluations and for staff resolution of such potential licensing issues.

b. Periodic management meetings will be held at the site-specific project level whenever necessary, but at least quarterly, to review the summary results of the technical meetings; to review the status of outstanding concerns and issues; discuss plans for resolution of outstanding items and issues; to update the schedule of technical meetings and other actions needed for staff resolution of open items regarding site characterization programs; and to consult on what generic guidance is advisable and necessary for NRC to prepare. Unresolved management issues will be promptly elevated to upper management for resolution.

c. Early technical meetings will be scheduled to discuss written NRC comments on DOE documents such as Site Characterization Plans, DOE's semi-annual progress reports, and technical reports to foster a mutual understanding of comments and the information or activities needed for staff resolution of the comments.

d. In formulating plans for activities

which DOE will undertake to develop information needed for staff resolution of potential licensing issues. DOE will meet with NRC to provide an overview of the plans so that NRC can comment on their sufficiency. These discussions will be held sufficiently early so that any changes that NRC comments may entail can be duly considered by DOE in a manner not to delay DOE activities.

e. Schedules of activities pertaining to technical meetings will be made publicly available. Potential host States and affected Indian tribes will be notified and invited to attend technical meetings covered in this section (Section 2. Meetings). The notification will be given on a timely basis by the DOE. These technical meetings will be open meetings with members of the public being permitted to attend as observers.

### 3. Timely Release of Information

a. Data collected during site investigations will be made available to NRC on a current, continuing basis after the DOE (or DOE contractor) quality assurance checks that are inherent in determining that the data has been obtained and documented properly.

b. DOE's analyses and evaluations of data will be made available to NRC in a timely manner.

### 4. Site Specific Samples

Consistent with mutually agreed on procedures, DOE will provide NRC with site specific samples to be used by NRC for independent analysis and valuation.

### 5. Agency Use of Information

It is understood that information made available to either Agency under this agreement may be used at that Agency's option in carrying out its responsibilities.

### 6. Project Specific Agreements

Project specific agreements to implement the above principles will be negotiated within 120 days of the time this agreement is entered into. These project specific agreements will be tailored to the specific projects to reflect the differences in sites and project organizations.

7. Nothing in this agreement shall be construed as limiting forms of informal consultation not mentioned in this agreement (for example, telephone conversation or exchanges of reports). These other consultations will be documented in a timely manner.

Dated: June 27, 1983.

Robert L. Morgan.

Project Director, Nuclear Waste Policy Act  
Project Office, U.S. Department of Energy.

Dated: June 17, 1983.

John G. Davis.

Director, Office of Nuclear Material Safety  
and Safeguards, U.S. Nuclear Regulatory  
Commission.

(FR Doc. 83-25376 Filed 8-24-83; 845 am)

BILLING CODE 7990-01-40

[Docket No. 50-309; CLJ-83-21]

### Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station); Memorandum and Order

The Commission has considered and affirms the Director's Decision, DD-83-3, issued February 14, 1983 under 10 CFR 2.206.<sup>1</sup> The Decision denied the October 20, 1982 petition of Safe Power for Maine, Emil G. Garrett, John B. Green and John Jerabek (collectively "Safe Power") for action pursuant to 10 CFR 2.206. Safe Power sought an order to show cause why Maine Yankee Atomic Power Company ("Maine Yankee" or "licensee") should not be ordered to discontinue operation of its nuclear power plant at Wiscasset, Maine, in light of Safe Power's allegations of Maine Yankee's financial incapability to operate the Wiscasset facility safely and dispose of spent fuel now stored there and to be generated during the remainder of the licensing period. The Commission has concluded that denial of this petition lay within the Director's discretion but notes that subsequent developments provide additional justification for the Director's decision. Accordingly, rather than simply declining to review the Director's decision the Commission is issuing the memorandum and order to enlarge the discussion of the issues raised by the petition.

In its petition for a show cause order Safe Power alleged a number of circumstances indicating "poor financial condition of Maine Yankee".<sup>2</sup> Safe

<sup>1</sup> By successive orders of the Secretary pursuant to 10 CFR 2.772, the time in which the Commission may take review of the Director's Decision was extended to July 28, 1983.

<sup>2</sup> These asserted circumstances include: (1) Use of funds obtained through pledge of the company's stock of nuclear fuel for purposes other than purchase, remanufacturing and handling of nuclear fuel; (2) need to ask for early payment from Central Maine Power Company to meet Maine Yankee's daily cash requirement because its unsecured borrowing limit has been reached; (3) exhaustion of all of Maine Yankee's established sources of capital with the exception of infusion of additional common equity contributions by its sponsors; and (4) need for "sponsor guarantees" to continue the fuel financing.

Power requested that the Commission halt operation of Maine Yankee until the license "has demonstrated that it has adequate financial backing and adequate financial support . . . to raise capital requirement to continue operation, to make and changes or capital investments required by the NRC, and to provide for the funding of its shutdown and disposal of spent fuel at the end of its licensed term." Safe Power also asked that the Commission determine what amounts Maine Yankee should collect to provide for decommissioning and disposal of spent fuel and order the creation of a trust fund in which these monies would accumulate until needed.

In denying Safe Power's petition the Director correctly observed that the Commission's concern with financial problems of a licensee is limited to the relation which those problems may have to the protection of public health and safety.<sup>3</sup> Allegations about financial difficulties at an operating facility are not by themselves a sufficient basis for action to restrict operations. In the Commission rulemaking, cited by the Director, which eliminated the financial qualification review for electric utilities, 47 F.R. 13750, the Commission noted the absence of evidence that financial problems are inevitably linked with corner-cutting on safety.<sup>4</sup> Thus, even had the Commission retained its financial qualifications review requirements, a showing the Maine Yankee was undergoing financial difficulties would not by itself require that the Commission halt operations at that plant.<sup>5</sup> On the other hand,

<sup>3</sup> Recently in an opinion issued subsequent to the Director's decision the Supreme Court took note of this limitation on the Commission's concern with economics:

The Nuclear Regulatory Commission (NRC) . . . does not purport to exercise its authority based on economic considerations. 10 CFR 8.4, and has recently repealed its regulations concerning the financial qualifications and capabilities of a utility proposing to construct and operate a nuclear power plant. 47 F.R. 13751. In its notice of rule repeal, the NRC stated that utility financial qualifications are only of concern to the NRC if related to the public health and safety.

*Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, — U.S. —, 73 L.Ed. 2d 733, 787 (1983).

<sup>4</sup> The Commission's rule is currently under review in the D.C. Circuit in *New England Coalition on Nuclear Pollution v. NRC*, No. 83-1581.

<sup>5</sup> Under Section 186 of the Atomic Energy Act the Commission may revoke a license when a condition exists that would have permitted the Commission to deny the license in the first instance, but it is not required to do so, especially where means short of license suspension are available to provide continued assurance of public health and safety.



ENCLOSURE 2

SCOPE OF NRC'S EA REVIEW

EA ITEMS IDENTIFIED IN SITING GUIDELINES

NRC REVIEW

- |   |  |
|---|--|
| 1. Decision Process for Nomination                              | ° None (addressed by Commission concurrence on siting guidelines)  |
| 2. Site Qualification/Disqualification                          | ° DOE findings with respect to the guidelines<br>° Technical evaluation used to support findings<br>° Data, interpretations, performance assessments supporting technical evaluations  |
| 3. Geohydrologic Setting Determination                          | ° Technical evaluations used to determine the geohydrologic settings<br>° Data, interpretations, performance assessments supporting technical evaluations  |
| 4. Comparative Evaluation of Sites Within Geohydrologic Setting | ° None regarding conclusions or methodology<br>° Substantiation of conclusions   |
| 5. Suitability for Development of Repository                    | ° Suitability conclusion<br>° DOE findings with respect to the appropriate guidelines<br>° Technical evaluations used to support findings<br>° Data, interpretations, performance assessments supporting technical evaluations |

ENCLOSURE 2 (Cont'd)

SCOPE OF NRC'S EA REVIEW

EA ITEMS IDENTIFIED IN SITING GUIDELINES

NRC REVIEW

- |   |   |
|---|---|
| 6. Suitability for Characterization                       | <ul style="list-style-type: none"><li>° Suitability conclusion</li><li>° DOE findings with respect to the appropriate guidelines</li><li>° Technical evaluations used to support findings</li><li>° Data, interpretations, performance assessments supporting technical evaluations</li></ul> |
| 7. Comparative Evaluation of Site Against All Other Sites | <ul style="list-style-type: none"><li>° None regarding the relative merits of one site against another</li><li>° Substantiation of conclusions</li></ul>  |
| 8. Effects of Site Characterization                       |   |
| ° Public Health and Safety (Radiological)                 | <ul style="list-style-type: none"><li>° Proposed site characterization activities</li><li>° Potential effects on repository performance</li><li>° Data, interpretations supporting above</li></ul>  |
| ° Public Health and Safety (Non-Radiological)             | <ul style="list-style-type: none"><li>° None</li></ul>  |
| ° Environment   | <ul style="list-style-type: none"><li>° DOE findings with respect to the appropriate guidelines</li><li>° Technical evaluations used to support findings</li></ul>  |

ENCLOSURE 2 (Cont'd)

SCOPE OF NRC'S EA REVIEW

EA ITEMS IDENTIFIED IN SITING GUIDELINES

NRC REVIEW

9. Alternative Activities for Site Characterization to Avoid Effects in No. 8 above
10. Regional and Local Impacts of Repository

- ° Alternative plans for site characterization activities
- ° Proposed repository facilities and operations
- ° Effects on repository performance, environment, transportation and socioeconomics
- ° Data, interpretations supporting above

OTHER EA ITEMS

11. Descriptions of the Site and Region
12. Descriptions of the Repository Design

- ° Data, interpretations, performance assessments
- ° Preliminary designs
- ° Data, interpretations, performance assessments supporting preliminary designs

# State a likely nuclear thoroughfare

By SUE LINDSAY

Rocky Mountain News Staff Writer

Thousands of trucks carrying deadly loads of spent nuclear fuel, each 10 times more radioactive than the bomb dropped on Hiroshima, may roll through Colorado by the end of the century posing a potential danger that has so far drawn a slow reaction from state officials.

The issue centers around whether the federal government will locate its high-level radioactive waste dump in the West. Many experts believe it is likely.

If one of three proposed Western sites is chosen, Colorado could become the hub of rail and highway traffic to the dump from the East, where most of the waste from nuclear reactors is produced.

According to some federal projections, the major transportation corridor would be Interstate 70, which passes through Denver and across the Rocky Mountains.

One federal study estimates that by 2000, a tractor-trailer truck carrying nearly a half-ton of highly radioactive waste would arrive at the dump every 90 minutes, 24 hours a day every day, transforming many interstate highways into nuclear thoroughfares.

Earlier this month a truck carrying Navy torpedoes overturned at the interchange of I-70 and I-25 in Denver, closing both highways, causing the largest traffic jam in Denver's history and underscoring how vulnerable the city is to accidents involving hazardous materials.

High volumes of spent nuclear fuel, the most radioactive substance on Earth, probably won't be on the road before 2000. That's how long it will take to select and construct a dump.

But decisions about where to locate the dump, which could have a major impact on Colorado, are under active consideration.

"The decisions are being made now," said Fred Millar of the Environmental Policy Institute in Washington. "Colorado will lose its say if it doesn't get involved now."

"Once the site is selected, reversing the federally generated momentum will be practically impossible," Millar warned.

Until recently, the topic has attracted little concern from state and local officials.

"I don't think the state generally is aware of some of the planning that's going on at the federal level which could result in higher use of the I-70 corridor for transportation of spent nuclear fuel," said state Sen. Tom Glass, D-Frisco, whose mountainous district contains the most treacherous stretches of that route.

"This highway presents such unique hazards itself under normal conditions, from the Mousetrap at rush hour to the Eisenhower tunnel to a runaway truck in Vail Pass," said Glass. "This is a tough road by any standard."

Denver and Colorado officials contend that the state still has time to make its influence felt.

"It's early enough in the process that if we act soon, we can respond," said Tony Massaro, Denver's director of environmental affairs. "DOE will narrow the list down to three sites in February. If we wait much beyond that, we will have some serious problems."

Casks being used to ship the waste are designed to meet standards set 23 years ago. Their ability to withstand crashes under current highway conditions is being seriously questioned.

But the Department of Energy says people are becoming needlessly alarmed.

*Classified Information, State*  
WASHINGTON, D.C. 20540

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DENVER, COLORADO  
ROCKY MOUNTAIN NEWS

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"We know there has been a lot of activism in the area which seems to frighten people," said Roy Garrison, DOE's transportation chief. "But these shipments have been moved for 40 years without ever any death or injury. It is a fact there have been no problems other than conventional accidents."

Garrison said the increased volume of shipments won't threaten the public, he contends that the shipping casks are indestructible.

"Other hazardous materials don't have the kind of record we're talking about here," Garrison said. "Gasoline is considered an acceptable risk and it kills a lot of people every year."

But others say public concern is justified.

"This stuff isn't acid or gasoline, it's radioactive waste. And there isn't a high level nuclear disposal site that works anywhere in the world right now," said Steve Frushman, general counsel for high-level radioactive waste with the Texas governor's office.

So far, the nation's 76 nuclear reactors have generated 25,000 tons of waste. It's stored in pools of water at the reactor sites. But they are filling up.

Nine sites for nuclear waste dumps have been proposed.

The three in the West are near Moab, Utah, on the border of Canyonlands National Park; on the U.S. government's Hanford reservation near Richland, Wash.; and at the Nevada test site 65 miles northwest of Las Vegas.

It's also possible that a temporary site may be established at a federal installation in Idaho Falls, Idaho.

The Nuclear Waste Policy Act of 1982 requires that three possible sites be selected early next year. A final site is to be chosen by 1987 and opened in 1993. But the legislation is fraught with loopholes and contradictions which open the door for years of challenge.

Although most nuclear waste is in the East, Millar and others bet the site will be in the West, where populations nearest the proposed sites are lower, have less political influence and are more supportive of the nuclear industry.

"Whether it's the MX missile or nuclear waste disposal, the West is picked on for sites because there's a lot of room out here and we don't have the political clout we need to prohibit it," said Rep. Ray Kogovsek, D-Colo.

"In Utah, 86 percent of the land is owned by the federal government. If the government wants to deposit waste on land they own, sooner or later they are going to do it."

But Sen. Gary Hart, D-Colo., cautioned that the not-in-my-back yard philosophy won't solve the problem.

"Frankly, as an American and an elected official, I think it is irresponsible for people to say not in the West, or East or South or any particular state. This is a national problem."

"Technology, rather than politics, has to prevail," he said. "This stuff has to be put not in the place which has the least political muscle, but where it is the safest. And that decision will be made by the president of the United States."

Few waste shipments have traveled the nation's highways or railways in recent years because there is no national dump. From 1979 to 1981, an average of 96 commercial and experimental shipments of highly radioactive waste were transported annually.

The number of shipments would increase significantly once a site is built.

See NUCLEAR, page 24



Continued from page 3

The Department of Energy estimates that from 350,000 to 450,000 truck shipments or 35,000 to 45,000 rail shipments would be necessary to transport the waste produced by the currently operating nuclear reactors over their 30-year lifetimes.

Up to 120 trucks would be on the road every day by the year 2000, according to a 1981 report by the National Academy of Science's National Research Council.

"Only one mess up could contaminate the Colorado River or close the economic connection between the Eastern and Western Slopes along I-70 for years," said geologist Roy Young, a consultant to the Sierra Club.

Truck accidents in general, including minor incidents, occur at the rate of one every 400,000 miles, according to DOT.

But the Nuclear Regulatory Commission says the probability of an accident severe enough to break a cask is similar to that of a cask being struck by a meteor — once in several million years.

The casks contain "spent fuel," a somewhat misleading term because it implies that the fuel has lost its power. In fact, it is millions of times more radioactive than fresh fuel.

Fuel that has been irradiated inside a nuclear reactor for several years is considered spent when the enriched uranium it contains no longer fissions properly.

When it is removed, it must be stored under water to cool it and contain the radiation.

Even after an unshielded fuel assembly has been out of a reactor for six months, its temperature exceeds 800 degrees Fahrenheit. Standing one yard away, a person would receive a lethal dose of radiation in 10 seconds.

In an accident, a damaged cask could

release radioactive gases and particles into the air. They could be inhaled or settle on vegetation, soil or water and eventually be ingested. People near a radioactive spill would absorb radiation through the skin or by inhaling it.

Depending on the amount of exposure, the effects can be immediate or latent, such as increased cancers, birth defects or genetic mutations.

In 1980, the NRC estimated there would be nearly 2,500 immediate deaths and even more cancer victims should such a calamity occur at lunch hour in downtown Manhattan.

The prospects of an accident are also deadly for Coloradans. While fewer lives would be lost if an accident occurred on I-70 in the mountains, the impact on Colorado's ski and tourism industry would be devastating.

"Both I-70 and I-76 lead from the East to Denver where a million people are living," said Colorado Port of Entry director Dee Hartman. "Essentially, we have no control over the feds. If they want to bring it through Denver, they will."

Who should respond to such an accident is an open question. An NRC report estimated that a "model state system" would cost roughly \$3.6 million. "States shouldn't have to foot that bill," contends Texas' Frishman.

But federal responsibility for emergency response offers little comfort to Denver.

"They may say you don't need to train local people because their people are always on call, but we saw how well that worked with the torpedo incident," said Rep. Patricia Schroeder, D-Colo., who was highly critical of the government's response to that accident.

Frishman is calling for a study of the risk along various routes. He and others complain that responsibility for safely transport-

ing the waste is being lost in a bureaucratic shuffle.

DOE transportation chief Roy Garrison said his department's policy requires carriers to follow the regulations of the Department of Transportation.

DOT's regulation HM-164 directs nuclear shipments to be transported on interstate highways, taking bypass routes around cities where feasible and available.

DOT's enforcement of other hazardous materials shipping regulations, is not good. For example, the truck carrying torpedos that overturned in Denver should have bypassed the city, but didn't.

More than 200 local and state jurisdictions have banned or restricted the transport of radioactive waste through their communities.

DOT has moved to pre-empt several such ordinances. But resistance continues to build. Michigan passed a law prohibiting transport of nuclear waste in casks which hadn't been physically tested. Since none used in the United States has undergone such tests, the Michigan law effectively bans nuclear shipments.

"The real issue," said Frishman, "is that states need information about transportation so they can respond properly and be involved in the process. Up to now DOE has been unwilling and unable to provide us sufficient information."

Colorado and Denver barely have begun considering restrictive laws aimed at nuclear transport and they have been slow to ask for such information.

"Clearly, Colorado should do what it can to pass strong laws on routing and safety precautions," said Schroeder. "When states have passed laws, the government has said it's been pre-empted. ... They've used that to keep everybody out of it."

-- Hart said the Reagan administration had dodged its responsibility to implement the Nuclear Waste Policy Act. "There is plenty of latitude for the states to deal with it," he said. "If the federal agencies wanted this act to work, they would sit down with the states and make it work."

A number of states, including Utah, Nebraska, Wisconsin, Minnesota and Washington, have tried to get mapping information developed for DOE at Oak Ridge National Laboratories in Tennessee.

Up to now, DOE has resisted those efforts. DOE's transportation head Garrison said there is "some movement to accommodate the states' requests."

Colorado hasn't asked for the information. Denver intends to ask the state to make a formal request, said Denver's Massaro.

Leonard Slosky, aide to Gov. Richard D. Lamm said the state is "following the DOE planning process."

On the mapping question, Slosky said Colorado is "trying to track down that process."

"We need to see what they have and what it means. The current DOE plan says that routes would be selected by commercial shippers. Any model that predicts where shipments would go is of limited utility. We don't know yet if they would go by rail or highway."

Trucks carrying any hazardous products, including radioactive waste, are already prohibited from traveling through the Eisenhower Tunnel on I-70. Instead, they are routed over Loveland Pass, which, Port of Entry director Hartman notes, is treacherous even on a good day.

"So we're having these trucks go over a winding, curving road supposedly because it's safer," Hartman said. "Is that good? I don't really want nuclear waste going over Loveland Pass or the tunnel."

WILLIAM A. O'NEILL  
GOVERNOR



STATE OF CONNECTICUT  
EXECUTIVE CHAMBERS  
HARTFORD

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OFFICE OF THE  
DOCKETING & SERVICE  
BRANCH

March 12, 1985

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Attention: Docketing and Service Branch  
Public Document Room  
1717 H Street, N.W.  
Washington, D.C. 20555

Dear Mr. Secretary:

The State of Connecticut offers the following comments concerning the proposed rule for "Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures" as published in the January 13, 1985 issue of the Federal Register, Vol. 50, No. 12.

The proposed federal rule appears to restrict the role of the public in determining site suitability of high-level nuclear waste repositories. The proposed rules, which would amend existing procedures, would eliminate the requirement for a draft site characteristic analysis, thereby circumventing early public comment. However, Connecticut's experience with siting locally unwanted land uses (LULU's) has benefitted from generous participation procedures.

The concept of limiting public participation is also contradicted by several recent theories published on this subject, including "Siting Hazardous Waste Facilities" by Dave Morell and Christopher Maggrian (1982; Ballinger Publishing, Cambridge, Mass.), "Siting Hazardous Waste Management Facilities" (1983, the Conservation Foundation, Chemical Manufacturers Association, National Audubon Society); and "Facility Siting and Public Opposition" by Lawrence Bacow, Michael O'Hare, and Debra Sanderson (1983, VanNostrand Rhinehold, New York). These publications stress the point that no siting attempt can be successful, in the sense of minimizing community and personal disruption while assuring a fair and timely decision, unless all parties at interest are afforded access to complete information from the very beginning.

DS10 110  
add. Clark Richard, 113055  
James Vail 964 MLBC  
Edward Rigney, 62355

MAR 19 1985

Acknowledged by card.....

*pd*

Secretary to the Commission

March 12, 1985

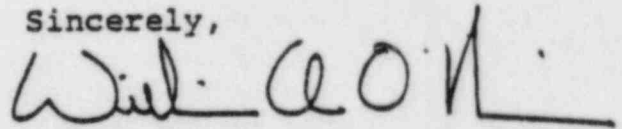
Page 2

Even though the subject Waste Siting Act does not require that a draft environmental assessment be made available for public comment, the DOE intends to do so according to the Federal Register Notice. If they intend to do so, the regulations should clearly so state. Although the present administration may be sincere in its intent, the intent of future administrations cannot be assumed. Any means to encourage adequate information flow at all stages of such a project will enhance the likelihood of an error free and acceptable decision.

The experience of the Connecticut Siting Council in siting decisions regarding any "unwanted" facility indicates that restrictions on public participation in such decision, disguised as streamlined regulations, prove counterproductive. Any time or money saved early on will almost certainly be lost to more vigorous and effective public opposition and court challenges at later stages of a project. In fact, a recent study by Charles River Associates, a consulting firm in Boston, Massachusetts, indicates that delays late in a construction project are far more costly than those encountered at early stages.

Thank you for this opportunity to review and comment on this proposed rule.

Sincerely,

A handwritten signature in dark ink, appearing to read "Will. A. O'Neill", with a long horizontal stroke extending to the right.

WILLIAM A. O'NEILL  
Governor



# SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.

NATIONAL OFFICE

570 Seventh Avenue - Suite 100 - New York, New York 10018 - (212) 840-6595

Miro M. Todorovich - Executive Director

SE2

'85 04:51 March 15, 1985

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\*Member, Steering Committee  
Affiliation for identification only

Samuel J. Chilk  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

JOCKET NUMBER

EXHIBIT FILE

PR-64 (5)  
(50 FR 2579)

RE: 10 CFR Part 60  
Disposal of High-Level  
Radioactive Waste in  
Geologic Repositories:  
Amendments to Licensing  
Procedures (50 FR 2579,  
January 17, 1985)

Dear Mr. Chilk:

Scientists and Engineers for Secure Energy has reviewed the proposed rule amending licensing procedures for high-level radioactive waste repositories and wishes to commend the Nuclear Regulatory Commission and the Department of Energy for their sensitivity in dealing with this important step in the nuclear fuel cycle.

While the passage of the Nuclear Waste Policy Act of 1982 by Congress established a definite Federal policy for waste disposal, it also presented the Commission with the task of proposing revisions to previously adopted procedures to reflect the provision of the Waste Policy Act and with the opportunity to take into consideration scientific experience gained in the

DS1010  
add. Clark Prichard 113055  
P. W. W. 90-4 MNB  
Edward R. R. 6-355

ACKNOWLEDGED BY CARD... MAR 19 1985



last three years. SE<sub>2</sub> analyzed the revised procedures with regard to:

- (a) the public's ability to comment;
- (b) the implementation of the Commission's statutory duties; and
- (c) the timely development and implementation of otherwise safe high-level radioactive waste repositories.

We note that public input and review is mandated by the Waste Policy Act and that under the proposed rules the citizens in the states being considered for nomination as repositories will, on an ongoing basis, be given ample opportunity to comment on the proposed plans. In fact, under the NRC/DOE Procedural Agreement, "States and Indian tribes will have an opportunity to be informed routinely concerning the information made available to NRC and NRC's comment thereon and to attend NRC/DOE technical meetings"<sup>1</sup> and further, "to bring their concerns to the attention of the NRC."<sup>2</sup> The Waste Policy Act authorizes DOE to fund a variety of State activities facilitating public review and comment and requires DOE to report on the site characterization

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<sup>1</sup>Federal Register, Vol. 50, No. 12, Thursday, January 17, 1985. Pages 2583-84.

<sup>2</sup>Ibid, page 2584.

activities at least twice a year to the Commission and to State and tribal officials.

The Waste Policy Act places primary responsibility on DOE for investigating the suitability of several areas as waste repositories. We find the procedures enumerated in these proposed rules facilitate timely development of repository sites because they have been designed to allow the investigation, review and comment phases to be carried out concurrently and in parallel rather than consecutively thereby compressing the period of time involved without cutting short local input or jeopardizing the resolution of safety issues.

Seeing meaningful revisions of NRC's procedures as moves toward leaner, better and more efficient government, SE<sub>2</sub> can not agree with Commissioner Asselstine's views because they would at times add a layer of duplication and at others lengthen the process unnecessarily.

Sincerely,

*Miro M. Todorovich*

Miro M. Todorovich

Executive Director

RECORDED FILE PR-60 (6)  
(50 FR 2579)

# NATIONAL CONGRESS OF AMERICAN INDIANS

1985

MAR 18 P5:07

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A. Bruce Jones  
Lumbee

March 18, 1985

SPANCH

The Honorable Samuel Chilk  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

RE: Comment on Proposed Change to  
10 CFR 60, Part 60

By Hand

Dear Mr. Secretary:

This responds to the request for comment on rule changes to 10 CFR 60, Part 60, proposed by the Nuclear Regulatory Commission (NRC) (Federal Register, Vol. 50, No. 12, January 17, 1985).

This comment is offered by the National Congress of American Indians (NCAI). The NCAI, established in 1944 to promote Indian treaty, traditional, cultural and property rights, is the oldest and largest national membership organization of American Indian and Alaska Native governments and people.

Although the NCAI is concerned about other proposals for change to 10 CFR 60, our foremost objection regards the proposal to change Subpart A, Section 60.2, Definitions, wherein the terms "Indian Tribe" and "Tribal organization" would be replaced by the term "affected Indian tribe," as defined in the Nuclear Waste Policy Act of 1982 (NWPA).

We strongly object to this proposed change because it would serve to limit participation by an already narrow category of Indian Tribes in the NRC high-level waste geologic repository licensing procedures. The proposed change would preclude participation by tribally-sanctioned organizations which may be requested by more than one tribal government in the interest of cost-saving and information-sharing and technical assistance.

8503250242 850318  
PDR PR  
60 50FR2579 PDR

804 D STREET, N.E. • WASHINGTON, D.C. 20002 • (202) 546-9404

Acknowledged by card..... MAR 19 1985

Delivered  
to Mr. Chilk  
March 18, 1985  
J. M. [unclear]  
[unclear] 62355

# NATIONAL CONGRESS OF AMERICAN INDIANS

1984

## Letter - NRC Secretary Chilk

Re: Comment on Proposed Change to 10 CFR 60

March 18, 1985

Page Two

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Most importantly, the proposed change would preclude the participation of Tribes that are not at this time "affected tribes" under the NHPA. There are only three Tribes at present that have petitioned for and received "affected" status. Most Tribes in the first and second repository States have not petitioned for "affected" status, and some may not be aware that they are potentially affected. To correct this information gap, our organization has a contract with the Department of Energy to develop and disseminate information on the NHPA and related issues to Tribes that could be affected by the siting and transportation issues. Since the federal government does not know where the sites, including the MRS site, or the transportation routes will be, the NRC should not preclude participation by Tribes that may be affected by these issues prospectively, but are not designated as "affected" now.

We are concerned that the NRC, by adopting the poor draftsmanship of the NHPA, may further limit participation by Tribes that have land and usage rights that are not the subject of congressionally-ratified treaties. Section 2(2) of the NHPA mentions both federally defined possessory or usage rights and congressionally-ratified treaties, the latter being one method of establishing reservation boundaries and Indian country. Indian country is defined in Section 1151(a) of 18 U.S.C. and the Court has interpreted it to mean include all reservation lands, with the term reservation being a term of art meaning all Indian lands which are subject to restrictions against alienation, notwithstanding the issuance of any patent. In 1871, in an appropriations act, Congress restricted its future treaty-making with Indian Nations and Tribes. Since that time, nearly 30 million acres have been federally defined as reservations or Indian country, through congressional settlements, Executive Orders, administrative procedures and court decisions. Also since that time, Congress has passed numerous acts recognizing the property and usage rights of Tribes,



# NATIONAL CONGRESS OF AMERICAN INDIANS

1985

Letter - NRC Secretary Chilk

Re: Comment on Proposed Change to 10 CFR 60

March 18, 1985

Page Three

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Cheyenne & Cree

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including the National Environmental Policy Act, the American Indian Religious Freedom Act and the Archaeological Resources Protection Act, all of which recognize Tribes, their rights and property, irrespective of their establishment method. Since the NRC rule and the NWPA address, in the first instance, property that would be affected by nuclear waste, the focus here should be on the character of that property and related jurisdictional systems, rather than on the precise manner in which they were federally defined or recognized.

For the present, we urge that the NRC leave the definitions as they are, considering future changes as the siting and transportation issues are more focused and as Tribes are at least as informed as are the States today.

As an overall comment, we would appreciate changes in 10 CFR 60, and all NRC materials, to write "Tribe(s)" with a capital "T," as "State(s)" is written with a capital "S." Our guide for this is the initial governing document of the United States, which provides in the Commerce Clause that Congress is authorized to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes" (U.S. Constitution, Article 1, Section 8, Clause 3).

Thank you for your serious consideration of our comment.

Sincerely,



Suzan Shown Harjo  
Executive Director



# Natural Resources Defense Council, Inc.

1350 NEW YORK AVENUE, N.W.

SUITE 300

WASHINGTON, D.C. 20005

202 783-7800

New York Office

122 EAST 42ND STREET  
NEW YORK, N.Y. 10168

212 949-0049

March 19, 1985

Western Office

25 KEARNY STREET  
SAN FRANCISCO, CALIF. 94108  
415 421-6561

Samuel J. Chilk  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attention: Docketing and Service Branch

DOCKET NUMBER

PROPOSED RULE

PR-60  
(50 FR 2579)

(8)

Dear Mr. Chilk:

The Natural Resources Defense Council, Inc. (NRDC) submits the following comments on the Nuclear Regulatory Commission's proposed rule regarding "Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures" (50 Fed. Reg. 2579, January 17, 1985).

NRDC welcomes this opportunity to respond to the Commission's proposed revisions of 10 C.F.R. Part 60. It is our view, however, that by eliminating the requirements in § 60.11 for the Commission review of the Department of Energy's (DOE) site selection process and the issuance for public comment of a draft site characterization analysis, the Commission misapprehends the appropriate role it is to play in the selection and eventual construction and operation of a repository. Furthermore, many of the reasons given by the Commission for these revisions are based on its interpretation of various sections of the Nuclear Waste Policy Act which are inapplicable to a defense-only repository. Our comments focus primarily on the need for Commission review of DOE's site selection process and for issuance of a draft site characterization analysis. We wish to underscore, however, the particular need for these two procedural steps in connection with the licensing of a defense-only repository.

New England Office: 850 BOSTON POST ROAD • SUDBURY, MA. 01776 • 617 237-0472

Public Lands Institute: 1740 RACE STREET • DENVER, CO. 80206 • 303 377-9740

MAR 20 1985

Acknowledged by card.

I. The Commission Should and Must Review the DOE Site Selection Process

The proposed rule sets forth two justifications for eliminating the Commission's review of site selection information now required by § 60.11 -- that there is no statutory authority for such a review, and that such a review would come too late in the process to be useful. Concerning the first justification, the Commission reasons that the site selection information does not belong in the site characterization report (renamed in these revisions and hereafter referred to as the site characterization plan), since the Nuclear Waste Policy Act (NWPA) specifically includes a discussion of these items in the environmental assessments (EAs). The Commission, however, apparently does not plan to review this information in the draft or final environmental assessments. According to the Commission, there is simply a lack of authority for it to engage in any form of review of DOE's site selection process.

The second justification for the proposed revision is that, with the passage of the NWPA, the site characterization plan is not required until after the sites under consideration have already been subject to extensive scrutiny. The proposal concludes, although the point is not self-evident, that Commission review of the site selection process would be superfluous in light of the information already gathered about each site.

These comments will address each of these justifications in turn. As a preliminary matter, however, it is our basic position that the Commission should undertake a continuing comparative review of the sites throughout the site selection process. In this way the Commission can most effectively exercise its oversight and decisionmaking responsibilities concerning the siting of a repository. Although it would be preferable for the Commission to review site selection information in the site

characterization plan rather than in the EAs, the form of the review is not as important as the fact that such review takes place. These comments, which focus on the necessity for Commission review of site selection information contained in the site characterization plan, can also be applied in large part to the review of site selection information contained in the EAs.

A. The Commission Has the Statutory Authority and Responsibility to Review Site Selection Information

In our view, a comparison and evaluation by the Commission of the sites to be characterized is not discretionary. Rather, the Commission has the authority and responsibility to conduct such a review under the Nuclear Waste Policy Act, the Energy Reorganization Act, the Atomic Energy Act, and the National Environmental Policy Act. Other portions of the Commission's Part 60 regulations, which are not the subject of the current proposed revision, also make site selection review advisable.

1. Nuclear Waste Policy Act

The Commission is clearly reluctant to engage in the comparative evaluation of sites at any stage in the site selection process. In explaining this reluctance, the Commission sets out some of its responsibilities under the Nuclear Waste Policy Act to emphasize that no specific provision provides for Commission review of site selection information. In our view, although the NWPA does not specifically require Commission site selection review, or for that matter environmental assessment review, the structure of the Act and the Commission's extensive participation at all other stages of the process logically require the Commission to oversee DOE's site selection decisions. The process the Nuclear Waste Policy Act establishes, from the identification of potential sites, to nomination, to characterization, and to eventual site selection, is a single site selection process. This continued selection from among

alternatives is the core of the repository siting process. Consequently, NRDC believes it is essential for the Commission to be involved in the decisionmaking as site alternatives are eliminated.

Moreover, contrary to assertions in the proposed rule, nothing in the Nuclear Waste Policy Act "calls for" site selection information to be excluded from the site characterization plan. 50 Fed. Reg. 2582, January 17, 1985. To the contrary, while the NWPA specifically requires inclusion of such information in the EAs and does not require its inclusion in the site characterization plan, the Act also provides that the Commission may require DOE to include in the site characterization plan, "any other information" it deems necessary. § 113(b)(1)(A)(v). Clearly, in light of this broad discretion given the Commission to require the inclusion of any information it deems necessary, the fact that site selection information is not specifically named in § 113(b) does not mean that it is excluded, as the Commission implies. Furthermore, the Commission's failure to review similar information in the draft environmental assessments, demands continued inclusion of this information in the site characterization plan so as not to compound the error.

As a separate matter, Section 121 of the Nuclear Waste Policy Act requires the Environmental Protection Agency (EPA) to develop general requirements needed to assure protection of public health and the environment from management and disposal of high-level wastes. Once the EPA issues final standards, Section 121 of the NWPA requires the Commission to revise its Part 60 regulations to become consistent with those standards.

The most recent working draft of EPA's standards (to be codified in 40 C.F.R. Part 191) establishes seven "assurance requirements" that are designed to provide confidence that a repository will meet the long-term containment requirements. One



of these "assurance requirements" provides that the Commission undertake a comparative evaluation of the three sites in order to determine which of the three sites' natural properties provides better isolation of the wastes. EPA intends that this evaluation play a significant role in choosing a site; consequently, the Commission's refusal to comment "upon the relative merits of one site against another" (50 Fed. Reg. at 2583) conflicts with this requirement.

It is true that, as more detailed information is gathered during site characterization activities, the determination called for in § 191.14(e) can be made with greater and greater accuracy. However, since the Commission claims that submission of the site characterization plan begins its formal, substantive review, the time to make preliminary determinations, based on the extensive information the Commission admits is already known about a site, is in its comment on the site characterization plan. Such determinations would assist DOE in carrying out its site characterization activities, and enable the Commission to identify areas of special concern within any one site, as well as alert it to issues affecting repository safety common to all three sites.

## 2. The Energy Reorganization Act

Even if the Nuclear Waste Policy Act does not require the Commission to review DOE's site selection process, this does not mean, as the Commission seems to conclude, that it is necessarily precluded from such review. Section 202(3) & (4) of the Energy Reorganization Act establishes the Commission's licensing and regulatory authority over all high-level nuclear waste repositories. The NWPA reconfirms this in § 114(e). This authority enables the Commission to regulate DOE activities prior to construction since, in the words of the Commission, "DOE activities that take place before an application is filed and may



affect the long-term safety of the repository obviously may preclude receipt of a construction authorization." 46 Fed. Reg. at 13971.

This earlier Commission interpretation of the scope of § 202, in the preamble to the 1981 final rule, contrasts markedly with the present view of the Commission that there are some areas in the siting process in which it cannot participate. In our view, Section 202 evinces an active Commission involvement in all aspects of repository development, including final site selection. By not reviewing site selection information wherever it may be found, the Commission is impermissibly limiting the scope of its duties.

### 3. The Atomic Energy Act

In addition to preserving the Commission's authority to license repositories under the Energy Reorganization Act, Section 114(e) of the NWPA also recognizes the Commission's independent authority to protect public health and safety under the Atomic Energy Act. NRDC believes that the refusal of the Commission to compare sites by reviewing site selection information compromises this responsibility. As noted earlier, the NWPA establishes a process by which potential sites are eliminated from consideration in stages. The methodology used to eliminate these alternatives, whether the number of sites is being reduced from 9 to 5, or from 5 to 3, or from 3 to 1, is obviously the essence of the Act. The proposed revision denies the Commission the ability to influence, in the most direct, basic way, DOE's site selection decisions. As recognized by all concerned, the geological features of a repository are by far the most important factor in ensuring safe isolation of high-level wastes. In our view, therefore, the refusal of the Commission to play a central role in a comparative analysis of sites is an abdication of its public health and safety responsibilities.

#### 4. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) also mandates direct Commission input into DOE's site selection process. In fact, the Commission's original justification for the Part 60 rule was compliance with NEPA. 46 Fed. Reg. at 13922. The Commission has offered no explanation for why this essential ingredient of the Commission's NEPA compliance, namely the evaluation of alternatives, is no longer valid; it states merely that a Part 51 rulemaking will come later. NRDC believes that, because Part 60 rests in part on NEPA authority, NRDC and other interested parties should be allowed to see and comment on those Part 51 revisions while considering the revisions of Part 60.

In the meantime, NRDC can draw only one conclusion from the Commission's refusal to avail itself of opportunities to review DOE site selection and to engage in comparative analysis of sites in both the EAs and site characterization plans -- that the Commission has decided that such review is not its appropriate role. However, the Commission cannot escape its responsibilities by refusing to recognize them. Consideration of alternatives is necessary for the simple reason that adverse environmental impacts of site activities can be avoided or reduced through proper site selection. Thus, the Commission's required role in the siting process of a repository is not only merely to ascertain whether the repository meets the technical criteria, guidelines, and standards established by DOE, NRC, and EPA, but also to use its expertise to continually evaluate and compare the range of choices as the list of sites is winnowed down.

#### 5. Existing 10 C.F.R. Part 60 Regulations

It should be noted that an ongoing evaluation of DOE's site selection decisions will better enable the Commission to make reasoned decisions regarding construction authorization and license applications. Eventually the Commission will have to

evaluate alternatives in determining whether to issue a construction authorization (§ 60.31(c)) and whether to issue a license (§ 60.41(d)). Although the relationships between the sites will change as more information is received about each site, the Commission should not wait until site characterization is complete before beginning such a review.

Failure to engage in a comparative analysis based on current knowledge will result in the amount and complexity of the information simply overwhelming the Commission when it finally has to evaluate alternatives as required in § 60.31 and § 60.41. Issues should instead be addressed at the earliest possible time. This would allow the Commission to make tentative judgments, and would alert it to any change in circumstances. Consequently, it is not only appropriate but highly desirable for the Commission to keep itself, DOE and the public informed regarding its current views on the comparative evaluation of sites.

B. Commission Review of Site Selection Information is Appropriate at the Site Characterization Plan Stage

The second justification the Commission offers for refusing to review site selection information is that such a review would come too late in the process. In making this claim, the Commission fails to recognize the purpose of review of site selection information, which is to provide Commission input into DOE site selection decisions made at various stages of the process. By not reviewing site selection information in the draft environmental assessments, the Commission has missed a critical opportunity to make a comparative evaluation of the potential sites. Thus, DOE's determination of which sites to nominate, and which sites to recommend to the President, will be made without the Commission's independent evaluation of DOE's tentative decisions. The Commission's next formal opportunity to comment on site selection decisions is in its site

characterization analysis. The Commission should direct this analysis toward the critical step of choosing one site.

II. The Commission Should Retain the Part 60 Provision Requiring the Issuance of a Draft Site Characterization Analysis For Public Comment

NRDC strongly supports the retention of the provision in Part 60 that requires issuance of a draft site characterization analysis for public comment. Issuance of a draft site characterization analysis will involve the public in the decisionmaking process and assist the Commission in preparing its required analysis. 44 Fed. Reg. at 70409. NRDC believes that formal public input into the Commission's analysis will force the Commission to scrutinize more carefully DOE's site characterization plan, which will result in a more reasoned analysis by the Commission. In contrast, removing the public comment requirement will emasculate the Commission's role as an independent regulator of DOE's site characterization plan.

The Commission argues that a public comment period is not appropriate because the Commission will already be aware of all the relevant issues and public concerns. Issue identification, however, is not as important as an opportunity for the public to comment upon the adequacy of the Commission's analysis, and its characterization of the issues. The process would force the Commission to take into account concerns of the public, examine more closely its own assertions, and, perhaps most important, act as an intermediary between DOE and the public. These will occur only if a draft site characterization analysis is issued for public comment.

The Commission claims that effective opportunities exist for States, Indian tribes and the public to influence the site characterization process through formal and informal comment during the siting process, the DOE/NRC Procedural Agreement, and



the Section 60.18(f) process. First, although these methods are used to communicate to the Commission and to some extent to inform interested parties of the Commission's activities, none provide that the Commission must actually address issues expressed to it. As the Commission knows, it is one thing to be "aware" of public concerns, it is another to have to respond to them. There is also no assurance that the concerns of States, Indian tribes or the public will be the concerns of the Commission, thus expressing these concerns to the Commission does not provide any reasonable assurance that they will have any influence on DOE's site characterization activities. Secondly, neither the comments to DOE on its site characterization plan nor the informal comments to the Commission will be specifically directed at the Commission's analysis of the site characterization plan.

As for the Procedural Agreement, although the Commission may view it as the principal mechanism for evaluating site characterization, the Agreement is less concerned with providing for public input and more concerned with NRC/DOE interactions. While NRDC is in favor of the purposes underlying the Agreement, and believes it can be used effectively to ensure better communication between the the Commission and DOE, the Procedural Agreement simply does not provide any means for ensuring Commission consideration of State, Indian tribes, or public concerns. There is no comparison between a Procedural Agreement that provides for notification to States and Indian tribes of technical meetings, which the public may attend as observers, and an open public comment period on a draft site characterization analysis. If the Commission is actually going to rely on the Agreement's procedures as providing an efficacious means for DOE and the Commission to obtain input on site characterization, then the least the Commission can do is to make the public participation provisions less inadequate by providing for



notification to the public of the meetings and responding to public discussion and comment in a formal manner.

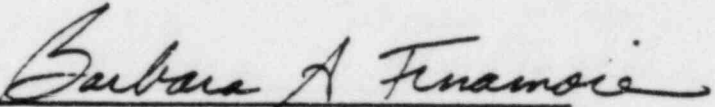
Finally, Section 60.18(f) requires the Director merely to invite comments on the site characterization plan. Not only is the Director not required to respond to the comments, but in all likelihood site characterization will have begun before the comments are even read.

NRDC does not agree with the Commission's contention that comment and review on a draft site characterization would be at odds with the ongoing dynamic review process it envisions. The Commission implies that comment on a draft site characterization analysis would "freeze" the entire review process. Though NRDC supports the Commission's notion of an ongoing evaluative process, NRDC also supports establishing a window through which all the accumulated knowledge can be viewed at once and the interrelatedness of the issues involved in site characterization examined. If the Commission is suggesting that any analysis will have to deal with only the information available at the time, NRDC agrees. There is no reason, however, why this analysis cannot be meaningful. Site characterization is not an "arbitrary point in time," but a critical stage in the process, which is why the NWSA requires DOE to issue its site characterization plans for comment and to hold hearings near the site, and why the Commission must comment on DOE's plan. Any freeze of the analysis process would in fact be difficult, since during the period of comment and review the Commission and DOE would presumably be exchanging information under the terms of the Procedural Agreement, and during site characterization DOE is required by both the NWSA and the Commission to submit periodic updates on its characterization activities.

NRDC strongly disagrees with any notion that the scheduling provisions of the Nuclear Waste Policy Act require that the draft site characterization analysis not be issued for public

comment. Considering the infrequency with which actions have up to now met the deadlines established in the NWPA, we find very curious the Commission's emphasis on the 3 to 4 month period it would take to receive comments and respond to them. Also, as the Commission is aware, the original proposed rule specifically found that a public comment period could be met "without undue schedule delays." 44 Fed. Reg. at 70409. If there were no reason to receive comments on a draft site characterization analysis, NRDC agrees that it would be desirable for the Commission to "complete its review and provide comments to DOE...in a prompt fashion." As discussed above, however, there are very important reasons that comments should be received and the Commission should not neglect them.

Respectfully submitted,

  
Barbara A. Finamore  
Charles E. Magraw  
Natural Resources Defense Council  
1350 New York Avenue N.W., Suite 300  
Washington, D.C. 20005  
(202) 783-7800

ECOLOGY/ALERT

BOX 621

BLOOMSBURG 17815

E Nemethy, Sec'y

JANET NUMBER  
PROPOSED RULE PR-68 (9)  
(50 FR 2579)

Mar 14 -85

REGISTERED  
USNRC

Sec'y - LRC  
Wash, DC 20555

7:55 - 2:35 Re: Proposed rule - High  
level waste disposal  
Fed Reg - Jan 17-85, p 2579

ATT: DOCKETING & SERVICE BRANCH

Gentlemen =

We commend your statement (page 2583, col 1) that even though the "Waste Policy Act makes no provision for the Commission to comment to DOE on its environmental assessments...it is nevertheless the intention of the Commission to review and comment on the environmental assessments, as well as other technical documents..."

This is too important an issue to be impaired by legal hair-splitting over who does what, and to which.

Better to have many controls, and reviews by the public at every step of the way, than not enough.

After all, DOE and NRC will be preparing designs for repositories intended to last for thousands of years. So, additional months, or even years, spent in planning and review should not be considered time wasted.

We also suggest this is too important an issue to be entrusted exclusively to state or local officials. Beyond having vote-getting personalities, too many of these folks have the IQ of a groundhog.

RE: COMMISSIONER ASSELSTINE'S ADDITIONAL VIEWS:

- 1 - We concur.
- 2 - We also suggest that 60.18(c) be re-worded to read: "...the Director shall invite and consider the views of interested persons on DOE's site characterization plans and shall review ...etc# (By the way, who is this Director?)
- 3 - We commend your decision in 60.18(f) to allow a period of "not less than 90 days" for public comment.
- 4 - ~~Finally~~ We suggest a public document room automatically be established in the court house or other public building in the town nearest the site - in which all documents, correspondence etc re: the project shall be available for public inspection.
- 5 - Finally, though public comment may be tedious, repetitious or even divisive, we feel the people who will live near the site should be given a respectful hearing. You may find the common-sense views of some old farmer may just ~~surprise~~ enlighten the "experts".

Acknowledged by card..... MAR 22 1985



50 FR 2579 (50 FR 2579)

10

## Governor's Task Force on High-Level Radioactive Waste

March 17, 1985

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attention: Docketing and Service Branch

Dear Mr. Secretary:

Attached are the State of Minnesota's comments on the proposed revisions to 10 CFR 60, as published in the Federal Register on January 17, 1985.

Sincerely,

*Tom Kalitowski*

Tom Kalitowski, Chairman  
Governor's Task Force on High-Level  
Radioactive Waste

Enclosure

DS1011  
Att. Dick Packer, 113055  
James W. 0604026  
02355

8503270292 850325  
PDR PR  
60 50FR2579 PDR

Acknowledged by card.

MAR 25 1985



STATE OF MINNESOTA

COMMENTS ON THE PROPOSED AMENDMENTS TO 10 C.F.R. PART 60

The State of Minnesota has reviewed the proposed amendments to 10 C.F.R. Part 60, "Disposal of High-Level Radioactive Waste in Geologic Repositories." Minnesota wishes to comment on aspects of the proposed amendments relating to the participation of states and affected Indian tribes in site characterization analysis and licensing reviews.

1. Minnesota strongly disagrees with the proposed rules regarding the contents of the site characterization plan. Because the guidelines lack any provisions requiring DOE to set forth its method for selection of sites for characterization or describe its decision process, we believe that the NRC should request that such information be provided in the site characterization plan.

Requiring such information by the NRC does not conflict with the Nuclear Waste Policy Act (NWPA) or duplicate information already provided by DOE. The Waste Policy Act specifies that DOE will prepare an environmental assessment for each site nominated for characterization. The content of these environmental assessments is specified and includes the type of site selection information previously required by 10 CFR 60 in the site characterization report. However, the site selection information pertains only to the selection of the five nominated sites, and not to the selection of the three candidate sites; it is not duplicative of information previously required.

There is no provision of the NWPA that precludes the NRC from considering site selection information; instead, Section 13(b)(1)(A)(v) of NWPA authorizes the NRC to request "Any other information required" for its review of a general plan for site characterization. Because the site selection information for the three candidates sites is not available elsewhere, and because the NRC does have the authority to request such information, we believe it should be included in the site characterization plan.

We are troubled by the reluctance of DOE to provide the method and decision process used in the selection of the three candidate sites and the reluctance of the NRC staff to review and comment on such information. While we would like to believe that the selection would be based on technical considerations and the desire to produce three viable alternatives, this reluctance leads us to the conclusion that other considerations will enter into the decision. This should not be a concern of the states alone, but also should be shared by the NRC and the staff. The willingness to look at the quality of the data available but not its application, compartmentalizes review activities to an unreasonable and unnecessary extent. Taking this "blind" position is also inconsistent with the NRC's past efforts to develop a participatory role in the process as early as possible.



It is difficult to understand why the NRC finds it inappropriate to comment on site selection information, particularly if sites are selected that will raise potential licensing issues. There is no way to avoid the politically sensitive aspects of site selection; they are present at each stage of the process. Rather than be a party to procedures that promote an aura of secrecy, the Commission, in the interest of ensuring that sites selected for characterization are the best among the five nominated, should be pursuing a course more characteristic of an independent regulator than a DOE facilitator.

We wish we could share the NRC's confidence that these DOE decisions will lead to a licensible site; however, the general nature of the guidelines and DOE's position on past issues, such as the preliminary determination of suitability, have not been reassuring. We hope the NRC will retain the methodology and decision process in the contents required for the site characterization plan, thereby providing other parties, if not the NRC, with the opportunity to review and comment on those issues.

2. Minnesota favors the current language in 10 CFR 60.11 that provides for public comment on a draft site characterization analysis prepared by NRC staff. The NRC assumes that ongoing consultation and contact between the NRC, DOE and the states and affected parties eliminates the need for any formal public interaction with the NRC. The NRC, however, should not assume that the states or other interested parties will have the resources to participate in a manner similar to that of NRC and DOE. This was apparent when similar assumptions were made about the DOE/NRC staff concurrence meetings. Even if states and interested parties are to participate at that level, they lack some of the technical expertise needed to carefully and fully follow and understand the progress of this program in all its complexity.

The states and affected parties would find it extremely helpful to have a document, prepared by technical experts, that analyzes and identifies key issues associated with various aspects of the site characterization program. Many of the states and parties involved would depend on the NRC to provide this analysis before they submitted their comments to DOE. This is a critical point in the repository siting program and every effort should be made by NRC staff to enhance, rather than restrict, public comment and participation.

The desire to maintain an ongoing DOE/NRC interagency process is commendable and should be encouraged; however, it should not be considered a substitute for formal public review of the site characterization analysis. If scheduling mandates are to be emphasized, then we suggest that this interaction be depended on to reduce the amount of time needed by staff to prepare the analysis and compensate for the time required for public review of that analysis.

3. The proposed amendments, if adopted, would change 10 CFR Part 60.63(a) to read as follows:

State and local governments and affected Indian tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter. (Emphasis added.)

This proposed rule is nothing more than a reminder to states, local governments, and affected Indian tribes of the existence of 10 CFR Part 2, which governs procedure in NRC adjudications and which does not provide a state, local government or affected Indian tribes an absolute right to participation in NRC licensing proceedings even though the licensing proceeding will have a direct impact on the state, local government or affected Indian tribe.

Minnesota believes that the proposed rule amendment should be changed to provide an absolute right of participation in NRC hearings on licensing a high-level radioactive waste repository to those state, local and tribal governments which are affected by the proposed repository. The decision being made in such a proceeding will profoundly affect those entities. The possibility that these entities could be excluded from participation should be remedied.

Minnesota's position on this matter is prompted not only by the importance on the repository licensing matter, but also by the recent efforts of the NRC staff to "reform" the NRC's rules of practice so that states, local governments, and affected Indian tribes could be prevented from effectively participating in NRC licensing hearings of any kind. The staff's suggestions for "improving" the licensing process were published on April 12, 1984 (49 Fed. Reg. 14698). In a letter dated May 25, 1984, Minnesota strongly objected to those suggestions. A copy of that letter is attached. Minnesota continues to believe that those suggestions would adversely affect all future intervenors and would reduce the public's confidence in the NRC as a licensing body.

Minnesota urges the NRC to change the proposed language of 10 CFR Section 60.63(a) to read as follows:

Upon request, the government of any state, county, municipality or Indian tribe affected by the location of the proposed repository shall be granted party status in any hearing conducted by the Commission on the license application held pursuant to Subpart G of Part 2 of this chapter.

4. The existing 10 CFR Section 60.63 sets forth criteria for approval of state proposals to facilitate state participation. The proposed amendments would renumber Section 60.63(b)(2) to be Section 60.63(d)(2) and amend it to read as follows:

The proposed activities (i) will enhance communications between NRC and the state or affected Indian tribes, (ii) will make a productive and timely contribution to the review, and (iii) are authorized by law. (Emphasis added.)

The addition of the word "timely" in describing the type of contribution of a state or Indian tribe that would be looked upon favorably by the NRC could be used to further limit the participation of a state or Indian tribe in the review of a site characterization plan and/or a license application. While Minnesota recognizes the need to conduct the proposed activities in a manner that does not unduly delay license reviews, we also recognize that the states do not always have the expertise and personnel immediately available to address complex issues that will be considered by the NRC.

Based on our experience to date with the repository program, as well as our expectations regarding the pressures exerted on decision makers as the program progresses, we are concerned that the word "timely" will become the focal point of this qualification, despite the benefits that might accompany state participation. The key word is "productive" and, if a state can make a productive contribution to the review, the NRC should be willing to accommodate reasonable needs of states in providing that contribution.





# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III  
ATTORNEY GENERAL

ST. PAUL 55155

May 25, 1984

ADDRESS REPLY TO:  
ATTORNEY GENERAL'S OFFICE  
POLLUTION CONTROL DIVISION  
1915 WEST COUNTY ROAD B-1  
ROSELILLE, MN 55127  
TELEPHONE (612) 296-7542

• Secretary  
U. S. Nuclear Regulatory Commission  
Washington D.C. 20555

Re: Request for public comments on suggestions for procedural changes in nuclear power plant licensing process, 40 Fed. Reg. 14698 (April 12, 1984)

Dear Sir:

On April 12, 1984, the Commission published a request for public comments on suggestions for procedural changes in the nuclear power plant licensing process. (49 Fed. Reg. 14698.)

The State of Minnesota, by its Attorney General and its Minnesota Pollution Control Agency, (hereinafter "Minnesota") has reviewed the suggestions published in the Federal Register and wishes to comment on five aspects of the suggestions, as discussed below.

1. Creation of a Screening Atomic Safety and Licensing Board. It has been suggested that 10 C.F.R. Section 2.721 be revised to authorize the establishment of one or more Screening Atomic Safety and Licensing Boards. The screening boards would rule on requests for hearing, petitions for leave to intervene, and admissibility of contentions in all initial licensing proceedings.

Minnesota supports the adoption of this suggestion. The creation of screening boards should result in more consistency and predictability with respect to the rulings made by the Boards. Under the present system, an individual Atomic Safety and Licensing Board is appointed each time a request for hearing is received, and that individual Board makes its own determinations on requests for hearing, petitions for leave to intervene, and the admissibility of contentions. Because each Board is not necessarily aware of what is being done by other Boards or what other Boards have done in the past, there is potential for conflicting rulings on similar requests, petitions, and contentions. Minnesota believes that improving consistency and predictability as to these rulings by creating screening boards would benefit all parties.

2. Applying Judicial Standards of Standing. It has been suggested that 10 C.F.R. Section 2.714 be amended so that no person would be able to initiate a hearing on a nuclear power plant or intervene in a hearing on a nuclear power plant unless that person can meet judicial standards of standing. Specifically, 10 C.F.R. Section 2.714(f) is proposed to be amended as follows:

(f) Ruling on request for hearing or petition to intervene. The Commission or the presiding officer designated to rule on the intervention petition or request for hearing shall, in ruling on the request or petition shall [sic] consider the following factors, among other things:

(1) The nature of the requestor's or petitioner's right under the Act to be made a party to the proceeding.

(2) The nature and extent of the requestor's or petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the requestor's or petitioner's interest. No request for hearing or petition to intervene may be granted unless the Commission or the presiding officer designated to rule on the request or petition determines that the requestor or the petitioner meets judicial standards for standing.

Minnesota strongly objects to the suggestion because it is contrary to express provisions of the Atomic Energy Act (Act). Section 189 of the Act provides, in relevant part:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control; . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

(Emphasis supplied.) Under the Act, any person "whose interest may be affected" has standing to request a hearing or to intervene in a hearing and the Commission is required by the Act to grant such a hearing request or admit any such person as a party. The suggested amendment would require a person's request



or petition to be denied if the person could not meet the more stringent test that must be met to establish judicial standards for standing.

Judicial standards for standing are discussed in the leading case of Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). In that case the United States Supreme Court announced a two-part test for standing. Standing exists if "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," and if "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 152-153, 90 S.Ct. at 829-830.

The suggested amendment goes beyond the requirements of the Act and is thus beyond the Commission's statutory authority. Therefore the Commission cannot adopt the suggested amendment.

3. Changing the Requirements Relating to Contentions. It has been suggested that 10 C.F.R. Section 2.714 be amended to change the requirements relating to contentions. These changes, as discussed below, are significant, and Minnesota objects to these changes.

First, the suggested amendments would change the time for filing of contentions. The existing 10 C.F.R. Section 2.714(b) allows the person who requests a hearing or petitions to intervene to file his or her contentions "not later than fifteen (15) days prior to the holding of the special prehearing conference." The suggested amended 10 C.F.R. Section 2.714(g) requires the contentions and supporting information to be submitted "at the time the petition or request is filed." Second, the suggested amendments would greatly increase the burden on the person who requests a hearing or petitions to intervene to provide information supporting the contentions. The present regulation, 10 C.F.R. Section 2.714(b) only requires the "bases for each contention set forth with reasonable specificity." The suggested amended regulation 10 C.F.R. §2.714(g)(1) would require submission of the following:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and which at the time of the filing the requestor or petitioner intends to rely upon in proving its contentions at the hearing,

together with references to the specific sources and documents which will be relied upon to establish such facts or expert opinion.

(iii) Sufficient information (which may included information pursuant to §2.714(g)(1)(i) and (ii)) to show that a genuine dispute exists with the applicant <sup>1/</sup> on an issue of law, fact or policy. This showing must include references to the specific portions of the application (including the applicant's environmental and safety report) which the requestor or petitioner disputes and the supporting reasons for each such dispute, or, if the requestor or petitioner believes that the application fails to contain certain information on a relevant matter as required by law, the identification each such failure and the supporting reasons for the requestor's or petitioner's belief. On issuer arising under NEPA, a petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement or appraisal that differ significantly from the data or conclusions in the applicant's document. Amended or new contentions based on NRC environmental documents shall be filed and ruled upon in initial licensing proceedings in accordance with paragraph (j) of this section. (Emphasis supplied.)

The suggested amendments relating to contentions create an impossible situation for intervenors. Ordinarily, in accordance with the provisions of 10 C.F.R. §2.105(d), the Commission informs the public, in the Federal Register, about a proposed license or license amendment thirty days before the due date for the filing of requests for hearing or petitions to intervene. This has, in most cases, been just barely enough time for a potential intervenor to make a decision that it is interested in filing a request for hearing or a petition to intervene and to file the request or petition. Additional time is essential to allow for the drafting of contentions. Under the suggested amendments, potential intervenors will have a maximum of thirty

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<sup>1/</sup> History has shown that intervenors in Commission licensing proceedings are just as likely to have a genuine dispute with the Commission staff on issues of law, fact, or policy as with the applicant. If this suggested amendment is intended to limit litigation of disputes only to those between the applicant and the intervenor, this suggested amendment is not reasonable.

days to obtain a copy of the license application and supporting information, review that information, note all problems, develop a case-in-chief, put it in writing, and submit it within the deadline.

The requirement that intervenors must submit, along with their contentions, all of the information set forth in the suggested amendments to 10 C.F.R. Section 2.714(g)(1) amounts to a requirement that intervenors have ready their case-in-chief at the time of filing the request for hearing or petition to intervene, prior to the opportunity to conduct discovery. This requirement is much too onerous at the point in the proceeding where the only decision to be made is whether a particular contention is admissible. It is more onerous than the requirements in any judicial proceeding. Minnesota recognizes that this information must eventually be developed in order to have a meaningful presentation of the issues. However, this information should not be required at such a preliminary stage.

Under the suggested amendments, the only persons who have a hope of submitting an admissible contention are those who have been privileged to have received a copy of the license amendment as the same time as the Commission staff received it, who have followed the Commission staff review and the drafting of the proposed license or license amendment, and who have been preparing their case in chief prior to the publication of notice in the Federal Register of the existence of the license application. In a state such as Minnesota, which is a non-agreement state, it is doubtful that anyone, including the State and its agencies, could submit a successful request for hearing or petition to intervene.

In Minnesota's experience, the present rule allowing contentions to be filed just prior to the special prehearing conference has allowed sufficient time to prepare meaningful contentions and the statement of bases required by the present rule has provided sufficient information to allow the Licensing Boards to rule on their admissibility. Therefore the present rule should be retained. The suggested amendments are unreasonable and should be rejected by the Commission.

4. Requiring a Demonstration of Special Need for Cross Examination. It has been suggested that 10 C.F.R. Section 3.733 and 2.743 be revised to permit cross examination only upon the request of a party filed within 10 days after service of the written testimony concerning a particular issue and limiting cross examination only to those parties who have submitted an admissible contention on the issue. A motion to cross examine



must include a detailed cross examination plan and a statement as to why written testimony could not establish the same points.

Minnesota regards this suggestion as entirely unacceptable. The major purpose of a Commission licensing hearing is to adjudicate disputed facts. Trial-type procedures are not only appropriate but essential to develop a full and complete hearing record. The right of parties to cross examine witnesses in an adversarial proceeding is a fundamental characteristic of the adversarial process arising from basic constitutional principles of due process. There would have to be an extraordinarily good reason to remove that constitutional right entirely from persons who did not happen to file a contention on a given issue. Such a good reason is not demonstrated by the discussion of this suggestion. In fact, no reason is offered by the discussion of this issue.

There are perfectly legitimate reasons why an intervenor may wish to, and should have a right to, cross examine witnesses on issues raised by another party. Many intervenors, including states, have limited resources to devote to Commission licensing proceedings. They be forced by this fact to coordinate their efforts with other intervenors and to divide up the work with respect to issue in which they have a common interest. Thus two intervenors may, to avoid duplication of effort, agree between themselves to assert different contentions but to support each other with respect to the presentation of evidence and the cross examination of adverse witnesses concerning these contentions. In addition, given the complexity of the subject matter, an intervenor may discover that it is vitally interested in an issue which it did not initially identify. The Commission has no valid reason to cut off the rights of parties to fully participate in all issues which are the subject of the hearings.

Even where the suggested amendment allows a party an opportunity to make a motion for the right to cross examine witnesses, the terms of the suggested amendment is a de facto removal of the right to cross examination. It is totally unreasonable and unrealistic to expect a party who has been served with potentially voluminous testimony and exhibits to accomplish, within ten days, the tasks of reading and digesting the material, preparing a detailed cross examination plan, and preparing and submitting a written motion to the presiding officer. No person who has ever been a party to a Commission licensing proceeding could seriously suggest that ten days would be sufficient to accomplish all of this.

The time schedule established by this suggested amendment



contains serious potential for abuse by parties with substantial financial resources. For example, an applicant who wishes to ensure that its witnesses will not be cross examined has the opportunity to present the intervenors with thousands of pages of testimony and exhibits which would be clearly beyond the capability of the intervenor to review in time to file a motion for cross examination.

Minnesota emphatically objects to the suggested amendments regarding cross examination and urges the Commission not to consider them any further.

5. Limitations on Filing Proposed Findings of Fact, Conclusions of Law, and Exceptions. It has been suggested that 10 C.F.R. Sections 2.754 and 2.762 be amended to limit the filing of proposed findings of fact, conclusions of law, and exceptions on a given issue only to those parties who raised the issue in a contention. Applicants and Commission staff, however, would not be subject to this limitation.

Minnesota strenuously objects to this suggestion, as it will not further the Commission's interest in better decision-making and it will severely limit the full participation by intervenors. As discussed above, intervenors may have a significant interest in contentions raised by other parties. There is nothing inherently unfair about a party submitting its views as to the state of the record on an issue which has been duly raised in an adversarial proceeding. The filing of proposed findings of fact and conclusions of law does no harm; on the contrary, it could be of help to the decision-makers. The filing of valid exceptions by persons other than those who put an issue in controversy is likewise no threat to sound decision-making. This suggestion is not supported by any valid rationale and should not be adopted by the Commission.

Minnesota appreciates the opportunity to comment on the suggested amendments, which, if adopted, would have a profound impact on the ability of Minnesota to participate in any future Commission licensing proceedings. In general, the suggestions are inimical to intervenors and to the public. The suggestion that these amendments would "improve" the hearing process is

ironic. The "improvement" would consist of the elimination of all hearings other than those requested by applicants.

Very truly yours,

HUBERT H. HUMPHREY, III  
Attorney General

By Joelyn F. Olson  
JOCELYN F. OLSON

Mardene E. Senechal  
MARDENE E. SENECHAL

Special Assistant  
Attorneys General



RECORDED & INDEXED  
PR-60 ⑪  
(50 FR 2579)

20-10-10

MARK WHITE  
GOVERNOR

OFFICE OF THE GOVERNOR  
STATE CAPITOL  
AUSTIN, TEXAS 78711

September 9, 1983

Mr. Robert Browning  
Nuclear Regulatory Commission  
Washington, D.C. 20555

RE: Procedural Amendments to Nuclear Regulatory Commission 10 CFR 60,  
Disposal of High-Level Radioactive Wastes in Geologic Repositories

Dear Mr. Browning:

We have reviewed the draft materials distributed to state representatives at the meeting on August 19, 1983, at Dallas, and evaluated the various proposals relative to our interests in participating in Nuclear Regulatory Commission activities and decisions as they relate to disposal of high-level nuclear wastes in geologic repositories. We have also reviewed the existing appropriate sections of 10 CFR 60 to determine whether amendments are needed to have the rule conform to provisions of the Nuclear Waste Policy Act of 1982. We have determined that, while some minimal level of amendment to procedure is needed to achieve conformity with the Act, further amendment may be appropriate to enhance the efficiency and maintain the substance of an assured opportunity for interaction between an interested state and NRC.

We have chosen as a format for a response to your request for comment, a revision, in rule form, of the appropriate sections of 10 CFR 60. You will find this draft revision attached. Much of it will be familiar to you, as we have drawn heavily from sections of the existing 10 CFR 60, as well as from the two draft proposals presented in the Dallas meeting. Our focus was largely on Section 60.11 and Subpart C of the rule, as was yours, but you will note some major conceptual variation from your 8/17/83 Draft. I think you will find the proposal, overall, to be supportive of my statement in the Dallas meeting to the effect that we and other states are seeking an assured access to NRC activities and decisions that affect us as potential host states for a high-level nuclear waste repository. We also want that access to be one that does not result in an unnecessary burden on the NRC or the states, yet will result in a full and constructive relationship between the parties.

MAR 25 1985  
Acknowledged by card. *pd*

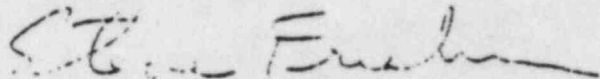
Mr. Robert Browning  
September 9, 1983  
Page 2

You will note in the attached proposed rule amendments that we have developed a procedure that removes the existing requirement for NRC to write and submit for public review a Draft Site Characterization Analysis. While we prefer the draft SCA process now standing in 10 CFR 60, we also recognize the advisory nature of the SCA and the need to expedite its transmittal to DOE. Thus we view our proposal to contain an acceptable alternative process by which substantially the same results can be achieved by NRC and the states, but in a manner that is less consumptive of time and resources on the part of all parties.

Our proposed changes to Subpart C, we think, preserve the opportunity for formal interaction between parties, while establishing a more permissive means of achieving that interaction. In addition, we have attempted to include only those provisions of the existing Subpart C that seem appropriate in light of the provisions of the Nuclear Waste Policy Act.

We appreciate the opportunity to respond to your draft proposals regarding NRC Rule 10 CFR 60. If you have questions or comments regarding our proposal please do not hesitate to contact me. I will be happy to discuss this matter further with you and your staff, at your convenience.

Sincerely,



Steve Frishman, Director  
Nuclear Waste Programs Office

SF:ez

Enclosure

cc: Mr. Holmes Brown, National Governor's Association



September 9, 1983  
10 CFR PART 60 - DISPOSAL OF HIGH-LEVEL WASTES IN GEOLOGIC REPOSITORIES

1. The Authority citation for Part 60 continues to read as follows:

AUTHORITY: Secs. 51, 53, 52, 63, 65, 97, 151, 182, 183, 68 Stat. 529, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2072, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); sec. 121, Pub. L. 97-425, 96 Stat. 2223 (42 U.S.C. 10141).

2. Section 60.2 is revised by inserting, in the appropriate alphabetical location, a definition of the term "affected Indian tribe."  
As revised, §60.2 reads:

60.2 Definitions.

As used in this part --

"Affected Indian tribe" means an affected Indian tribe as defined in the Nuclear Waste Policy Act of 1982.

3. Section 60.2 is further amended by deleting the definitions of "Indian tribe" and "Tribal organization."
4. Section 60.10 is redesignated as §60.15.

- (v) Plans to apply quality assurance to data collection, recording, and retention.
  - (3) Plans for the permanent closure, decontamination, and dismantlement of surface facilities and for the mitigation of any significant adverse environmental impacts caused by site characterization activities, if such area is determined unsuitable for application for a construction authorization for a geologic repository operations area;
  - (4) Criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act of 1982, to be used to determine the suitability of such area for the location of a geologic repository; and
  - (5) Any other information which the Commission, by rule or order, requires.
- (b) A description of the possible waste form or waste package for the high-level radioactive waste to be emplaced in such geologic repository, a description (to the extent practicable) of the relationship between such waste form or waste package and the host rock at such area, and a description of the activities being conducted by DOE with respect to such possible waste form or waste package or such relationship; and
- (c) A conceptual design for the geologic repository operations area that takes into account likely site-specific requirements.

§ 160.19 Review of site characterization activities

- (a) The Director shall cause to be published in the Federal Register a notice that a site characterization plan has been received from DOE and that a staff review of such plan has begun. The notice

shall identify the area to be characterized and the NRC staff members to be consulted for further information.

- (b) The Director shall make a copy of the site characterization plan available at the Public Document Room. The Director shall also transmit copies of the published notice of receipt to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe.
- (c)
  - (1) The Director shall review the site characterization plan and prepare a site characterization analysis with respect to such plan.
  - (2) The Director shall, in the Federal Register notice provided for in Section 60.18(a), request comment from affected states, Indian tribes, and interested persons which he will review and consider in preparing the site characterization analysis and additional comments and recommendations.
  - (3) The Director shall also review and consider comments and questions submitted in the DOE public hearings held according to Section 113(b)(2)(3) of the Nuclear Waste Policy Act of 1982, and the Director shall review and consider DOE responses to such questions and comments in his preparation of the site characterization analysis and additional comments and recommendations.
- (d) The Director shall provide to DOE his site characterization analysis, together with a summary of comments received under Section 60.18(c)(2) and his response to those comments, and such additional comments as may be warranted. Such comments shall include either a list -

that the Director has no objection to the DOE's site characterization program, if such a statement is appropriate, or specific objections with respect to DOE's program for characterization of the area concerned. In addition, the Director may make specific recommendations pertinent to DOE's site characterization program.

- (e) If DOE's planned site characterization activities include onsite testing with radioactive material, the Director's comments shall include a determination, if appropriate, that the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under §60.22 of this part.

(NOTE: 60.22 appears to need revision to support Subsection (e))

- (f) The comments of the Director under this section shall not constitute a commitment to issue any authorization or license or in any way affect the authority of the Commission, the Atomic Safety and Licensing Appeal Board, Atomic Safety and Licensing Boards, other presiding officers, or the Director, in any proceeding under Subpart G of Part 2 of this chapter.

- (g) During the conduct of site characterization activities, DOE shall report not less than once every six months to the Commission on the nature and extent of such activities and the information that has been developed and on the progress of waste form and waste package research and development. The semiannual reports shall include the results of site characterization studies, the identification of new issues, plans for additional studies to resolve



new issues, elimination of planned studies no longer necessary, identification of decision points reached and modifications to schedules where appropriate. DOE shall also report its progress in developing the design of a geologic repository operations area appropriate for the area being characterized, noting when key design parameters or features which depend upon the results of site characterization will be established. Other topics related to site characterization shall also be covered if requested by the Director.

- (h) During the conduct of site characterization activities, NRC staff shall be permitted to visit and inspect the locations at which such activities are carried out and to observe excavations, borings, and in situ tests as they are done.
- (i) The Director may comment at any time in writing to DOE, expressing current views on any aspect of site characterization. Comments received in accordance with this Section and Section 60.64 shall be considered by the Director in formulating his views.
- (j) The Director shall transmit copies of the site characterization analysis including the comment summary and response required under Section 60.18(d), all comments to DOE made by him under this section to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe.

(k) All correspondence between OCE and the NRC under this section, including the reports described in paragraph (g), shall be placed in the Public Document Room.

(l) The activities described in paragraphs (a) through (k) above constitute informal conference between a prospective applicant and the staff, as described in §2.101(a)(1) of this chapter, and are not part of a proceeding under the Atomic Energy Act of 1954, as amended.

Section 60.61 Provision of Information

- (a) The Director shall provide to the Governor and Legislature of any State containing a site which has been approved for site characterization, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made by the commission with respect to the site characterization, siting, development, design, licensing construction, operation, regulation, permanent closure, decontamination and dismantlement of surface facilities of any proposed repository at such site.
- (b) Notwithstanding paragraph (a), the Director is not required to distribute any document to any entity if, with respect to such document, that entity or its counsel is included on a service list prepared pursuant to part 2 of this chapter.
- (c) Copies of all communications by the Director under this section shall be placed in the Public Document Room and copies thereof shall be furnished to DOE.

Section 60.62 Site Review

- (a) Upon approval of a site for site characterization and upon request of a state, or Indian tribe, the Director shall make available NRC staff to consult with representatives of states and Indian tribes to keep them informed of the Director's view on the progress of site characterization

and to notify them of any subsequent meetings or further consultations with the Department of Energy.

- (b) Requests for consultation shall be made in writing to the Director.
- (c) Should the State, Indian tribe, or other interested person direct questions or comments in accordance with section 60.18(c)(2) to NRC concerning the preparation of the site characterization analysis, the Director shall review and consider such comments and questions in the preparation of the site characterization analysis. In addition, he shall summarize and respond to such comments and questions and provide such summary and response to DOE in accordance with Section 60.18(d).
- (d) Consultation under this section may include, among other things, a review of applicable NRC regulations, licensing procedures, potential schedules, and the type and scope of State activities in the license review and site characterization plan review. In addition, staff shall be made available to cooperate with the State in developing proposals for participation by the State.

#### Section 60.63 Filing of Proposals for State Participation

- (a) State and local governments and affected Indian tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter.
- (b) States in which sites have been approved for site characterization may submit to the Director a proposal for State participation in the review of the site characterization activity reports and/or license application.



A state's proposal to participate may be submitted at any time prior to docketing of an application or up to 120 days thereafter.

- (c) Proposals for participation under this Subpart shall be made in writing and signed by the Governor of the State or the official designated by State law or by joint designation of the governor and legislature.
- (d) Items which may be presented for consideration, in whole or in part, subject to revision by the State, in a proposal for State participation include but are not limited to:
  - (1) A general description of how the State wishes to participate in the review and a preliminary identification of issues which it wishes to review.
  - (2) A preliminary description of material and information which the State plans to submit to the NRC staff for consideration in the review.
  - (3) Services or actions which the State may request such as seminars, public meetings, additional Public Document Rooms, or employment or exchange of State personnel under the Intergovernmental Personnel Act.

#### Section 60.64 - Approval of Proposals

- (a) The Director and a representative of the State shall jointly arrange for meetings between the representatives of the State and the NRC staff to

discuss any proposal submitted under Section 60.63(b), with the primary goal of identifying any modifications that may contribute to the effective participation by the State.

- (b) The Director shall approve all or any part of a proposal as it may be modified through the meetings described above if it is determined that the proposed activities:
  - (1) will enhance communications between NRC and the State,
  - (2) will contribute productively to the license review and/or site characterization activity report reviews, and
  - (3) are not prohibited by law.
- (c) The decision of the Director shall be transmitted in writing to the Governor or designated official of the originating State. A copy of the decision shall be made available at the Public Document Room. If all or any part of a proposal is rejected, the decision shall state the reason for the rejection.
- (d) The State originating the proposal may appeal the rejection of all or any part of a proposal to the Commission.
- (e) A copy of all proposals received shall be made available at the Public Document Room.

Section 60.55 Participation by Indian Tribes

(NO CHANGES SUGGESTED IN THIS SECTION)

Section 60.56 Notice to States. If the Governor and Legislature of a State have jointly designated on their behalf a single person or entity to receive notice and information from the Commission under this part, the Commission will provide such notice and information to the jointly designated person or entity instead of the Governor and Legislature separately.

Section 60.57 Coordination

The Director may take into account the desirability of avoiding duplication of effort in taking action on multiple proposals submitted pursuant to the provisions of this Subpart to the extent this can be accomplished without substantial prejudice to the parties concerned.



JONES EUBANK

PROPOSED RULE

PR-60 (12)  
(50 FR 2579)MARK WHITE  
GOVERNOROFFICE OF THE GOVERNOR  
STATE CAPITOL  
AUSTIN, TEXAS 78711

September 19, 1984

Mr. Robert Browning, Director  
Division of Waste Management  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. Browning:

We appreciate the opportunity for continued consultation with you and your staff on the draft revision of 10 CFR 60 -- "Disposal of High-Level Radioactive Wastes in Geologic Repositories". While we find no objection to most of the proposed modifications, there are several key points on which we are compelled to comment: (1) opportunity for state comment on the NRC site characterization analysis prior to its submission to the Department of Energy, (2) irrevocable commitment by NRC to explicitly respond to the affected state comment on site characterization analyses, and (3) a defined mechanism for appeal to the Commission of state participation decisions by the Director of the NRC Office of Nuclear Material Safety and Safeguards (NMSS). Section references below apply to the July, 1984 draft revision to 10 CFR 60 (Document 7590-01).

Items (1) and (2) above concerns subpart B, sections 60.15 through 60.18 addressing site characterization. In order to offer explicit comments on these sections, knowledge of the mechanics and schedule of interactions between NRC and DOE in the site characterization process is necessary. The Nuclear Waste Policy Act provides broad guidance on this portion of the high-level waste disposal program. The Act also provides in section 117 that the Commission shall provide timely and complete information for, among other things, site characterization plans. Consistent with these provisions of the Act, we recommend that one or more meetings be held for DOE, NRC, potential host states, and affected Indian tribes to develop the mechanics of the interactions surrounding the site characterization plan, site characterization analysis, comments of the affected states and Indian tribes, and the initiation of site characterization activities. Until this process is adequately defined we cannot prepare comprehensive comments on the portions of 10 CFR 60 addressing participation in the site characterization planning process.

In spite of the uncertainty presented by the lack of detail for the site characterization planning process, we have prepared comments on the current draft revision of 10 CFR 60 based on assumptions regarding details of that process. The three key assumptions are: (a) the DOE will not commence site

MAR 25 1985  
Acknowledged by card.....



characterization until the final site characterization analysis has been submitted to them and addressed, (b) the NRC will be allocated sufficient time to complete a comprehensive process for assessment of the DOE site characterization plan, and (c) the DOE site characterization plan will be modified to address the issues presented in the site characterization analysis before site characterization begins. As noted above, final comments on 10 CFR 60 cannot be prepared until these key issues are definitively addressed.

With respect to the opportunity for state input, the revised rule contains two relevant provisions. At subsection 60.18(c) the Director of NMSS is permitted (but not required) to "invite and consider the views of interested persons on DOE's site characterization plan". This mechanism could allow some affected state input but only at the discretion of the Director, and the comments would not be based on a draft site characterization analysis, in view of the removal of this provision in the draft revision. The other relevant provision (subsection 60.18(f)) of the draft revision instructs the Director of NMSS to request public comment on the site characterization analysis, but it is our understanding that the opportunity for comment will occur after the site characterization analysis is submitted to the DOE and further that the comments will then simply be filed in the NRC Public Document Room.

We submit that offices and agencies of each potential host state are uniquely qualified, because of extensive familiarity with geotechnical and other factors regarding the potential sites and vicinities, to identify relevant issues to be addressed in the site characterization plans and the analyses of those plans. For example, in Texas, we have obtained data from the Texas Department of Water Resources on quality and availability of water from a water-bearing unit that had not been considered by DOE. This recognition of unique state perspective was, in fact, noted by the NRC in NUPES-0539, "Means for Improving State Participation in the siting, Licensing, and Development of Federal Nuclear Waste Facilities."

The need for greater state input in the licensing process was clearly articulated in one of the key waste management studies of recent years, the "Report of the President by the Interagency Review Group on Nuclear Waste Management (TID-29442, pp. 95-96). Although, the Nuclear Waste Policy Act requires that hearings be held in the vicinity of sites to be characterized, our experience suggests that DOE responses to these comments will not be adequate. The critical licensing role played by NRC should enhance the likelihood of DOE attention to concerns identified by the states if the NRC finds merit in those concerns and passes them on to DOE in the site characterization analysis.

With respect to our concern that the NRC respond directly to comments of affected states, the key role of these states in the high-level waste management issue is clearly articulated in the Nuclear Waste Policy Act. State leadership of the affected states is identified as the focal point for interaction between the federal government and affected parties. Because of that

Mr. Robert Browning, Director  
Division of Waste Management  
September 19, 1984  
Page 3

responsibility, it is essential that the state receive direct responses to concerns submitted to federal authorities on key program documents -- such as the site characterization analysis. We, therefore, recommend alteration of 10 CFR 60 to include an irrevocable commitment for direct NRC response to state comments on that document. Congress recognized the states' critical need for full information and, furthermore, grants specific authority to obtain that information in section 117 of the Nuclear Waste Policy Act.

Finally, item (3) above concerns the provision in subpart C, subsection 60.63(e) which states that the Director of NMSS will accept or deny state participation proposals. In view of the relatively subjective determination required to make such a decision based on the specified criteria (subsection 60.63(d)), we are concerned that a mechanism be defined for appeal of unfavorable decisions to the Commission. Based on discussions with you and your staff on July 27, 1984 and August 9, 1984, we understand that staff decisions can always be appealed to the Commission itself and explicit statement of that option in 10 CFR 60 is not required. This understanding, if correct, sufficiently addresses our concern about this provisions. We strongly support your suggestion that language noting this opportunity for appeal to the Commission be included in the Statement of Consideration for this rule.

We appreciate your providing a copy of your draft revision of 10 CFR 60 for review. I hope these comments are helpful in this revision of the high-level radioactive waste disposal regulations.

Yours truly,



Dan Smith, Assistant Director  
Nuclear Waste Programs Office

25102

✓cc: Steve Frishman, Director, Nuclear Waste Programs Office



RECEIVED BUREAU  
RECORDED FILES PR-60 (13)  
(50 FR 2579)

Division of Planning and Natural Resources

COEUR d'ALENE TRIBE OF IDAHO

Coeur d'Alene Tribal Headquarters  
PLUMMER, IDAHO 83851

16 March 1985

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D. C. 20555

'85 MAR 25 / P4:31

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Sir:

This is to comment on the proposed rulemaking of Jan. 17, 1985 (Federal Register, Vol. 50, No. 12, p. 2579), limiting notification, funding, and participation by Indian Tribes to those having "affected status" as defined under the Nuclear Waste Policy Act of 1982. Thus Section 60.2 would change "Indian Tribe" and "Tribal Organization" to "affected Indian Tribe" as defined in the NWPA, which requires that "affected status" be determined by the Secretary of the Interior. I would bring to your attention that the Secretary has found the Coeur d'Alene Tribe not entitled to "affected status" even though Lake Coeur d'Alene (one-third of which lies within the Coeur d'Alene Indian Reservation) and the Coeur d'Alene River and its tributaries are crossed, recrossed, and skirted through much of their length by Interstate 90, a primary transportation route to the proposed Hanford repository, and even though the Tribe's Reservation lies downwind from Hanford in an area where the soil has been transported from as far away as Oregon by the prevailing winds, which blow from Hanford for the major part of the year. The definition is in any case rather peculiar, giving more importance to areas outside reservations, where Tribes have no more than fishing hunting, and gathering rights, than to Reservation lands themselves, where Tribal members live.

In conjunction with Section 60.63, which now is to read " . . . State and local governments and affected Indian Tribes may participate in license reviews . . . ." the Coeur d'Alene Tribe is thus entirely excluded from the process, even though the potential damage to its lands certainly exceeds that to any local government's lands. The NRC should provide a means by which Tribes which do not meet the peculiar definition of "affected Tribe" even though subject to transportation and windborne effects, can receive funding for effective participation in the process.

Respectfully,

*James C. Albrecht*

James C. Albrecht  
Natural Resources Planner

*10-10-85  
add Carl Puchner, 11-1-85  
James C. Albrecht, 11-1-85  
Edward Regner, 12-5-85*

Acknowledged by card. MAR 25 1985 *pd*



Department of Energy  
Washington, D.C. 20585

DOE NUMBER  
PROPOSED RULES PR-60  
(50 FR 2579)

(14)

MAR 21 1985

Mr. Samuel J. Chilk  
Secretary of the Commission  
Attention: Docketing and Service Branch  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. Chilk:

The Department of Energy is pleased to respond to the request of the Nuclear Regulatory Commission (NRC) for comments on the proposed procedural amendments to 10 CFR 60, published on January 17, 1985 (50 Federal Register 2579). The proposed amendments should bring the regulation in line with the Nuclear Waste Policy Act of 1982. Attached are our comments with recommended alternative language where appropriate. Most of our recommended changes to the proposed or existing rules are in the line-in/line-out form. Recommended additions are underlined and recommended deletions are in brackets. For each recommended change, we have added a brief rationale. We are available to meet with NRC concerning the enclosed comments.

Sincerely,

*Ben C. Rusche*  
Ben C. Rusche, Director  
Office of Civilian Radioactive  
Waste Management

Enclosure:

DOE Comments on NRC Proposed Revisions to 10 CFR Part 60

Acknowledged by card..... MAR 25 1985 *pd*



1.3 COMMENTS ON SUPPLEMENTARY INFORMATION

DOE notes that the first footnote to page 2580 of the proposed rule identifies that the Content of Application Section (60.21) will be reviewed after issuance of the DOE Siting Guidelines. We would encourage the NRC to propose any necessary revisions to this section as soon as practicable in order to ensure that any additional data deemed necessary by the NRC staff to make a finding can be factored into the site characterization activities and to minimize any unnecessary delay in the license application preparation activities which DOE has already begun.

In addition, Commissioner Asselstine requested comments on two matters set forth at page 2588 of the Proposed Rule. With regard to the first point raised by Commissioner Asselstine, DOE agrees with NRC that discussion of the site screening and selection process in the site characterization plans is neither necessary nor appropriate. This information will have already received extensive and sufficient public review, including a review by the NRC staff, during preparation of the site specific environmental assessments. Therefore, DOE agrees with the deletion of the requirement in the existing 10 CFR 60.11 as proposed by NRC. The second point raised by Commissioner Asselstine deals with the timing of public review of NRC's site characterization analyses. DOE agrees with NRC that circulation of a draft site characterization analysis for public comment is not necessary and that the rule should be promulgated as now proposed. Under the proposed rule, the public will have a sufficient opportunity to comment on the site characterization analyses and to make the NRC aware of its concerns at any time during the site characterization process. Also, DOE will be interacting extensively with NRC and the States and Indian tribes prior to the release of the site characterization plans. This will allow all parties ample opportunity to comment on DOE's planned activities during site characterization.

2.0 SECTION-BY-SECTION ANALYSIS

(The underlined wording should be inserted for the reasons specified in the rationale.)

Subpart B

|                                     |   |
|-------------------------------------|---|
| 60.15(c)<br>(presently<br>60.10(c)) | NRC has stated that it will be revising 10 CFR Part 51 to make it consistent with the NWPA. Pending this revision, NRC should footnote the cross reference to Part 51.40 in Section 60.15(c) to indicate that NWPA has superseded the current Section 51.40(d). This footnote should identify Section 114(f) of the NWPA as containing the environmental review provisions applicable to high-level nuclear waste repositories. |
|-------------------------------------|---|

60.15 (d) (2) The number of exploratory boreholes and shafts shall be limited to the extent practical, consistent with obtaining the information needed for site characterization, and with mine safety considerations.

Rationale: Safety considerations might require more shafts than are strictly necessary for site characterization.

60.16,  
60.17 In the proposed revisions to these sections, the word "area" is used synonymously with the term "candidate site", as defined in the NWA and the Siting Guidelines. Although NRC has expressed a preference not to adopt the statutory term in this case, DOE strongly believes that both agencies should adhere to the statutory terminology to the greatest extent possible, in order to avoid the confusion that would result from the two agencies having different names for identical concepts. Accordingly, DOE urges that NRC adopt the term "candidate site", and make any additional changes necessary to give its regulations the maximum congruence with statutory terminology.

60.18 (d) Within 150 days of receipt of a site characterization plan from DOE, the director shall provide to DOE the site characterization analysis together with such additional comments as may be warranted. These comments shall include either a statement that the Director has no objection to the DOE's site characterization program, if such a statement is appropriate, or specific objections with respect to DOE's program for characterization of the area concerned. In addition, the Director may make specific recommendations pertinent to DOE's site characterization program.  
Within 90 days of receipt of a site characterization plan from DOE, the Director shall provide to DOE specific comments that, in the Director's view, should be considered by DOE prior to the sinking of exploratory shafts.

Rationale: The sinking of exploratory shafts at a candidate site is a critical path activity in each site characterization program. The site characterization programs themselves are critical path activities in the overall waste management program. Accordingly, it is essential that a specified time be established for significant events that could affect those critical path activities. The comments of NRC on a site characterization plan is one of those significant events. The suggested modification to Section 60.18(d) provides for two such specified time intervals: first, a ninety (90) day period within which NRC will provide to DOE those specific comments

considered by DOE prior to sinking exploratory shafts; the second, a 150-day period for issuing the overall site characterization analysis. The ninety (90) day period is consistent with the time being planned for public review and comment on the SCP's. This will ensure timely consideration of all comments prior to sinking of exploratory shafts and minimize the potential for delays.

60.18 (e)

If DOE's planned site characterization activities include on-site testing with radioactive material, the Director's comments shall include a determination, if appropriate, that the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under 60.22 of this part.

The Commission will concur in the use of radioactive tracers if, at the end of site characterization, they will be present in the geologic repository operations area in concentrations less than those allowed by Table II, 10 CFR 20. The removal of these trace amounts at the end of site characterization shall not be required.

Rationale:

The regulation does not differentiate between "10 metric tons of spent fuel" (the maximum amount permissible under Section 13(c)(2)(B)(i)) and small amounts of radioactive tracers. The proposed change is necessary to allow DOE the flexibility to use radioactive tracers if necessary in conducting site characterization activities.

60.18 (h)

During the conduct of site characterization activities, NRC staff shall be permitted ... as they are done in accordance with the Procedural Agreement and implementing project specific agreement between NRC and DOE in effect at that time.

Rationale:

DOE suggests that the regulation specifically reference the existing DOE/NRC Procedure Agreement and the project specific implementing agreement to preclude any questions concerning their future applicability.

New Section

60.\_\_\_\_

Timely Commission Action

The Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than --

1. January 1, 1989, for the first such application and January 1, 1992, for the second such application; or

2. The expiration of three years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established by law;

whichever is later.

Rationale:

This recommended new section would recognize the NRC's responsibility under Section 114(d) of the NWPA to reach a decision on construction authorization within the timetable set forth therein. DOE believes this timetable to be stringent, and therefore also believes that a specific regulatory provision to the effect of this recommendation is desirable, in order to emphasize the NRC's dual obligations to conduct its licensing proceedings in a full, fair and open manner, but also to reach its decisions in a timely manner.



JOHN H. HARRIS  
RECORDED 2025  
PR-60 (15)  
(50 FR 2579)

HARMON, WEISS & JORDAN

2001 S STREET, N.W.

SUITE 430

WASHINGTON, D.C. 20099

GAIL MCGREEVY HARMON  
ELLYN R. WEISS  
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DIANE CURRAN  
DEAN R. TOUSLEY

TELEPHONE  
(202) 328-3500

OFFICE OF THE  
DOCKETING & SERVICE  
BRANCH

April 8, 1985

Samuel Chilk, Secretary  
U.S. Nuclear Regulatory Commission  
ATTN: Docketing and Service Branch  
Washington, D.C. 20555

Dear Mr. Chilk:

Enclosed are the Comments of the Confederated Tribes and Bands of the Yakima Indian Nation on the Proposed Amendments to 10 CFR Part 60, 50 Fed. Reg. 2579.

Sincerely yours,

*Dean R. Tousley*

Dean R. Tousley

ASSOCIATE ATTORNEY FOR  
THE YAKIMA INDIAN NATION

Enclosure

cc: Mr. Melvin R. Sampson  
Mr. Russell Jim  
Mr. James B. Hovis

Acknowledged by card..... APR 9 1985

*pt*

10-10-85 10:31

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF  
GENERAL INVESTIGATION  
AND  
INSPECTION  
BRANCH

|                                    |   |                   |
|------------------------------------|---|-------------------|
| -----                              | ) |                   |
| Disposal of High-Level Radioactive | ) |                   |
| Waste in Geologic Repositories;    | ) | 10 CFR Part 60    |
| Amendments to Licensing Procedures | ) | 50 Fed. Reg. 2579 |
| -----                              | ) |                   |

COMMENTS OF THE YAKIMA INDIAN NATION

Pursuant to Nuclear Regulatory Commission notice published January 17, 1985, 50 Fed. Reg. 2579, the Confederated Tribes and Bands of the Yakima Indian Nation submit the following comments on NRC's proposed amendments to licensing procedures for disposal of high-level radioactive waste in geologic repositories, 10 CFR Part 60. Except for the two matters discussed below, the Yakima Indian Nation has no objections to the other proposed amendments to Part 60.

I. THE COMMISSION INCORRECTLY CONCLUDES THAT IT LACKS AUTHORITY TO REVIEW DOE'S SITE SELECTION PROCESS.

The proposed amendments to 10 CFR Part 60 would eliminate the provision in 10 CFR § 60.11 that the NRC review DOE's repository site selection process. The Commission concludes that, since the Nuclear Waste Policy Act ("NWPA") does not explicitly provide for NRC review of the site screening and selection processes of the Department of Energy, "[s]uch a review by NRC is not necessary to fulfill any of its statutory responsibilities." 50 Fed. Reg. 2583, col. 2. The Yakima Indian Nation strongly disagrees.

Apart from ignoring clear statutory authority to engage in a review of DOE's site selection process, NRC's failure to do so would be a policy mistake with profound implications for the likelihood of success of the national radioactive waste disposal program.

- A. NRC review of DOE's site selection process is not only authorized, but is required by the Atomic Energy Act of 1954, the Energy Reorganization Act of 1974, the National Environmental Policy Act of 1969, and the Nuclear Waste Policy Act of 1982.

The lack of explicit NHPA provisions for NRC review of DOE's site selection process--other than the Commission's concurrence in the general siting guidelines--does not dispose of the possible sources of statutory authority for the Commission to do so. On the contrary, the NHPA quite clearly provides that NRC authority to promulgate technical requirements and criteria (i.e., Part 60) is pursuant to "other provisions of law." NHPA § 121(b)(1)(A). The NHPA specifically mentions as such authority the Atomic Energy Act of 1954 (42 U.S.C. § 2011 *et seq.*) and the Energy Reorganization Act of 1974 (42 U.S.C. § 5801 *et seq.*). Thus, Congress did not intend in the NHPA to prescribe the scope of NRC review of DOE's repository program. Rather, the authority for NRC requirements and their appropriate scope are derived from those "other provisions of law."

The Atomic Energy Act, as amended by the Energy Reorganization Act, is the NRC's organic statute. It assigns to the NRC the primary responsibility for assuring that the public health and safety and the environment are adequately protected

from the hazards associated with activities involving radioactive materials, including disposal. Section 202 of the Energy Reorganization Act explicitly establishes NRC authority to license and regulate high-level waste repositories, 42 U.S.C. § 5842.

In sharp contrast to questions of nuclear power plant safety, the primary determinant of the adequacy of a high-level radioactive waste repository over the very long periods of concern will be not engineered features, but rather the natural, geologic characteristics of the site chosen. Congress emphasized this point when it required in the NWSA that detailed geologic considerations should be the primary criteria for the selection of sites for repositories, NWSA § 112(a), and when it established elaborate procedures for the selection of sites. See NWSA §§ 112-118. This primacy of natural site conditions in determining the adequacy of a proposed repository means that siting is the absolute essence of the NRC's mandated public health and safety and environmental protection responsibilities under the above-cited statutes.

The repository site selection process is by far the most important aspect of the adequacy of the repository program. Thus, for NRC to decline to review that process in the crucial early stages of selecting sites for characterization would be a basic abdication of its public health and safety and environmental protection responsibilities under the Atomic Energy Act and Energy Reorganization Act. NRC cannot hope to adequately discharge its responsibilities by deferring its review of the sites until the stage of repository construction authorization.



Moreover, the Commission's responsibilities under the National Environmental Protection Act ("NEPA") require it to engage in evaluation of alternatives as a part of its licensing process. Under NWPA § 114(f), the Commission must, to the extent practicable, adopt the environmental impact statement submitted by DOE with its application for construction authorization as its own. Under the same section, the alternatives considered in that EIS for purposes of NEPA compliance are those

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).

Thus, the sites which DOE selects for characterization now will be the only effective alternatives that the Commission will have to consider in fulfilling its NEPA responsibilities. It was precisely in recognition of this fact that the Commission required, as a condition of its concurrence in DOE's siting guidelines, that DOE agree to make the "preliminary determination of suitability" at the end of site characterization instead of before it, as DOE had proposed. The Commission recognized at that time that if DOE did not have strong incentives to select the most suitable sites for characterization, the Department might later come to the Commission with an EIS which considers unacceptable alternatives.

For the same reason of satisfactory NEPA compliance, the Commission must play an active role in reviewing DOE's comparison and selection of sites for characterization. Indeed, NEPA was cited by the Commission as its primary authority for the original

promulgation of Part 60. 46 Fed. Reg. 13922. The same NEPA responsibilities which prompted the original promulgation of Part 60, including its requirement for NRC review of DOE's site selection process, remains unaltered by the NWPA.

In the most important court case interpreting the Commission's role in NEPA implementation, the U.S. Court of Appeals for the D.C. Circuit wrote:

NEPA requires that an agency must--to the *fullest* extent possible under its other statutory obligations--consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual.

...  
Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings.

*Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1128 (D.C. Cir. 1971)

(Emphasis in the original). The only alternatives which the Commission need consider under the NEPA modifications included in the NWPA are the three sites which are selected for characterization by DOE. NWPA § 114(f). If DOE selects for characterization sites which are unlikely to prove to be suitable alternatives for NEPA purposes, NRC will not have an acceptable EIS which it can adopt.

Since ultimate NRC satisfaction of its NEPA responsibility is being profoundly affected by present DOE actions in selecting sites for characterization, there can be no question but that this is an "important, appropriate and nonduplicative stage of [the] proceeding" which requires NRC's "full exercise of its substantive discretion". Only aggressive NRC review and oversight of the DOE

selection of sites for characterization can ensure the Commission's ability to adopt the DOE EIS.

Finally, the NWPA explicitly does not compel the Commission to amend or narrow the scope of its licensing requirements. NWPA § 114(f) states, in part:

*nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act .... Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear [sic] Regulatory Commission as established in title II of the Energy Reorganization Act of 1974....*

(Emphasis added.) Congress was well aware of the existing provisions of Part 60 when it passed the NWPA, and incorporated many of them in the Act. However, in light of the above language, it could not be more clear that Congress did not intend its failure to incorporate all of the details of Part 60 in the Act to be deemed as implicit rejections of them. Inconsistent provisions, such as the Commission properly addresses in other aspects of the instant proposal, obviously warrant amendments by the NRC. On the other hand, where Congress was silent on a subject already addressed by the Commission in Part 60--such as NRC review of DOE's site selection process--Congress made plain its intent that NRC licensing and regulatory requirements not be deemed implicitly curtailed by any provision in the NWPA.

Thus, the Commission's conclusion that the NWPA *by omission* somehow proscribes its review of DOE's site selection process is patently incorrect. As discussed above, Commission responsibilities under its organic statutes and NEPA require such

a review, and the NWPA is entirely consistent with those requirements.

#### Recommendation

The Commission should amend Part 60 to explicitly mandate thorough NRC review of the draft EAs, including the methodology used by DOE in the comparison of sites. Provision for only a partial NRC EA review in the NRC/DOE Procedural Agreement is not sufficient, since the NRC's failure to review DOE's comparison methodology is a basic abdication of its statutory responsibilities, and the Procedural Agreement is too easily amended without the benefit of public participation.

- B. NRC failure to review DOE's site selection process and comparison methodology would be a policy mistake which significantly increases the chance for another major failure in the nation's nuclear waste disposal program.

Policy considerations apart from any statutory requirements argue even more strongly for NRC review of DOE's site comparison and selection process. If DOE makes serious missteps in its site selection process (as virtually all of the affected parties believe they are doing now), the Commission's only recourse at the time a final site is selected will be to reject DOE's application for a construction authorization. Certainly the adverse implications of such a development for the successful and timely implementation of a repository would far outweigh any possible costs associated with a less deferential Commission stance on site selection for characterization now.

Serious federal efforts to locate a repository have been thwarted at least twice in the past by the technical and political siting blunders of DOE's predecessor agencies. The extensive



state and tribal participation prescribed by the NHPA for the siting process ought to do much to improve the political atmosphere, but it does not substitute for thorough technical oversight by the agency responsible for protecting public health and safety and the environment--the NRC.

In sum, the Yakima Indian Nation strongly supports the position expressed by Commissioner Asselstine, 50 Fed. Reg. 2588, that NRC should retain the 10 CFR § 60.11 requirement for NRC review of the site screening and selection process which is now to be documented in the environmental assessments. Alternatively (but less desireably), the Commission should require a thorough site selection discussion in the site characterization plans pursuant to its authority under NHPA § 113(b)(1)(A)(v), and the Commission should thoroughly review that discussion in its site characterization analysis.

II. THE COMMISSION SHOULD RETAIN THE PRESENT REQUIREMENT FOR ISSUANCE OF A DRAFT SITE CHARACTERIZATION ANALYSIS FOR PUBLIC COMMENT.

The Commission contends that the 10 CFR § 60.11 requirement for issuance of a draft site characterization analysis ("SCA") for public comment is no longer needed because of the new timing for a site characterization plan ("SCP") and the prior opportunities for interactions among DOE and other program participants. While the NHPA does provide for additional opportunities for DOE interaction with states and Indian tribes prior to issuance of the SCP, that does not obviate the utility of Commission issuance of its SCA in draft form.

In addition to providing a vehicle to involve the public in the decision-making process, the issuance for public comment of a draft SCA also serves as a means of assisting the Commission in preparing its own analysis. That function, which the Yakima Indian Nation believes is very important, is unaffected by any changes imposed by the NWPA.

Experience to date in this program has shown that the views of affected states and Indian tribes and public interest groups can be very important in the development of the Commission's positions on important issues in the waste disposal program. For example, the Commission's stance on DOE's proposed general siting guidelines was obviously quite materially affected by the arguments presented to the Commission by affected parties on that issue. The guidelines were significantly improved as a result of that influence. Since affected states and tribes have the benefit of NWPA funding for their participation in this program, their resources are better than usual to provide well-considered comments.

The ability of the affected parties to present their own comments to DOE on the SCPs is very important, but those comments do not have the impact of the comments of the regulator. Once again, the experience with the siting guidelines is an excellent example of this point. Most of the revisions which the Commission sought in DOE's proposed siting guidelines were basically the same as revisions which were sought by the states and Indian tribes for a year prior to their submission to the Commission for concurrence. DOE (and the NRC Staff) largely ignored our comments

until they were pressed by the Commission itself in its conditional concurrence decision.

The Commission's SCAs can in a like manner be beneficially affected by an opportunity for comments by affected parties prior to finalization. It is no slight to the competence of the Commission Staff to state that NWPA-funded affected states and tribes might identify important issues and arguments which the Staff overlooked, but would want to include. Neither comments to DOE on the SCP nor informal opportunities to comment to NRC under the Procedural Agreement will substitute for an opportunity to comment on NRC's analysis of the SCPs.

As far as the scheduling mandates of the NWPA are concerned, the YIN feels strongly that the benefits to the Commission and the program to be derived from comments on draft SCAs far outweigh the costs in terms of delay. In addition, the Commission can specify a relatively short comment period (e.g., 30 days) and refuse to grant extensions. While this would be less than ideal from the viewpoint of prospective commenters, it would be far better than no opportunity to comment at all.

To conclude, the Yakima Indian Nation strongly supports the view of Commissioner Asselstine that the present requirement in 10 CFR § 60.11 for NRC issuance of draft site characterization analyses for public comment should be retained. Nothing in the NWPA requires or even suggests the deletion of this procedural step, and the potential benefits of it far outweigh the potential costs.

Respectfully submitted,

*Dean R. Tousley*

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April 8, 1985

ASSOCIATE ATTORNEY FOR  
THE YAKIMA INDIAN NATION





ER 85/134

United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

DOCKET NUMBER  
PROPOSED RULE **PR-60**  
(50 FR 2579)

(16)

APR 11 1985

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Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Dear Sir:

The Department of the Interior has reviewed the proposed Amendments to Licensing Procedures for Disposal of High-Level Radioactive Waste in Geologic Repositories as noted in the Federal Register on January 17, 1985, and has the following comments.

General

The revisions as proposed would no longer require the preparation of draft Site Characterization Analyses (SCAs) by the Nuclear Regulatory Commission (NRC) for the Department of Energy (DOE) Site Characterization Plans (SCPs) for candidate repository sites. As proposed, only final SCAs would be required. No public comment would be invited until the SCAs have been completed by NRC. This revision decreases the opportunities for this Department to alleviate potential conflicts or issues concerning natural resources under our jurisdiction. Likewise issues within our areas of expertise might not surface until well into the SCA process. An explanation for this revision is given on page 2584 of the Notice. The stated reasons for this change include (1) the extensive opportunities for interaction between NRC, DOE, the States, affected Indian tribes, and the public regarding the sites recommended for characterization, and (2) scheduling mandates for the Nuclear Waste Policy Act of 1982 (NWP). Given that the review opportunities afforded the general public are also our only opportunities, we are concerned that NRC's proposed changes will limit this Department's participation in the licensing of repositories until very late in the decision process.

We agree that numerous opportunities are available to interact with DOE during pre-licensing activities (e.g., opportunities to comment on draft Environmental Assessments and SCPs and to present testimony at related hearings). However, during this same period of time, specific opportunities to interact directly with NRC, the ultimate licensing authority, are relatively limited. The review of draft SCAs would provide such a specific opportunity. In addition, it is unclear that the scheduling mandates of NWP will not accommodate draft and final SCAs prepared by NRC [see page 26 (Figure 9) and page 55 (Table 3), Preliminary Draft, Project Decision Schedule, Radioactive Waste Management System, DOE/RW-0018, January 1985]. We recommend retaining the present requirement for the preparation of a draft SCA because it allows for early conflict resolution.

We would also urge that the final rulemaking provide a mechanism to involve any Federal land management agency in site screening and selection whose management responsibilities may be affected by a geologic repository. Otherwise, the affected agency might have to cope with schedules developed independently by DOE and other entities.

APR 15 1985  
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A procedural agreement similar to that between DOE and the NRC should be executed between DOE and any affected Federal land management agency to assure that information flow is maintained to facilitate each organization's mission with regard to site investigation and characterization, and to ensure that affected land management agencies are informed of and invited to all technical meetings.

An additional concern is that NRC's future plans include revisions to 10 CFR 51, which governs its procedures for NEPA compliance under the NHPA. With such revisions, NRC could lessen the level and effectiveness of the Department of the Interior's role, in reviewing license applications and the development of disposal activities. We urge the Department of the Interior be allowed to review any proposed revisions to NRC's NEPA compliance procedures.

#### Specific Comments to 10 CFR 60, Subpart B Proposed Revisions

§60.17 - This section specifies the contents of the SCP that DOE must submit to NRC as part of the licensing process for a repository. We recognize that there are several changes to this section that are necessitated by the provisions of the NHPA; however, there are other revisions to this section that we believe should not be made and are not necessitated by the NHPA. Foremost, we recommend that NRC retain the requirement for DOE to identify in a SCP the criteria used to arrive at the candidate area and to describe the process by which the site was selected for characterization. Although the preamble states that NRC anticipates that such information would be provided by DOE in the environmental assessment to accompany the SCP we do not believe such information should be deleted from DOE's plan, which serves as the "record of decision" document for the proposed site. The decision process for site selection should require DOE to identify, address, and describe the means by which issues of concern raised by the public were then considered by DOE. Further, our review of the assessments for the nine sites issued for consideration in December 1984 by DOE indicated many conclusions reached in these EA's were based upon erroneous reasonings. However, such information will be fully addressed in the environmental documents accompanying this plan, nothing more than an executive summary of the issues and an iteration of DOE's analysis and decision need be presented in the SCP.

We recommend that NRC spell out precisely what type of information and the level of analysis that must be reflected in DOE's SCP and its overall licensing application to NRC, because the information required in this proposed rulemaking is vague. We believe the NRC should qualify the information needed for adequate review of applications. To merely state that the DOE will understand and provide information to the level of detail required by the NRC and other statutory reviewers (e.g., Department of the Interior) is not adequate. Considering the fact that the NRC and DOE appear to be attempting to lessen opportunities for the general public and other Federal agencies to participate throughout the decision process, it is difficult to know how reviewers, other than the NRC, may be able to request further information or analysis from DOE.

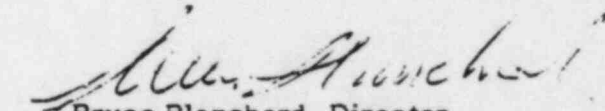
We recommend that NRC's requirement for DOE to plan for not only mitigating significant adverse impacts but also reclaiming the site be retained within the proposed rules. Under paragraph (a)(3) of this section, NRC does not require DOE to plan for reclaiming the site, but merely to plan for mitigating any significant adverse environmental impacts that occur as a result of site characterization. We believe

regulatory revision is a serious omission by NRC in light of the fact that reclamation planning is required by the NWPA [42 U.S.C. 10133(c)(4)].

\$60.18 - This section considers the review procedures for site characterization activities. We recommend that NRC retain the provisions for public participation rather than adopt the changes as proposed in this document. As stated above, it appears that NRC/DOE proposes to limit general public involvement to compliance with NEPA only and to minimize State, Indian tribe, and other Federal agency involvement on decision documents. NRC will continue to publish a notice in the Federal Register that a SCP has been received from DOE and that NRC staff review has begun. However, according to paragraph (a) of this section, NRC is proposing to no longer afford the public an opportunity to consult with staff and discuss issues of concern during staff review, but merely allow the public to contact the NRC staff for information on the proposal. Also, along the same vein, paragraph (c) of this section proposes the NRC may invite and may consider the views of interested persons. We believe the proposal is a much less responsive policy than presently exercised by NRC under its existing regulations. These regulations state: "The Director shall publish a notice of availability of the draft... analysis and... request comment.... The Director shall then prepare a final... analysis which shall take into account comments received and any additional information acquired during the comment period." [10 CFR 60, 11(d)-(e)].

We hope these comments will be helpful to you.

Sincerely,

  
Bruce Blanchard, Director  
Environmental Project Review



CONFEDERATED TRIBES AND BANDS

*Yakima Indian Nation*

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GENERAL COUNCIL  
TRIBAL COUNCIL

JACKET NUMBER

PROPOSED RULE

PR-60

JACKETED (50 FR 2579)  
USNRC

April 17, 1985

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Honorable Samuel Chilk, Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Re: 10 CFR Part 60 Amendments

Dear Secretary Chilk:

On January 17, 1985, the Commission issued for public comment proposed amendments to 10 CFR Part 60, Licensing Procedures for Disposal of High-level Radioactive Waste in Geologic Repositories, 50 Fed. Reg. 2579. Because of the coincident deadlines for submission of comments on these proposed amendments and on the draft environmental assessments for proposed repository sites, the Yakima Indian Nation filed its comments on these amendments late, on April 8, 1985.

As detailed in our comments (enclosed), the Yakima Indian Nation feels strongly that the proposed amendments, if adopted as proposed, would seriously undermine the Commission's ability to fulfill its statutory responsibilities in the nuclear waste program. Moreover, the proposed amendments would greatly increase the likelihood that the national nuclear waste disposal program would experience very significant unnecessary delays or outright failures in its implementation. In brief, we believe the Commission staff's reluctance to engage in a thorough review of the Department of Energy's site screening and selection process constitutes a fundamental abdication of the Commission's public health and safety and environmental protection responsibilities under the Atomic Energy Act, the National Environmental Policy Act, and the Energy Reorganization Act. Moreover, contrary to the Commission's position expressed in the proposed amendments, nothing in the Nuclear Waste Policy Act either requires or suggests such deference by the Commission concerning the selection of sites for characterization.

Because these issues have such profound implications for the Commission's responsibilities in this crucial national program and for the success of the program itself, the Yakima Nation feels that they deserve a higher degree of scrutiny than the Commission might ordinarily devote to such a rulemaking. For this reason, we

APR 22 1985

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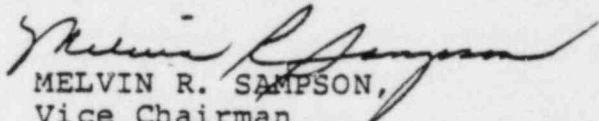


Honorable Samuel Chilk, Secretary  
April 17, 1985  
Page 2

request that the Commission schedule a public meeting before voting on promulgation of a final rule to receive oral comments on this proposed rule from the staff, affected states, Indian tribes, and representatives of the general public that have submitted comments on the proposal. Such a session, similar to the ones which the Commission held during its consideration of the concurrence in DOE's general siting guidelines, would serve to illuminate the issues in this vital rulemaking for the Commissioners' benefit, and, whether or not it changed the outcome, would result in a better-informed Commission decision.

The Yakima Nation urges your favorable consideration of this request.

Sincerely yours,

  
MELVIN R. SAMPSON,  
Vice Chairman  
Yakima Tribal Council

MPS:ls

Enclosure

## Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures

2583, col. 2. The Yakima Indian Nation strongly disagrees. Apart from ignoring clear statutory authority to engage in a review of DOE's site selection process, NRC's failure to do so would be a policy mistake with profound implications for the likelihood of success of the national radioactive waste disposal program.

- A. NRC review of DOE's site selection process is not only authorized, but is required by the Atomic Energy Act of 1954, the Energy Reorganization Act of 1974, the National Environmental Policy Act of 1969, and the Nuclear Waste Policy Act of 1982.

The lack of explicit NWPA provisions for NRC review of DOE's site selection process--other than the Commission's concurrence in the general siting guidelines--does not dispose of the possible sources of statutory authority for the Commission to do so. On the contrary, the NWPA quite clearly provides that NRC authority to promulgate technical requirements and criteria (i.e., Part 60) is pursuant to "other provisions of law." NWPA § 121(b)(1)(A). The NWPA specifically mentions as such authority the Atomic Energy Act of 1954 (42 U.S.C. § 2011 *et seq.*) and the Energy Reorganization Act of 1974 (42 U.S.C. § 5801 *et seq.*). Thus, Congress did not intend in the NWPA to prescribe the scope of NRC review of DOE's repository program. Rather, the authority for NRC requirements and their appropriate scope are derived from those "other provisions of law."

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In sharp contrast to questions of nuclear power plant safety, the primary determinant of the adequacy of a high-level radioactive waste repository over the very long periods of concern will be not engineered features, but rather the natural, geologic characteristics of the site chosen. Congress emphasized this point when it required in the NWA that detailed geologic considerations should be the primary criteria for the selection of sites for repositories, NWA § 112(a), and when it established elaborate procedures for the selection of sites. See NWA §§ 112-118. This primacy of natural site conditions in determining the adequacy of a proposed repository means that siting is the absolute essence of the NRC's mandated public health and safety and environmental protection responsibilities under the above-cited statutes.

The repository site selection process is by far the most important aspect of the adequacy of the repository program. Thus, for NRC to decline to review that process in the crucial early stages of selecting sites for characterization would be a basic abdication of its public health and safety and environmental protection responsibilities under the Atomic Energy Act and Energy Reorganization Act. NRC cannot hope to adequately discharge its responsibilities by deferring its review of the sites until the



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discretion". Only aggressive NRC review and oversight of the DOE selection of sites for characterization can ensure the Commission's ability to adopt the DOE EIS.

Finally, the NWPA explicitly does not compel the Commission to amend or narrow the scope of its licensing requirements. NWPA § 114(f) states, in part:

*nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act .... Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear [sic] Regulatory Commission as established in title II of the Energy Reorganization Act of 1974....*

(Emphasis added.) Congress was well aware of the existing provisions of Part 60 when it passed the NWPA, and incorporated many of them in the Act. However, in light of the above language, it could not be more clear that Congress did not intend its failure to incorporate all of the details of Part 60 in the Act to be deemed as implicit rejections of them. Inconsistent provisions, such as the Commission properly addresses in other aspects of the instant proposal, obviously warrant amendments by the NRC. On the other hand, where Congress was silent on a subject already addressed by the Commission in Part 60--such as NRC review of DOE's site selection process--Congress made plain its intent that NRC licensing and regulatory requirements not be deemed implicitly curtailed by any provision in the NWPA.

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Serious federal efforts to locate a repository have been thwarted at least twice in the past by the technical and political siting blunders of DOE's predecessor agencies. The extensive



state and tribal participation prescribed by the NWPA for the siting process ought to do much to improve the political atmosphere, but it does not substitute for thorough technical oversight by the agency responsible for protecting public health and safety and the environment--the NRC.

In sum, the Yakima Indian Nation strongly supports the position expressed by Commissioner Asselstine, 50 Fed. Reg. 2588, that NRC should retain the 10 CFR § 60.11 requirement for NRC review of the site screening and selection process which is now to be documented in the environmental assessments. Alternatively (but less desirably), the Commission should require a thorough site selection discussion in the site characterization plans pursuant to its authority under NWPA § 113(b)(1)(A)(v), and the Commission should thoroughly review that discussion in its site characterization analysis.

II. THE COMMISSION SHOULD RETAIN THE PRESENT REQUIREMENT FOR ISSUANCE OF A DRAFT SITE CHARACTERIZATION ANALYSIS FOR PUBLIC COMMENT.

The Commission contends that the 10 CFR § 60.11 requirement for issuance of a draft site characterization analysis ("SCA") for public comment is no longer needed because of the new timing for a site characterization plan ("SCP") and the prior opportunities for interactions among DOE and other program participants. While the NWPA does provide for additional opportunities for DOE interaction with states and Indian tribes prior to issuance of the SCP, that does not obviate the utility of Commission issuance of its SCA in draft form.

In addition to providing a vehicle to involve the public in the decision-making process, the issuance for public comment of a draft SCA also serves as a means of assisting the Commission in preparing its own analysis. That function, which the Yakima Indian Nation believes is very important, is unaffected by any changes imposed by the NWPA.

Experience to date in this program has shown that the views of affect states and Indian tribes and public interest groups can be very important in the development of the Commission's positions on important issues in the waste disposal program. For example, the Commission's stance on DOE's proposed general siting guidelines was obviously quite materially affected by the arguments presented to the Commission by affected parties on that issue. The guidelines were significantly improved as a result of that influence. Since affected states and tribes have the benefit of NWPA funding for their participation in this program, their resources are better than usual to provide well-considered comments.

The ability of the affected parties to present their own comments to DOE on the SCPs is very important, but those comments do not have the impact of the comments of the regulator. Once again, the experience with the siting guidelines is an excellent example of this point. Most of the revisions which the Commission sought in DOE's proposed siting guidelines were basically the same as revisions which were sought by the states and Indian tribes for a year prior to their submission to the Commission for concurrence. DOE (and the NRC Staff) largely ignored our comments

until they were pressed by the Commission itself in its conditional concurrence decision.

The Commission's SCAs can in a like manner be beneficially affected by an opportunity for comments by affected parties prior to finalization. It is no slight to the competence of the Commission Staff to state that NWPA-funded affected states and tribes might identify important issues and arguments which the Staff overlooked, but would want to include. Neither comments to DOE on the SCP nor informal opportunities to comment to NRC under the Procedural Agreement will substitute for an opportunity to comment on NRC's analysis of the SCPs.

As far as the scheduling mandates of the NWPA are concerned, the YIN feels strongly that the benefits to the Commission and the program to be derived from comments on draft SCAs far outweigh the costs in terms of delay. In addition, the Commission can specify a relatively short comment period (e.g., 30 days) and refuse to grant extensions. While this would be less than ideal from the viewpoint of prospective commenters, it would be far better than no opportunity to comment at all.

To conclude, the Yakima Indian Nation strongly supports the view of Commissioner Asselstine that the present requirement in 10 CFR § 60.11 for NRC issuance of draft site characterization analyses for public comment should be retained. Nothing in the NWPA requires or even suggests the deletion of this procedural step, and the potential benefits of it far outweigh the potential costs.

Respectfully submitted,

Dean R. Tousley  
HARMON, WEISS & JORDAN  
2001 S Street, N.W.  
Suite 430  
Washington, D.C. 20009

April 4, 1985

ASSOCIATE ATTORNEY FOR  
THE YAKIMA INDIAN NATION





101 State Capitol Building  
Salt Lake City, UT 84114  
Telephone 801-533-4372

## high level nuclear waste office

Norman H. Bangerter, Governor

UTAH NUMBER  
PROPOSED RULE PR-60  
(50 FR 2579)  
Patrick D. Spurgin, Director  
Jack Wittman, Associate  
DOCKETED  
USNRC

April 17, 1985

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Secretary of the Commission  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Attention: Docketing and Service Branch

Dear Sirs:

On January 17, 1985, the Nuclear Regulatory Commission published a notice of proposed rule-making addressing modifications to 10 CFR Part 60 necessitated by provisions of the Nuclear Waste Policy Act of 1982. This letter serves as the comments of the State of Utah High-Level Nuclear Waste Office on the proposed rule.

As a general comment, it is noted that the Nuclear Waste Policy Act contains unique provisions for state participation in nuclear waste repository siting, construction, operation and decommissioning procedures. This special role of the states reflects a recognition that state participation is necessary for an appropriate level of public confidence in the safety of the disposal strategies called for in the Act.

Clearly, the NRC also plays a unique role in the repository program. Provisions of the Nuclear Waste Policy Act call for NRC involvement in the program from the drafting of site selection guidelines, through site characterization plan review and comment, to the end point of repository decommissioning. NRC involvement throughout the program is necessary for its ultimate acceptability to the public. The states' participation in licensing is tied directly to NRC involvement. These considerations suggest that the NRC should interpret its authority under federal law in a manner that provides most liberally for NRC and state participation in DOE siting and licensing activities.

On a more specific note, a clearer definition should be added to the regulations for "preliminary activities". The DOE is not obligated to submit the site characterization plan to the NRC until the DOE plans to commence shaft sinking. As preliminary activities may be environmentally disruptive, it may also trigger state regulation required state permits.

APR 22 1985

Acknowledged by card.....  
dp

Therefore, the definition of preliminary activities is of great importance. It is urged that activities performed in preparation of sinking a shaft, including design boreholes and surface preparation be considered part of the shaft sinking process so that such activities can be effectively evaluated along with the site characterization plan.

As is noted in the section-by-section analysis of the proposed changes, under the heading of "provision of information", the Nuclear Waste Policy Act requires the Commission to furnish timely and complete information to host states and affected Indian tribes regarding its determinations or plans.

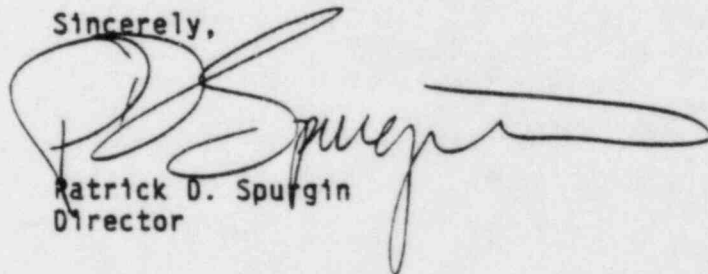
The DOE and NRC have undertaken, through procedural agreements, a series of meetings wherein the two agencies exchange views on the adequacy of certain activities undertaken by DOE in view of NRC's interpretations of the requirements for licensing. The Commission is urged to assure that the states and affected tribes are given notice of such meetings, of the subjects to be discussed, and of the opportunity to attend and participate at an appropriate level in the meetings in accordance with the spirit of section 117(a) of the Nuclear Waste Policy Act.

Finally, in regard to Commissioner Asselstine's request for comments on retention of requirements for issuance of draft site characterization analyses for public comment, we would urge in this and in all other cases, that the NRC only retreat from the provisions of present 10 CFR Part 60 to the extent mandated by the law and no more, and that the Commission otherwise maintain the current level of involvement by all parties in site characterization planning and review. The Commission is again referred to our general commentary at the beginning of this letter.

In addition to these comments, please see the attached analysis of changes to the regulation developed by other state reviewers.

We hope that these comments will be of assistance in the preparation of the final modification to 10 CFR Part 60.

Sincerely,



Patrick D. Spurgin  
Director

PDS/hud

cc: Toni Ristau

enclosure

## ANALYSIS OF PROPOSED REVISIONS TO 10 CFR PART 60

### Summary

The purpose of the proposed revisions to 10 CFR Part 60 is to revise the regulations that treat state and Indian tribal participation in the siting and licensing process to conform with the provisions of the Nuclear Waste Policy Act of 1982. The portions of 10 CFR Part 60 that are proposed for revision to make the regulations conform with the provisions of the Nuclear Waste Policy Act of 1982 include:

| <u>Section</u> | <u>Existing Section Title</u>               |
|----------------|---|
| 60.2           | Definitions                                 |
| 60.10          | Site Characterization                       |
| 60.11          | Site Characterization Report                |
| 60.61          | Site Review                                 |
| 60.62          | Filing of Proposals for State Participation |
| 60.63          | Approval of Proposals                       |
| 60.64          | Participation by Indian Tribes              |
| 60.65          | Coordination                                |

The Nuclear Regulatory Commission (NRC) is required by law to cooperate with the states, and the NRC recognizes the value of state participation in siting and licensing decisions. However, the cooperation between the NRC and the states, as presently defined, consists mainly of issue definition and information exchange. The states are not granted a full advise-and-consent role in the decision process under current interpretations of the applicable statutes (The Atomic Energy Act of 1954, as amended; Reorganization Plan No. 3 of 1970; and the Nuclear Waste Policy Act of 1982) or regulations (10 CFR Part 60).

Another problem with the way that the 10 CFR Part 60 regulations are structured is that the NRC's role is basically only advisory until after site characterization is completed, as the Department of Energy (DOE) is not required to obtain any type of license or formal approval from the NRC until after site characterization is completed. The NRC does not become involved in the process for a particular site until after a site characterization plan is submitted by the DOE for that site. State involvement is tied to NRC involvement, as a State is not considered an interested party for purposes of these participation provisions until after the State is identified within a site characterization plan. This is well after the conclusion of the environmental assessment process.

It is not clear in the Act or in the regulations what role, if any, State comments prior to the site characterization phase have in influencing either NRC or DOE decision processes. As the Act and the regulations both define the commencement of the site characterization phase as the beginning of shaft sinking, there apparently is no regular mechanism available to the States to influence activities that occur prior to that time. Though many serious environmental consequences can result from these "preliminary"

activities, the only redress if the DOE or the NRC ignore State concerns about such activities appear to be through the courts under the provisions of Section 119 of the Nuclear Waste Policy Act.

#### Specific Changes Proposed for 10 CFR Part 60

Specific changes in 10 CFR Part 60 (and their implications for the State of Utah) are summarized below.

The changes proposed for Section 60.2 (Definitions) do not affect state participation in the siting and licensing process. In order to provide conforming definitions with the Nuclear Waste Policy Act, the definitions of "Indian tribe" and "tribal organization" have been dropped, and a definition of "affected Indian tribe" is added. The definition of "affected Indian tribe" is the same as that provided in the Nuclear Waste Policy Act.

The "preapplication review" portions of 10 CFR Part 60, which deal with site characterization activities, have been extensively revised. Substantively, these revisions define the contents of the site characterization plan that DOE must submit to the NRC prior to the commencement of the DOE's site characterization activities. In addition to information required under the old version of the "preapplication review" regulations (old 10 CFR 60.10 and 60.11), the DOE must submit plans for decontaminating and decommissioning the site characterization area, including plans for mitigation of any significant environmental effects, if the area is deemed to be unsuitable for development as a repository. The DOE must also submit its criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act for repository activities covered by that section of the Act, or other siting criteria utilized by the DOE for other types of sites, utilized for determining the suitability of sites for location of a geologic repository. The level of information required for waste forms or waste packages has been upgraded from a description of the research and development efforts related to waste packaging to a requirement that the DOE provide a description of the waste form or package and its relationship to the natural barrier systems peculiar to an individual site. The conceptual design for the repository that the DOE must submit must take into account "likely site-specific requirements." (See proposed 10 CFR 60.15, 60.16, 60.17, and 60.18). The language for these additional regulatory requirements is quoted directly from Section 113 of the Nuclear Waste Policy Act.

Also, it is important to note that both the Act (Section 113(b)) and the regulations (new 10 CFR 60.16) require that the site characterization plan be submitted to the NRC "before proceeding to sink shafts at any candidate site." Previously, the NRC required the DOE to submit site characterization plans as early as possible in the DOE's planning process. This implies that certain preliminary activities, such as drilling and seismic exploration, as well as construction of access, could occur prior to DOE submission of the site characterization plan. Thus, the only effective opportunity available to the NRC or the states and tribes for review and comment on such activities (if it is available at all) is at the Environmental Assessment stage.



Once the NRC receives a copy of DOE's site characterization plan for a given site, the NRC must prepare a site characterization analysis and make this analysis available to the public for comment. This analysis must be transmitted to the host state and affected Indian tribes, along with an invitation to comment. In both the old and new versions of the rule, the NRC will publish a notice of opportunity for comment in the Federal Register, and will afford a reasonable comment period, "not less than 90 days," for comment by interested parties, including states.

The NRC must provide the site characterization analysis to the DOE, together with whatever comments the NRC feels are important, and the NRC must include a statement either that the Director of the NRC has no objection to the DOE's proposed site characterization program, or specific objections to and/or recommendations about the DOE's proposed program. These new provisions are similar to those in the old version of the rule.

Additional sections have been added requiring the DOE to include a description of and justification for any planned onsite testing with radioactive materials (NRC approval of such planned testing is required), and a requirement for semiannual progress reports by the DOE to the NRC during site characterization activities. The use of radioactive materials at the site characterization stage is governed by the Nuclear Waste Policy Act (see Section 113(c)(2)(A) and (B)). The requirement for a semiannual progress report appears to be an NRC requirement not explicitly covered in the Act, justified by the NRC's interest in expediting licensing decisions. The new sections of the rule make mandatory reporting of progress and issues by the DOE to the NRC. The NRC may, when it receives these reports or comments from other interested parties or on its own initiative, comment to the DOE at any time during the site characterization process, and the NRC may also raise objections to the DOE's conduct of the characterization process. In both the old and new versions of the rule, copies of any such correspondence are to be made available by the NRC in its Public Document Room.

The final portion of this section in both the old and new versions of the rule indicate that consultations between the NRC and the DOE are informal consultations and are not regarded as a part of a proceeding under the provisions of the Atomic Energy Act of 1954, as amended. The new version of the rule adds a disclaimer stating that the conduct of informal conferences does not imply that the NRC will issue a license or any other authorization, and that the authorities of the NRC, the Atomic Safety and Licensing Boards and Appeal Board, and the presiding officers or NRC Director are unaffected.

Subpart C of 10 CFR Part 60 defines and orders participation by States and Indian tribes in the site characterization and licensing process. The Nuclear Waste Policy Act contains several explicit sections treating State and Indian tribal participation at various points in the process. Unfortunately, except for the State "veto" provisions (Section 116(b)(2)), which can only be implemented after a site is formally recommended by the President to the Congress, this participation is mainly limited to information and communication. Neither the statute nor the regulations at 10 CFR Part 60 appear to offer the opportunity for true interactive cooperation, coordination, and decisionmaking between the NRC, the DOE, and the States and Indian tribes.

Old 10 CFR 60.61 will be retitled "Provision of Information", and the revised "Site Review" provisions have been moved to 10 CFR 60.62. The section on provision of information provides that States and affected tribes will be notified regarding NRC determinations or plans made with respect to site characterization or other geologic repository activities. However, these provisions are not triggered until a geologic repository "may be located" within a State. For the purposes of this section, a repository "may be located" within a State when such State is identified in a plan submitted to the NRC by the DOE.

The "Site Review" section has been moved to 10 CFR 60.62, and the old section 60.62, entitled "Filing of Proposals for State Participation," has been eliminated. The site review provisions are not triggered until an area has been approved by the President for characterization and a request for consultation is submitted in writing to the NRC by either the State or an affected Indian tribe. Consultation is defined as keeping the parties informed of the Director's views on the progress of site characterization; review of applicable NRC regulations, procedures, and schedules; and cooperation in developing State proposals for participation in licensing reviews.

Old section 60.63, entitled "Approval of Proposals," has been eliminated. A new section, entitled "Participation in License Reviews," has been substituted. Participation in licensing reviews is defined by the rules of practice before the NRC provided in 10 CFR Part 2 (Subpart G). States and affected Indian tribes may submit proposals to the Director of the NRC for participation in the review of site characterization plans or license applications. The State or tribe may also request meetings with the NRC regarding any such proposal. The NRC may then, subject to the availability of funds, approve all or part of the proposal. To be approved, proposed activities must be suitable in light of the type and magnitude of potential impacts, must enhance communications between the NRC and the state, must make a timely and effective contribution to the review, and must be authorized by law.

Old section 60.64, entitled "Participation by Indian Tribes," has been eliminated, as Indian participation has now been incorporated in the various sections dealing with State participation. A section entitled "Notice to States" has been substituted. This section provides that the Governor and legislature of a State may jointly designate a person or entity to receive information and notification from the NRC on their behalf.

Old section 60.65, entitled "Coordination," has also been eliminated. This section allowed the Director of the NRC to take into account the desirability of avoiding duplication of effort in acting upon multiple participation proposals. However, the Nuclear Waste Policy Act now specifically grants participation rights to the States and affected Indian tribes, and Indian participation, for example, cannot be foreclosed even though a proposal for State participation has been submitted. Thus, the old section is no longer applicable. Old section 60.65 is now titled "Representation," and it requires any person or entity acting in a representative capacity for a tribe or a State to submit a basis for such authority upon request by the NRC.

RICHARD H. BRYAN  
Governor

STATE OF NEVADA

ROBERT R. FOUR  
Director



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EXHIBIT NUMBER  
PROPOSED RULE PR-60  
50 FR 2579  
DOCKETED  
USNRC

NUCLEAR WASTE PROJECT OFFICE

OFFICE OF THE GOVERNOR

Capitol Complex

Carson City, Nevada 89710

(702) 885-3744

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

April 16, 1985

Commissioner Nunzio J. Palladino  
Chairman, Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, D.C. 20555

Dear Chairman Palladino:

On January 17, 1985, the Nuclear Regulatory Commission published for notice and comment at 50 FR 2579-2590 amendments to 10 CFR 60, "Disposal of High-Level Radioactive Waste in Geologic Repositories: Amendments to Licensing Procedures." On March 4, 1985, the State of Nevada submitted comments for consideration on the aforementioned proposed rule amendment.

As reflected in the published notice, the aspects of the licensing procedures that the Commission has under review concern (1) the role of the NRC during site screening and site characterization activities, and (2) state, tribal and public participation in NRC activities with respect to geologic repositories. I believe that our comments on this proposed amendment, and our ongoing interaction with the Commission staff, reflect our concern with these issues.

I am, therefore, requesting, at this time, a meeting with the Commission in order to more fully elaborate and clarify our concern with this matter. A meeting similar to the one conducted by the Commission on the DOE siting guidelines (10 CFR 960) would

D-310  
Add Clark Pritchard, 1130 SS  
John W. Wolf, 96541-11AR  
Edward Regan, 6235

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provide a good opportunity for the affected states and tribes to discuss these issues and concerns directly with the Commission.

This request should not be interpreted as a request for public hearing, but for a meeting in keeping with the excellent interaction and relationship that the affected states and tribes have had with the Commission.

I look forward to hearing from you in this regard. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert L. Loux  
Director

RLL/gjb

cc: Commissioner James K. Asselstine  
Commissioner Frederick M. Bernthal  
Commissioner Thomas M. Roberts  
Commissioner Lando W. Zech, Jr.  
Secretary Samuel J. Chilkv  
Mr. Robert Browning



ENCLOSURE D

DRAFT CONGRESSIONAL LETTER

Dear Mr. Chairman:

Enclosed for your information is a copy of a notice of rulemaking to be published in the Federal Register.

On January 17, 1985 the Commission published proposed procedural amendments to 10 CFR 60, its statutory authority to license and regulate the disposal of high-level radioactive wastes in geologic repositories (50 FR 2579). The Commission received eighteen comment letters on the proposed revisions to the procedures in 10 CFR Part 60. The final amendments reflect changes suggested by some comments. There were a number of comments related to NRC review of DOE's site selection process, issuance by NRC of a draft site characterization analysis, and the issuance by NRC of amendments to its NEPA procedures which the Commission could not accommodate.

The enclosed amendments make certain revisions to the procedures for site characterization and the participation of States and Indian tribes in the process of siting, licensing, and development of a geologic repository for high-level nuclear waste. The proposed amendments affect the means and timing of State and Indian tribe participation. However, the Commission believes that the amendments do not significantly alter the basic principle of providing for the fullest and most complete participation of States and Indian tribes possible within the limits of the Commission's authority. We will continue to keep your committee informed on rulemakings concerning high-level radioactive waste.

Sincerely,

Robert B. Minogue, Director  
Office of Nuclear Regulatory Research

Enclosure:  
As stated

ENCLOSURE E

## Regulatory Analysis

### 10 CFR Part 60

#### 1. Statement of the Problem

The final rule 10 CFR Part 60, "Disposal of High-Level Radioactive Wastes in Geologic Repositories," as currently written (46 FR 13971), contains procedures for site characterization and the participation of States and Indian tribes in the siting, licensing, and development of high-level radioactive waste repositories. The Nuclear Waste Policy Act of 1982, Public Law 97-425 (Nuclear Waste Policy Act), establishes in considerable detail the procedures to be followed in the process of siting and licensing a geologic repository. The Nuclear Waste Policy Act contains specific provisions for site characterization and State and Indian tribe participation in the process of siting, licensing, and development of high-level radioactive waste repositories.

Revisions to the procedures given in the final rule 10 CFR Part 60 for site characterization and the participation of States and Indian tribes are being published in final form. For the most part, the revisions are needed in order to reflect the provisions of the Nuclear Waste Policy Act of 1982, particularly as they relate to site characterization and the participation of States and Indian tribes in the process of siting, licensing, and development of disposal facilities. In addition, however, the Commission is taking this opportunity to clarify its procedures in the light of further understanding and experience gained since the promulgation of the procedural rule.

#### 2. Objective

The objective of the proposed regulatory action is to make certain changes in 10 CFR Part 60 to reflect procedures for site characterization and for State and Indian tribe participation in the process of siting, licensing, and developing of high-level radioactive waste repositories established by the Nuclear Waste Policy Act, and to clarify the Commission's procedures in light of the

ENCLOSURE E



experience gained since the promulgation of the procedural rule 10 CFR Part 60 several years ago.

### 3. Alternatives

(a) Leave the final provisions of 10 CFR Part 60 (46 FR 13971) intact.

(b) Delete reference to State and Indian tribe participation in the process of siting, licensing, and development of a repository in 10 CFR Part 60, and publish procedures for State and Indian tribe participation as a regulatory guide.

### 4. Consequences

(a) Proposed Action: Publish final amendments to 10 CFR Part 60 to bring procedures for site characterization and State and Indian tribe participation in the siting, licensing, and development of high-level radioactive waste repositories in accordance with the Nuclear Waste Policy Act, and to clarify the procedures in light of recent experience.

The proposed revisions in 10 CFR Part 60 would bring the final rule in conformity with the Nuclear Waste Policy Act. They would clarify the procedures for site characterization and State and Indian tribe interaction with the Nuclear Regulatory Commission in light of recently enacted legislation and the experience gained over the last several years. The clarification of these procedures would benefit States and Indian tribes by giving them accurate, realistic information about opportunities available to States and Indian tribes to participate in consultations with the Nuclear Regulatory Commission. This would in turn make the process of siting, licensing, and development of high-level radioactive waste geologic repositories more efficient.

The most effective way of promulgating the revised procedures would be as revisions to 10 CFR Part 60. The promulgation of the revised procedures in this format would accomplish the objective with no unnecessary delay in making the revisions public.

(b) Alternative 1: Leave the provisions of the final rule, 10 CFR Part 60, intact.

This alternative would be inadequate because it would result in inconsistencies between the final rule, 10 CFR Part 60 and the Nuclear Waste Policy Act. These inconsistencies would leave uncertain the opportunities for participation of States and Indian tribes in the NRC activities related to siting, licensing, and development of a high-level radioactive waste geologic repository, and could lead to costly and time-consuming inefficiencies in the process.

The staff also considered a variation of this alternative where only minor changes would be made to conform terminology in 10 CFR Part 60 to the Waste Act, as an administrative rulemaking, without opportunity for public comment. This variation would result in the same uncertainties and inefficiencies in the licensing process.

(c) Alternative 2: Delete reference to State and Indian tribe participation in 10 CFR Part 60 and publish procedures for State and Indian tribe participation as a regulatory guide.

If this alternative were adopted, participation of States and Indian tribes would not be governed by the regulations of 10 CFR Part 60. Publishing procedures for State and Indian tribe participation as a regulatory guide would give only suggested guidance. States and Indian tribes have indicated strong preference for formal procedures. The regulatory guide approach would not be suitable for this reason.

## 5. Decision Rationale

The NRC staff has evaluated the proposed action and two alternative courses of action. The procedures for site characterization and State and Indian tribe participation in the siting, licensing, and development of high-level radioactive waste geologic repositories must be revised to bring them in accordance with the Nuclear Waste Policy Act, and to clarify the procedures in light of recent experience. Revising the procedures for State and Indian tribe participation by means of revising the final rule, 10 CFR Part 60, is the most effective method of accomplishing this.

The staff received numerous public comments on the proposed procedural amendments. While many comments supported the general idea of changes in 10 CFR 60 to bring it in conformity with the Nuclear Waste Policy Act, a number of comments favored retention of some of the aspects of 10 CFR 60 which were proposed for revision. Some commentators were against proposed changes which would remove site screening and selection information from the SCP requirements. An additional proposed change, deletion of the requirement for a draft SCA to be issued by NRC in advance of the final SCA, drew some unfavorable comment. Nevertheless, the staff has not found sufficient reason to change its decision to choose the proposed action as the preferred alternative.

ENCLOSURE F



on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

It has been determined that the Regulatory Flexibility Act is not applicable to this proposed rule since CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

This program/activity is not subject to the provisions of Executive Order 12342 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

Section 4(d) of the CCC Charter Act, as amended (15 U.S.C. 714b(4)), authorizes CCC to adopt, amend, and repeal rules and regulations governing the manner in which its business may be conducted and the powers vested in it may be exercised. In accordance with this authority, the regulations at 7 CFR Part 1407 set forth the procedures under which CCC may debar or suspend individuals and firms from contracting with CCC and from otherwise participating in programs administered or financed by CCC. In order to conform CCC's suspension and debarment regulations with those of the Department of Agriculture, CCC proposes to revise Part 1407 to adopt the Department's suspension and debarment regulations found at 41 CFR 4-1.800 *et seq.* and to provide that: (1) CCC suspension and debarment proceedings shall not be applicable to contracts entered into by CCC under its price support operations and other CCC programs with persons in their capacity as producers and (2) the authority to suspend or debar is revised to the Executive Vice President, CCC, or his designee.

In order to expedite the review of the provisions of this proposed rule in light of potential CCC suspension and debarment proceedings, it has been determined that the comment period should be limited to a period of 30 days. Accordingly, comments must be received on or before February 19, 1985 in order to be assured of consideration.

#### List of Subjects in 7 CFR Part 1407

Administrative practice and procedure, Government contracts, Penalties.

Accordingly, it is proposed that 7 CFR Part 1407 be revised to read as follows:

## PART 1407—SUSPENSION AND DEBARMENT

### Sec.

1407.1 Purpose.

1407.2 Suspension and debarment.

1407.3 Scope.

Authority: Sec. 4, 52 Stat. 1070, as amended (15 U.S.C. 714b).

### § 1407.1 Purpose.

This part prescribes the terms and conditions under which persons (i.e., an individual or any form of business entity, such as proprietorship, partnership, corporation, association, or cooperative) may be suspended and debarred from contracting with the Commodity Credit Corporation (CCC) and from otherwise participating in programs administered or financed by CCC.

### § 1407.2 Suspension and debarment.

The provisions of 41 CFR 4-1.800 *et seq.* shall be applicable to all CCC suspension and debarment proceedings, except that the authority to suspend or debar is reserved to the Executive Vice President, CCC, or his designee.

### § 1407.3 Scope.

CCC suspension and debarment proceedings shall not be applicable to contracts entered into by CCC under its price support operations and other CCC programs with persons in their capacity as producers.

Signed At Washington, D.C. on January 11, 1985.

Everett Rank.

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 85-1338 Filed 1-16-85; 8:45 am]

BILLING CODE 3410-26-01

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 2

### Criteria for Reopening Records in Formal Licensing Proceedings

#### Correction

In FR Doc. 84-33644 beginning on page 50189 in the issue of Thursday, December 27, 1984, the word "Reports" appeared in the heading. The word "Records" should have appeared in its place. The heading is corrected to read as set forth above.

BILLING CODE 1505-01-01

### 10 CFR Part 60

### Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

**SUMMARY:** The Nuclear Regulatory Commission is proposing revisions to procedures with respect to NRC reviews of license applications for disposal of high-level radioactive waste in geologic repositories. For the most part, the revisions reflect the provisions of the Nuclear Waste Policy Act of 1982, particularly as they relate to site characterization and the participation of States and Indian tribes in the process of siting, licensing, and development of disposal facilities.

**DATES:** Comment period expires March 18, 1985. Comments received after March 18, 1985 will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments filed on or before that date.

**ADDRESSES:** Submit written comments and suggestions to: Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Docketing and Service Branch. Copies of comments received may be examined at the Commission's Public Document Room, 1717 H Street NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Clark Prichard, Division of Radiation Programs and Earth Sciences, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 427-4586.

**SUPPLEMENTARY INFORMATION:** The Nuclear Regulatory Commission (Commission or NRC) in 1981 promulgated procedures for licensing Department of Energy (DOE) facilities for disposal of high-level radioactive wastes in geologic repositories (48 FR 13971, February 25, 1981). More recently, Congress has established a definite Federal policy for such disposal. Nuclear Waste Policy Act of 1982, Pub. L. 97-423, 42 U.S.C. 10101 (Waste Policy Act). Section 121 of the Waste Policy Act directs the Commission, not later than January 1, 1984, to promulgate technical requirements and criteria that it will apply in approving or disapproving license applications with respect to geologic repositories. The Commission has complied with this requirement by publishing final technical criteria (48 FR 28914, June 21, 1983). The Commission is now turning to

a review of its previously adopted procedures. One objective is to reflect the provisions of the Waste Policy Act. In addition, however, the Commission is taking this opportunity to clarify its procedures in the light of experience gained over the past three years in consultations on the SCA reviews of DOE siting projects and in light of the extensive prelicensing interaction process now underway between NRC, the states, and DOE.

The principal aspects of the licensing procedures that the Commission has under review concern (1) the role of NRC during site screening and site characterization activities, (2) State, tribal, and public participation in NRC activities with respect to geologic repositories, (3) NRC responsibilities under the National Environmental Policy Act (NEPA), (4) procedures and standards for identifying categories of material as high-level radioactive wastes, and (5) changes, especially with respect to content of the license application, needed to conform to the licensing procedures to the technical criteria.<sup>1</sup> The present rulemaking proposal deals with the first two of these topics; because the two are so intertwined they will be treated together.

#### Background

In 1974, when the Atomic Energy Commission's functions were divided between the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission, Congress provided generally that ERDA high-level waste disposal facilities were to be subject to NRC's regulatory and licensing authority (42 U.S.C. 5842). NRC's role with respect to such facilities remained unchanged when the functions of ERDA were transferred in 1977 to the new Department of Energy (DOE) (42 U.S.C. 7151).

Although the Atomic Energy Act recognizes the interest of the States in the peaceful uses of atomic energy and

the need for cooperation with the States with respect to the control of radiation hazards, the Federal government was authorized to regulate the disposal of high-level radioactive waste to protect public health and safety (42 U.S.C. 2021(c), 10 CFR 150.15). Nevertheless, the Act recognizes the need for cooperation with the States, 42 U.S.C. 2021(a), and it is Commission practice to consult with State and local governments on matters of common interest.<sup>2</sup>

Recognizing that further legislative guidance would help to define appropriate forms of consultation and cooperation, Congress in 1978 directed the Commission to prepare a report on means for improving the opportunities for State participation in the process for siting, licensing, and developing nuclear waste storage or disposal facilities. NRC Authorization Act for Fiscal Year 1979, Pub. L. 95-601, Sec. 14(b). After consultation with the States, the Commission submitted its report to Congress in 1979, *Means for Improving State Participation in the Siting, Licensing and Development of Federal Nuclear Waste Facilities*, NUREG-0539, reprinted in *Nuclear Waste Isolation Pilot Plant (WIPP): Oversight Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Interior and Insular Affairs*, 96th Cong., 1st Sess. 314-601 (1979) (the NRC Report). The NRC Report, "Based on the premise that State involvement in any national nuclear waste management program is a critical element in making the program work," included several procedural and substantive recommendations.

The value of such State involvement—for the Commission as well as for the States—was emphasized as the NRC developed a framework for licensing geologic repositories for high-level radioactive waste (10 CFR Part 60). The first step in this process was the Commission's publication of a Proposed General Statement of Policy (43 FR 53869, November 17, 1978). This document contemplated that the Commission would make licensing determinations before DOE commenced construction of a repository shaft. DOE would be encouraged, however, to

consult informally in advance with NRC staff. At this early stage, NRC would point out aspects of a location selected by DOE which might require special attention or present special problems and NRC would help to define the kinds of information needed for licensing decisions. As noted, repository construction (including sinking of the main repository shaft) would require licensing action. Site characterization would continue during repository construction, with the data to be reviewed before issuance of a license authorizing receipt of radioactive material. Upon commencement of NRC's informal review, NRC would publish a notice in the *Federal Register*, send copies of information submitted by DOE to State and local officials, and offer to meet with those officials to provide information and explore possibilities of their participation in the licensing process.

After soliciting and considering views, the Commission next proceeded to issue a proposed rule. One significant difference from the policy statement was that DOE would be permitted to sink shafts and engage in site characterization activities at depth before formal licensing proceedings were commenced. DOE's site characterization plans would nevertheless be reviewed in considerable detail in advance, with opportunity for public comment on an NRC draft site characterization analysis. The proposed rule incorporated detailed provisions to ensure extensive opportunities for State and public participation. These procedures were "designed to allow affected States to participate to the fullest extent possible within the limits of the Commission's authority and the State's own desires and capabilities." The Commission observed, however, that "provisions for State participation would be reviewed in the light of any pertinent statutory changes that may be enacted." Moreover, it noted that the extent of State participation may be affected by legislative action on the matters discussed in the NRC Report (44 FR 70406, December 6, 1979).

The final rule added provisions with respect to notice to and participation by Indian tribes. However, inasmuch as public comments on the proposed rule pointed out no serious deficiencies in the opportunities for State and public participation, the provisions that had been proposed were adopted without material change (46 FR 13971, February 25, 1981).

Both the proposed rule and final rule contemplated that DOE would characterize several sites at depth.

<sup>1</sup> Issues pertaining to NEPA will require modifications to 10 CFR Part 51. Amendments to 10 CFR Part 51 to reflect the Waste Policy Act will be the subject of a subsequent rulemaking. However, actions which the Commission may take relative to environmental assessments required by the Waste Policy Act are discussed later in this statement. Consideration of the definition of HLW is reserved, and the Commission anticipates publication of an advance notice of proposed rulemaking on this topic in coming months. The content of application section will be reviewed after issuance of DOE siting guidelines under the Waste Policy Act to take such guidelines into account if and as appropriate. The Commission would welcome suggestions from interested persons with respect to other changes that may be needed to reflect provisions of the Waste Policy Act.

<sup>2</sup> 42 U.S.C. 2021 is a codification of a 1950 statute which added a new Section 274 to the Atomic Energy Act of 1954. Section 274 established procedures and criteria for discontinuance of Federal regulatory responsibilities with respect to byproduct, source, and special nuclear materials and the assumption thereof by the States. However, under Section 274, the regulation of high-level waste disposal for safety reasons remained a Federal responsibility. See *Pacific Gas & Electric Co. v. Energy Commission*, 481 U.S. 193, 73 L.Ed.2d 732, 774 (1983).



primarily so as to enable the Commission to discharge its NEPA responsibilities with respect to evaluation of alternatives. With this in mind, DOE would have been required, as discussed below, to include information concerning its site selection process in its site characterization report to NRC.

#### The Existing Regulations

The principal aspects of the existing licensing procedures that are of present interest relate to (1) submission of DOE's site characterization report, (2) public notice of receipt of the site characterization report, (3) the preparation of a site characterization analysis by NRC, (4) consultation between NRC and States and Indian tribes, (5) participation in NRC reviews, and (6) procedures for the formal hearing process. It will be useful to review the present language of 10 CFR Part 60 with respect to these items before turning to the changes that we propose to adopt.

#### 1. Site Characterization Report (§ 60.11)

NRC requires that DOE submit a site characterization report "as early as possible after commencement of planning for a particular geologic repository operations area, and prior to site characterization." Both the timing and required content of this report reflect the statutory directive in section 14(a) of the NRC Authorization Act for 1980, Pub. L. 95-601, which provides:

Sec. 14(a) Any person, agency, or other entity proposing to develop a storage or disposal facility, including a test disposal facility, for high-level radioactive wastes, or irradiated nuclear reactor fuel, shall notify the Commission as early as possible after the commencement of planning for a particular proposed facility. The Commission shall in turn notify the Governor and the State legislature of the State of proposed situs whenever the Commission has knowledge of such proposal.

The Commission, in proposing its licensing procedures, made specific reference to this statute and explained that its rule would "ensure that the notice from the Department will, in fact, initiate a meaningful, substantive review" (44 FR 70409). The site characterization report, together with the NRC staff assessment thereof and meetings between NRC staff and State officials and other interested persons, "assures an early opportunity for other Federal and State agencies and the public to become involved in the decision making process" with respect to DOE's site characterization and site selection programs. *Ibid.* The review process would provide NRC an

opportunity to identify and consider a broad range of public concerns; this would assist NRC in the preparation of a comprehensive and reasoned analysis.

The site characterization report would include more than a description of the site and the program to be undertaken to characterize the ability of the site to achieve waste isolation. It would also discuss "the method by which the site was selected for site characterization . . . and . . . a description of the decision process by which the site was selected for characterization, including the means used to obtain public, Indian tribal and States views during selection." Alternative media and sites at which DOE intends to carry out site characterization would be identified. DOE's report on these topics would enable the Commission to consider whether additional information might be needed by the Commission in discharging its NEPA responsibilities (46 FR 13972).

#### 2. Notice and Publication (§ 60.11)

As directed by section 14(a) of the 1980 NRC Authorization Act, NRC rules provide for notice to the Governor and the State legislature of the State of proposed situs whenever a site characterization report is received. Although not required to do so by law, NRC would also (1) transmit copies of the site characterization report to these addressees, (2) provide similar notice to local officials, tribal organizations, and Governors of contiguous States, and (3) publish in the Federal Register notice of receipt of the site characterization report which, among other things, will advise that governmental and Tribal officials may request consultation with NRC staff.

#### 3. Site Characterization Analysis (§ 60.11)

The rules provide that NRC will review the site characterization report and prepare a draft site characterization analysis which discusses the information submitted by DOE, and that a request for public comment on the draft site characterization analysis is to be published in the Federal Register; copies are to be transmitted to the State and local officials and Tribal organizations who had previously received notice under the rule. It was anticipated that NRC would hold local public meetings in the immediate area of the site to be characterized, both to disseminate information and to obtain public input, but this is not an explicit requirement under the rule. After a comment period of at least 90 days, NRC would transmit a final site

characterization analysis to DOE. As noted above, these procedures were designed to solicit comments that would assist NRC to prepare a comprehensive and reasoned analysis.

#### 4. Consultation (§ 60.61, § 60.64(a))

Under Part 60, NRC staff would consult with State government and Tribal officials, on written request, to keep them informed of NRC views on the progress of site characterization and to notify them of NRC meetings and consultations with DOE. NRC would respond to written question or comments from these officials and transmit such responses to DOE. Consultation would not be limited to site characterization, but could include a review of NRC licensing procedures and the type and scope of State and Tribal activities in the license review permitted by law as well.

#### 5. Proposals for State Participation (§§ 60.62-64)

The NRC Report (at 18-24, 27-28) distinguished between improvement of State participation in the NRC review process on the one hand and, on the other, the carrying out of an "independent State review" of a proposal to store or dispose of nuclear waste. The Report identified several avenues for State participation in NRC reviews that could be implemented under existing law. These included support from NRC in the form of educational or information services, exchange of personnel under the Intergovernmental Personnel Act, and contracts for technical services needed by the Commission. Besides the activities that could be carried out under existing law, the Report (at 28) recommended that the Congress "establish a grant program to allow the States to participate more fully in the Federal waste management program."

Part 60 provides for State participation in the review of a site characterization report and/or license application. A proposal initiated by the State would describe how the State wishes to participate in the review and how it plans to facilitate local government and citizen participation, and it would include funding estimates of work to be done under contract with the NRC. Subject to the availability of funds and legal constraints, NRC would approve State proposals that it finds will enhance communications with the State and contribute productively to NRC's license review.

Under the State participation provisions, proposals can be submitted by any State "potentially affected" by

the siting of a repository, even if the prospective repository site is in a different State. By the same token, Indian tribes "potentially affected" by the siting of a repository may submit proposals for participation in the same manner as the States.

#### 6. Formal Licensing Procedures

The NRC rules provide that notice of specified events (docketing, hearing, proposed issuance of license, issuance of license) will be published in the *Federal Register*; there are additional specific requirements for notice to State and local officials (and to Tribal organizations if a repository is to be located within an Indian reservation). 10 CFR 2.101-2.106. Affected States and Indian tribes desiring to participate as a party to a licensing proceeding may petition for leave to intervene; and they may also participate in a more limited capacity as provided by the regulation. 10 CFR 2.714, 2.715.

#### The Needed Revisions

One of the purposes of the Waste Policy Act is to define the relationship between the Federal government and the State governments, and between the respective Federal agencies, with respect to the disposal of high-level radioactive waste. The Act prescribes in great detail procedures for DOE to consult and cooperate with the States (and affected Indian tribes) with respect to determining the suitability of an area for a repository and with respect to other issues arising in connection with the planning, siting, development, construction, operation, or closure of such a facility (Sec. 117, 42 U.S.C. 10137). DOE is directed to make initial grants to States with potentially acceptable sites for a repository and, subsequently, to provide further grants to any State in which there is a site approved for characterization (Sec. 118(c), 42 U.S.C. 10138). The latter grants are to enable the States, among other things, to review potential impacts of the repository upon the State and its residents and to provide information to such residents regarding the activities of DOE or the Commission with respect to the site. DOE is also directed to provide financial and technical assistance to a State in which a repository is to be located, after NRC has issued a construction authorization, in order to mitigate the impacts of development of the repository. *Ibid.* The Waste Policy Act also contains requirements that DOE hold public hearings at several stages of site selection and characterization (Sec. 112(b)(2), 42 U.S.C. 10132 (nomination); Sec. 113(b)(2), 42 U.S.C. 10133 (characterization); Sec. 114(a)(1), 42

U.S.C. 10134 (recommendation for development)). The designation of a site as suitable for application for a construction authorization will not be effective over State objections except pursuant to a Congressional resolution which thereafter becomes law (Sec. 115, 42 U.S.C. 10135).

The Waste Policy Act reconfirms the authority and responsibility of the Commission to review a specific repository proposal, pursuant to the Atomic Energy Act, in order to protect the public health and safety. The Waste Policy Act provides for Commission review prior to site characterization, as well as in a formal licensing proceeding, and for a Commission determination as to whether a repository of a particular design at a specified site will provide adequate isolation of radioactive waste. The Waste Policy Act makes no specific provision for the Commission to engage in, or independently review, the processes of site screening and selection. The Commission's only prescribed participation in this selection process comes in NRC's review and concurrence in guidelines for the recommendation of sites for repositories (Sec. 112(a), 42 U.S.C. 10132). However, the Commission will review DOE's draft environmental assessments as it would review any other information on site investigation and site characterization, in order to allow early identification of potential licensing issues for timely resolution. Reviews will be carried out in accord with the procedural agreement between NRC and DOE for interface during site investigation and site characterization.<sup>3</sup>

While the Waste Policy Act establishes new procedures for the high-level waste management program, the Commission remains entirely free to consult with the States and Indian tribes, at its own initiative or theirs, with respect to any matter pertaining to NRC's regulatory role. Although specific channels are established for States and Indian tribes to engage in consultation and cooperation with DOE, these cannot substitute for direct interaction with

NRC with respect to this agency's functions. Nevertheless, an examination of the details of the Waste Policy Act highlights differences from Part 60 which need to be taken into account. In addition, there are some changes—particularly with respect to funding of State participation—that would have been desirable even in the absence of the new legislation. The need for revisions can be analyzed using the same heading as before.

#### 1. Site Characterization Report

As is the case under the existing regulations, it is appropriate that the submission of information about a site and plans for characterization of the site should be the occasion for commencing NRC's initial substantive review. However, the Waste Policy Act specifies a number of actions DOE must take before such information is required to be submitted to NRC. Further, the Waste Policy Act calls for NRC to review information of narrower scope than that which, under 10 CFR Part 60, was to be included in the DOE site characterization report.

Under § 60.11, the site characterization report was to be furnished to NRC "as early as possible after commencement of planning" for a particular repository. In contrast, the Waste Policy Act requires that DOE first nominate several sites (after holding public hearings and consulting with the governors of affected States) and that particular locations would then be recommended as candidate sites which, if approved by the President, would be eligible for site characterization.

The new law marks this time—before DOE proceeds to sink shafts—as the point when the site characterization plan is submitted. When the Commission reviews this plan, the site to be characterized will already have been the subject of extensive scrutiny. It will have been described in an environmental assessment in which the siting guidelines are applied and will have been discussed at public meetings at which public comments will have been solicited and received. It also will have been reviewed by both DOE and the President in the course of the nomination approval process. Extensive data gathering programs may have been carried out in conjunction with these activities.

DOE may very well need to make choices and commitments in the course of such data gathering that could have a significant bearing upon the safety and licensability of a repository. The drilling of boreholes for testing purposes, for example, could affect the integrity of a

<sup>3</sup> Procedural Agreement between the U.S. Nuclear Regulatory Commission and the U.S. Department of Energy identifying guiding principles for interface during site investigation and site characterization. 48 FR 38701, August 23, 1983. The Procedural Agreement is designed to assure that an information flow is maintained to facilitate each agency's accomplishment of its responsibilities relative to site investigation and characterization. The Procedural Agreement also provides that DOE is to notify potential host States and affected Indian tribes of technical meetings between DOE and NRC technical staff and that DOE is to invite those States and tribes to attend. These technical meetings will be open meetings, with members of the public being permitted to attend as observers.



repository that might be constructed at the site. Close coordination between DOE and NRC is therefore needed prior to submission of the site characterization report so as to facilitate the early identification of issues of potential safety significance and so as to afford an opportunity for NRC to provide DOE with timely views.

Under the Waste Policy Act, the information which is to be submitted to the Commission for review and comment prior to site characterization is similar to existing § 60.11. Both Part 60 and the statute call for DOE to describe the site, the proposed site characterization activities, a conceptual repository design, and certain information with respect to waste form or packaging. However, several categories of information which were previously listed in § 60.11 are omitted under the Waste Policy Act from the required submission to NRC—notably, the method by which the site was selected for site characterization, the identification and location of alternative media and sites at which DOE intends to conduct site characterization, and a description of the decision process by which the site was selected for characterization (including the means used to obtain public, Indian tribal and State views during selection).

The Waste Policy Act still requires a discussion of the omitted items, but in a separate document called an environmental assessment (Sec. 112(b)(1), 42 U.S.C. 10132). The preparation of an environmental assessment is to be preceded by public hearings held by DOE and consultation by DOE with governors of affected States. *Ibid.* Although not required to do so by the Waste Policy Act, DOE intends to make environmental assessments in draft form available for public comment. All this occurs in connection with the nomination of a site prior to Presidential review and approval of a candidate site for site characterization.

The Waste Policy Act makes no provision for the Commission to comment to DOE on its environmental assessments or otherwise to participate in the nomination process. It is nevertheless the intention of the Commission to review and comment on the environmental assessments, as well as other technical documents being prepared by DOE, in order to assess on a continuing basis the information collected to date and the program for the development of additional information for a potential license application. However, the NRC staff would not comment upon the methodology used by

DOE to compare sites or upon the relative merits of one site against another. Such a review by NRC is not necessary to fulfill any of its statutory responsibilities. Moreover DOE will be selecting sites using guidelines in which the NRC will have already concurred. We regard it as appropriate, however, and fully consistent with the objectives of the Waste Policy Act, for the NRC staff to provide to DOE current expressions of its views on the quality of the data available and the potential licensing issues that may be anticipated and that may need to be addressed in DOE's site investigation and site characterization activities.

In view of the foregoing considerations, § 60.11 needs to be revised to change both the timing and content of the DOE site characterization report to conform to the Waste Policy Act. Despite these changes, however, the Commission plans to be involved at earlier stages in reviewing data collected by DOE as well as its programs for gathering additional data. The instrument for accomplishing this—namely, the Procedural Agreement referred to above—is already in place and is being implemented routinely.

## 2. Notice and Publication

The Waste Policy Act provides that: "Before nominating a site, the Secretary [of Energy] shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such nomination and the basis for such nomination" (Sec. 112(b)(1)(H), 42 U.S.C. 10132). Later, after public hearings and a prescribed review process involving Presidential approval, DOE must submit site characterization plans to those same officials, for review and comment; concurrently, DOE is required to submit such plans to NRC (Sec. 113(b)(1), 42 U.S.C. 10133). Although publication of notice in the *Federal Register* is not required expressly, DOE must make both the environmental assessment and the site characterization plan "available to the public" (Secs. 112(b)(1)(G), 113(b)(2)(A), 42 U.S.C. 10132-33). The Commission anticipates that DOE will give notice in the *Federal Register* as the means for assuring adequate public availability of these documents.

Since DOE is required to make its site characterization plan available to State and tribal officials and to the public, duplicative provisions may be removed from Part 60. Even so, however, it makes sense for the Commission to publicly acknowledge receipt of DOE's submission so as to provide notice of the

opportunity for consultation thereon with the NRC staff.

## 3. Site Characterization Analysis.

The Waste Policy Act requires, before DOE proceeds to sink shafts at a candidate site, that DOE submit its site characterization plans to NRC (as well as State and tribal officials) for review and comment (Sec. 113(b), 42 U.S.C. 10133). The Commission believes that Congress intended that DOE should provide the plans sufficiently far in advance so that comments may be developed and submitted back to DOE early enough to be considered when shaft sinking occurs, and at all time thereafter. As explained above, this implies an ongoing working relationship with DOE to assure that its data and assessments are made available to NRC as they are developed. As already mentioned, NRC and DOE have, in fact, developed a Procedural Agreement under which NRC is to have access to information as it is generated and, equally important, NRC is to comment regularly to DOE with respect to this information.

Thus, the Commission expects that the principal means of evaluation will be the interagency process that begins early in DOE's consideration of a site. When investigations have progressed far enough to warrant sinking of shafts, it is our expectation that NRC will already be adequately informed with respect to data generated to date and that NRC's concerns would already have been focused and brought to the attention of DOE. Assuming this to be the case, NRC should be in a position to complete its review and provide comments to DOE, as required by the Waste Policy Act, in a prompt fashion. The site characterization analysis would be a continuing dynamic process, better suited for ongoing public input and NRC review, rather than "freezing" the comment and review process at one arbitrary point in time.

An ongoing public review process would also facilitate DOE's ability to obtain comments on its site characterization plan from the States and Indian tribes as well. The Waste Policy Act affords an opportunity for these entities to enter into written agreements with DOE specifying procedures for consultation and cooperation that could include early review. Moreover, the NRC/DOE Procedural Agreement assures that States and Indian tribes will have an opportunity to be informed routinely concerning the information made available to NRC and NRC's comments

thereon and in attend NRC/DOE technical meetings.

Under existing 10 CFR Part 60, DOE's submission of site characterization plans was to occur, as already noted, "as early as possible after commencement of planning" for a particular repository. There was no assurance that either NRC or other interested parties would have had prior information about the site or any opportunity to make concerns known to DOE. It was in this context that the Commission determined that NRC would prepare a draft site characterization analysis for public review and comment before developing a statement of the agency's views for consideration by DOE.

Under the Waste Policy Act, however, DOE's submission comes after an extensive period of interaction between DOE and the States, affected Indian tribes, and the public, and after Presidential review and approval of the sites recommended for characterization. By the time a site characterization plan is to be submitted for review and comment, there should have been ample opportunity for NRC to have become acquainted with both DOE's programs and the public's concerns. Since technical meetings under the Procedural Agreement will be open, interested parties will have an opportunity to follow the course of NRC activities and to bring their concerns to the attention of NRC. Further opportunities for public involvement are provided by law, since DOE must also seek the comments of the States and tribes, and hold public hearings in the vicinity of the site. For these reasons, together with the scheduling mandates of the Waste Policy Act, the Commission believes it is no longer necessary to prepare a draft site characterization analysis on which public comment is sought. The Commission particularly asks for views on this proposed change.

It should be emphasized, however, that NRC will have been engaged in an ongoing review of DOE's activities even before submission of a site characterization plan and that the comments of interested parties may be submitted at any time for consideration as a part of that review process.

#### 4. Consultation

Under the Waste Policy Act, the Commission is directed to provide "timely and complete information regarding determinations or plans made with respect to site characterization, siting, development, design, licensing, construction, operation, regulation, or decommissioning" of a repository, Sec. 117, 42 U.S.C. 10137, but this affords no

rights to States and Indian tribes beyond those already provided in law. H.R. Rep. 97-785, Part I at 74. The proposed amendments contain conforming language implementing this requirement. The Waste Policy Act charges DOE with the responsibility to "consult and cooperate" with the States and Indian tribes in an effort to resolve their concerns about the safety, environmental, and economic impacts of a repository. States may make comments and recommendations to DOE regarding any activities taken under this subtitle," and this may be funded by grants from DOE (Sec. 116(c)(1)(B)(v), 42 U.S.C. 10136). DOE is directed to take State and Indian concerns into account "to the maximum extent feasible" (Sec. 117(b), 42 U.S.C. 10137). Accordingly, in expectation that States and tribes will communicate directly with DOE with respect to its site characterization plans, the provision that the Director will respond to questions and comments of the States and tribes on DOE's plans has been deleted.

However, the Commission has consistently expressed its intention to maintain a dialogue with the States, Indian tribes, and members of the public. This intention is unchanged. The scope of such dialogue may appropriately extend to any issue which must be considered and resolved by NRC in the discharge of its licensing responsibilities.

#### 5. Proposals for State Participation

Subpart C of 10 CFR Part 60 provides for the filing of proposals by States and Indian tribes for participation in reviews of site characterization reports and license applications. In response to such proposals, NRC would consider providing certain educational or information services and funding work that the State proposes to perform for the Commission, under contract, in support of the review.

With enactment of the Waste Policy Act, authority to fund a broad variety of State activities, including grants to enable a State "to review activities . . . for purposes of determining any potential economic, social, public health and safety, and environmental impacts" of a repository has been vested in DOE, Sec. 116(c)(1)(B)(i), 42 U.S.C. 10136; see also Sec. 116(b)(2)(A)(i) (pertaining to affected Indian tribes). The scope of NRC assistance available may be limited by this statutory direction. However, other elements of Commission support would not be affected as explained in greater detail in the section-by-section analysis below.

#### 6. Formal Licensing Procedures

The Waste Policy Act incorporates the basic licensing structure which had been described in the Commission's regulations. It expressly provides for consideration of a DOE application, subject to certain deadlines, "in accordance with the laws applicable to such applications" (Sec. 114(d), 42 U.S.C. 10134). Affected States and Indian tribes will be entitled to participate in the licensing proceedings.

The new requirement that DOE and NRC provide timely and complete information to the States and tribes, Sec. 117(a), 42 U.S.C. 10137, would apply to significant milestones in the formal adjudicatory process. The rule presently reflects this, and the Commission finds no need to modify the formal regulatory structure for licensing activities at geologic repositories.

#### Section-by-Section Analysis

In light of the foregoing considerations, the Commission is proposing to revise its licensing procedures with respect to disposal of high-level waste in geologic repositories. The following section-by-section analysis provides additional explanatory information. All references are to Title 10, Chapter I, Code of Federal Regulations. Other revisions, including changes that may be needed to conform with the Waste Policy Act's provisions for environmental reviews, will be the subject of separate rulemaking.

#### 10 CFR Part 60, Subpart A

##### Section 60.2 Definitions.

The terms "Indian Tribe" and "Tribal organization" would no longer appear in Part 60 and the definitions of the terms have therefore been deleted. The term "affected Indian tribe," as defined in the Waste Policy Act, is the proper designation for those entities that are entitled to notice and other recognition under the rule. The proposed rule incorporates the statutory definition of "affected Indian tribe."

#### 10 CFR Part 60, Subpart B

The sections in this subpart have been renumbered so as to allow for insertion of additional general provisions, if needed, at a future date.

##### Section 60.15 [formerly § 60.10] Site characterization.

No change.

##### Section 60.16-18 [formerly § 60.11].

The former section § 60.11, captioned "Site characterization report," has been



revised to conform to the Waste Policy Act. It has been divided into three sections in order to provide a clearer editorial structure.

The "site characterization report" has been changed to a "site characterization plan." Note that this includes more than DOE's "general plan for site characterization activities," conforming to Sec. 113(b), 42 U.S.C. 10133. It must also incorporate information on waste form and packaging as well as a conceptual repository design. The change from "report" to "plan" better conveys to sense that DOE is describing a program to obtain information which can be used later to evaluate a site, as opposed to a presentation of data which would allow a preliminary judgment as to site acceptability. The NRC review process at this stage is not directed to advising DOE whether or not the site is or is not satisfactory, but rather whether or not the characterization program (1) will generate data needed for arriving at subsequent licensing determinations and (2) will adversely and significantly affect the ability of the geologic repository to achieve the prescribed performance objectives.

*Section 60.16 Site characterization plan required.*

The requirement for DOE to submit a site characterization report appeared in § 60.11(a). As before, the document (now a "plan") is to be submitted to the Director of NRC's Office of Nuclear Material Safety and Safeguards. The purpose of the submission ("for review and comment") is derived from the Waste Policy Act. Similarly, the timing of the submission ("before proceeding to sink shafts") reflects the new statutory direction.

The regulation refers to characterization at any area which has been approved by the President for site characterization. Such an area would be a "candidate site" as defined in the Waste Policy Act. The regulation avoids that term, however, because it already defines "site" in a different way.

*Section 60.17 Contents of site characterization plan.*

This section restates, with minor changes, the information which the Waste Policy Act requires to be submitted to the Commission for review and comment.

Because Part 60 defines high-level radioactive waste to include spent nuclear fuel, the latter category of material is not referred to in § 60.17.

Consistent with other provisions of Part 60, the term "geologic repository operations area" (rather than "geologic repository" or "repository") is employed

when the context pertains to the area in which waste handling activities are conducted.

Part 60 defines "host rock" as "the geologic medium in which the waste is emplaced." Accordingly, the rule refers to the waste-host rock relationship instead of the relationship of the waste form or packaging and the geologic medium. The statute's reference to the "packaging" for the waste corresponds to Part 60's "waste package," and the proposed rule retains the latter term for purposes of consistency.

The Waste Policy Act requires DOE to include in its general plan for site characterization activities "any other information required by the Commission." The Commission has so far identified only one such item—namely information with respect to quality assurance. Other information may hereafter be found to be needed to enable the Commission to determine whether the proposed site characterization activities are appropriate; if so, the Commission would establish its requirement either by rule (particularly if the information would be valuable on a generic basis) or by order in a particular case. Although the Commission's obligations to observe the statutory schedule must be heeded, there is no reason in principle why the submission of other information could not be ordered even after the site characterization plan had been filed, if required for the Commission to discharge its review and comment responsibilities effectively.

The Waste Policy Act's reference to plans to control any adverse, "safety-related" impacts from site characterization activities can be traced to former § 60.11(a)(6)(iii). The Commission's concern originally was that DOE address those aspects of site characterization that (1) could be significant with respect to radiological safety prior to permanent closure or (2) could affect the ability of the repository to satisfy the performance objectives pertaining to waste isolation. The proposed rule contains language that reflects this construction of the statute.

The Commission recognizes that the requested level of detail is not spelled out precisely. Such items as "a description of the area" and "a conceptual design for the geologic repository operations area that takes into account likely site-specific requirements" must not be read in isolation. They must be understood to require sufficient detail for the Commission and other statutory reviewers to be able to comment in an informed manner. So construed, the Commission believes that they are

sufficiently clear; should additional information be needed, the Commission would retain the option, by order, to require further submissions.

As noted, the Commission has included an explicit statement that the site characterization plans should spell out DOE's quality assurance programs. Existing § 60.11 includes such language, but it was not included in the counterpart provision of the Waste Policy Act. However, since a principal aim of site characterization is to develop data that have been obtained and documented in a fashion which will support licensing findings, the NRC review should be concerned with the approach which DOE is taking to data collection, recording, and retention as well as to the content of the information which DOE seeks to assemble. Because of the importance it attaches to this item the Commission considers an explicit requirement for submission of information on quality assurance programs to be necessary.

We have also incorporated the statutory requirement that DOE is to include in its general plan a statement of the criteria to be used to determine suitability of the site for the location of a repository. Because site characterization will be a prerequisite for application of some guidelines, see Sec. 112(b)(1)(E)(ii), 42 U.S.C. 10132, we anticipate that the site characterization plan will also include a description of how DOE will use the information gathered during site characterization to determine if the site suitability guidelines are met.

The Waste Policy Act applies only with respect to geologic repositories that are used, at least in part, for the disposal of wastes from civilian nuclear activities, Sec. 8, 42 U.S.C. 10108. If DOE were to develop a facility exclusively for wastes from atomic energy defense activities, it would nevertheless be subject to licensing by NRC under the Energy Reorganization Act. The Commission has considered whether the changes proposed herein, which are largely responsive to the Waste Policy Act, would be appropriate with respect to such defense facilities. It appears that the Commission, acting under amended Part 60, could still effectively discharge its health and safety responsibilities for such defense waste facilities. But, in this section, the provisions that prescribe the contents of the site characterization plan need to recognize that defense-only facilities would not have any applicable siting criteria "developed pursuant to Section 112(a) of the Nuclear Waste Policy Act"; instead, in that case, the rule requires that the site

characterization plan set out the siting criteria actually used by DOE.

On environmental matters, the situation is more complex. The Waste Policy Act limitations with respect to the scope of the Commission's environmental responsibilities under NEPA—which we would implement in the modified procedures at the site characterization stage—would not apply to a repository used solely for defense wastes. Accordingly, the Commission would expect to require that DOE submit, with its site characterization plan for a defense facility, those items of information with respect to site screening and selection that appear in existing § 60.11(a) but which are not included in this proposed rule. Because the information relates to implementation of NEPA, it would be incorporated in revised 10 CFR Part 51 rather than Part 60.

#### *Section 60.18 Review of site characterization activities.*

As under existing § 60.11(b), the Commission will publish notice of receipt of DOE's site characterization plan. Although this may duplicate information published by DOE, it will serve to identify, to anyone interested, appropriate points of contact within the NRC staff. Since alternative areas are not required to be identified in the site characterization plan, the proposed rule omits any reference to such areas. Language pertaining to consultation has been revised to conform with proposed Subpart C.

Similarly, notwithstanding duplication of notice by DOE, the Commission will give direct notice to State and tribal officials concerning receipt of DOE's site characterization plan. Under the proposed rules, this information would be furnished to the officials entitled to timely and complete information under the Waste Policy Act. Because such officials would already have received copies of the site characterization plans from DOE, the notice from the Commission would not be accompanied by additional copies thereof. However, a copy of the site characterization plan would be placed in the public Document Room. (Existing § 60.11 would require local officials, and also the governors of contiguous States, to be afforded notice from NRC. This requirement has been deleted in the light of the new statutory provisions.)

For the reasons set out in the discussion above, the proposed rule omits the mandatory draft site characterization analysis described in existing § 60.11. However, the proposed rule does provide that the Director may invite and consider comments on DOE's

site characterization plan and that he may also review and consider the comments made in connection with the public hearings which DOE is required to hold. Moreover, the Director will publish a notice of availability of a site characterization analysis and will invite host States, affected Indian tribes and all other interested persons to review and comment thereon. Comments received in response to such invitation will be reviewed by the Director; and where the Director determines that there are substantial new grounds for making recommendation or stating objections to DOE's site characterization program, these concerns will be expressed to DOE.

The Director's review of the site characterization plan is substantially equivalent to the final site characterization analysis prescribe by existing § 60.11. The reference to the Director's "comments" reflects the Waste Policy Act provision that the information is submitted to the Commission for "review and comment." The proposed rule refers to a "statement" of objections by the Director, instead of a Director's "opinion" of objections by the Director, instead of a Director's "opinion"; the later term was unnecessarily equivocal. It is intended that the objections would be directed at the nature of the site characterization activities being proposed and not to the suitability of the site as such; of course, if it appeared that a particular site exhibited such a profound deficiency that it could not be compensated for adequately in the light of data from any site characterization program, the Director could object to the program in its entirety, but the Commission regards this as highly improbable given the procedures prior to submission of a site characterization plan to NRC specified in the Waste Policy Act.

The inclusion of a finding with respect to the necessity of using radioactive material implements the specific direction in Section 113(c)(2)(A), 42 U.S.C. 10133; the Commission has previously concluded that the use of source, special nuclear, and byproduct material for purposes of site characterization does not require a license, 10 CFR § 60.7, and there is no reason to believe that the Waste Policy Act was intended to change this view.

Since DOE is not required to prepare an environmental impact statement with respect to site characterization, see Sec. 113(d), 42 U.S.C. 10133, the references in references in existing § 60.11 to such statement have been omitted. A footnote to the text of the rule points out, however, that DOE's environmental

assessments will be reviewed—as other DOE documents will be—for the purpose of early identification of potential licensing issues for timely resolution.

The Waste Policy Act requires the DOE report to the Commission (and to State and tribal authorities) at least semiannually on the nature and extent of site characterization activities and the information developed from such activities. The same concerns were addressed in existing § 60.11(g). The Commission believes the two formulations are essentially the same, but that the more detailed version in the NRC regulation provides a clearer statement of the information that is needed. Accordingly, the proposed rule conforms closely to the Commission's earlier rule. The most significant change, reflecting the adoption of a statutory directive to DOE, is that the provisions are now expressed in mandatory ("shall") terms. Also, the existing rule includes a provision for submission of additional reports on any topic, if requested by the Director; as modified, such other topics must still be covered as requested by the Director, but the information may be included in the semiannual reports instead of "additional" ones. The Director will review the semiannual reports and, where appropriate on the basis of new information contained therein, the Director will make recommendations or state objections with respect to DOE's site characterization program.

The proposed rule provides for the Director to transmit to State and tribal officials copies of all comments made to DOE under § 60.18. This includes not only the site characterization analysis and comments on the site characterization plan, but also any other comments which the Director chooses to make by way of "expressing current views." Other correspondence between NRC and DOE will be placed in the Public Document Room, but will not routinely be distributed to the designated officials. The omission of the requirement that the Director consider comments received from States in accordance with § 60.61 conforms to the changes in Subpart C. Such comments may, however, be solicited and reviewed as appropriate in individual cases and, as noted, comments on the site characterization analysis will be invited and will be reviewed, and such review may be the basis for the director to express to DOE additional recommendations or objections.

Except for some editorial changes, other provisions of § 60.18 are the same as existing regulations.



*10 CFR Part 60, Subpart C*

This subpart deals with participation by State governments and Indian tribes in the Commission's licensing and pre-licensing activities. The role of the States and tribes in repository siting and development is addressed in great detail by several provisions in the Nuclear Waste Policy Act. While the Commission finds that some changes in Subpart C are needed in light of those provisions, it remains our intention to encourage close working relations with the States and tribes. The revisions are designed to clarify the means by which this can be accomplished in a manner conforming to the new law.

*Section 60.61 Provision of information.*

This section implements the requirement in the Waste Policy Act, Sec. 117(a), 42 U.S.C. 10137, that NRC furnish timely and complete information to host States and affected Indian tribes regarding its determinations or plans. It applies, insofar as Commission responsibilities are concerned, from the time a site characterization proposal is submitted throughout the entire life of the repository through "decommissioning." Consistent with other usage in Part 60, the phrase "permanent closure, or decontamination and dismantlement of surface facilities" is used instead of the statutory term "decommissioning."

Some of the most significant communications may consist of determinations made in the course of licensing proceedings. Under our rules of practice, parties on the service list in such proceedings are required to be served with notice of all relevant pleadings, decisions, order, etc. Accordingly, the Commission will use this established procedure as the means for providing information regarding licensing actions.

*Section 60.62 Site review.*

The Waste Policy Act establishes a structure for the involvement of States and affected Indian tribes. The proposed rule therefore provides explicitly for consultation with States and affected Indian tribes but omits mention of local governments. (However, the Commission anticipates, in light of the Waste Policy Act, see Sec. 116(c)(1)(B)(iv), 42 U.S.C. 10136, that the States would establish appropriate procedures to address local government and citizen concerns.)

Since the concerns of the States and affected Indian tribes will be dealt with primarily under the statutory consultation and cooperation procedures, the Commission has

eliminated reference to any consultation activities by NRC that are more appropriately and directly carried out by DOE under those procedures. Thus, consistent with the Waste Policy Act, questions concerning DOE's site characterization submissions should be directed to DOE for its consideration and response, and notification concerning NRC meetings or consultations with DOE should be provided by DOE. Notwithstanding these changes, however, it remains the policy of the Commission that consultation with interested parties with respect to site characterization should be encouraged. As now, information would be available routinely with respect to NRC's views on the progress of site characterization, on NRC procedures, and on the development of proposals for participation in license reviews.

Although the Waste Policy Act does not provide formally for NRC activity prior to Presidential approval of an area for site characterization, and this is noted in revised § 60.62, there will be coordination during the earlier stages of site screening and site characterization in accordance with the Procedural Agreement between NRC and DOE: special provisions has been made in that agreement for States and Indian tribes to receive notice and to attend NRC/DOE meetings so as to enable them to engage knowledgeably, on an early and ongoing basis, in site characterization reviews.

The opportunity to request that the Director consult with respect to the NRC review of site characterization activities is not limited to prospective host States. The extent to which a State may be affected by the prospective location would, of course, be a factor for the Director to consider in determining the staff resources that would be made available for purposes of such consultation.

*Section 60.63 Participation in license reviews.*

This section is a substitute for the earlier §§ 60.62-60.65.

Section 60.63 acknowledges, first of all, that State and local governments and affected Indian tribes may participate in license reviews as provided in the Commission's rules of practice. Local governments are mentioned in this context because they may have standing, apart from the State in which they are located, to participate in a licensing proceeding as a party or participate in a more limited capacity. See 10 CFR 2.714, 2.715(c).

The regulation retains a provision for a State or affected Indian tribe to submit

a proposal to facilitate its participation in the review of a site characterization plan and/or license application. The existing requirement that proposals be submitted no later than 120 days after docketing of a license application has been eliminated; although early submissions are desirable, we can readily conceive of cases in which proposals submitted after review of a license application could be implemented in the mutual interests of the proposing entity and the Commission. The types of services or activities that NRC might consider providing would include those educational or information services and related actions that are set out in existing § 60.62(d).

The Commission has omitted those portions of existing § 60.62(c) that contemplate Commission funding of State work in support of the license review. In light of the Waste Policy Act, funding of such work to improve the State's capacity to review a license application is a responsibility of DOE and it is to be financed out of the Nuclear Waste Fund. We do not rule out the possibility that the NRC may contract with State governments on occasion for particular services that we may require in order to be able to discharge our statutory responsibilities effectively. The execution of such contracts would be carried out under established procurement procedures and would be subject to applicable limitations with respect to competitive bidding and avoidance of conflicts of interest. See 41 CFR Chapter I (Federal Procurement Regulations). A further reason for handling such contracts under the general procurement regulations rather than Part 60 is that the criteria for approval of proposals (existing § 60.63, proposed § 60.63(d)) would be inappropriate when the Commission's purpose is to acquire services which it needs in discharging its own reviewing functions.

Considering this limitation of the scope of NRC activities under Subpart C, the requirement for gubernatorial approval of a State proposal has been eliminated as being unnecessary. The information required to be included in the proposal has also been modified to conform to the limitation of scope. The Waste Policy Act may have further limited the opportunities for states to receive funding from the NRC, the Commission is of the view that Congress intended that DOE should assume the Federal responsibility for activities of the types described in Sections 116 and 118 and that such activities should be

financed out of the Nuclear Waste Fund rather than out of NRC appropriations.

Existing § 60.64, pertaining to participation of Indian tribes, has been incorporated in the substantive provisions applicable to States. The change has been made for editorial reasons and is not intended to affect the right of affected Indian tribes to participate like the States in the activities described in Subpart C.

Existing § 60.65, dealing with coordination of multiple proposals, has been deleted. The Commission deems it unlikely that multiple proposals of the kinds considered eligible for acceptance under Subpart C would present any undue administrative difficulties; the criteria for approval of proposals (especially the finding of "productive contribution" to the license review) would afford the Director adequate discretion to take into account the desirability of avoiding duplication.

#### *Section 60.64 Notice to States.*

The Commission encourages the Governor and legislature of a State to jointly designate a single point of contact to receive notice and information from the Commission. This section provides for notice to such jointly designated nominees.

#### *Section 60.65 Representation.*

Under the present rule, the signature of the Governor would serve to document the authority pursuant to which proposals were being submitted to the Commission. Submissions by Indian tribes were to be accompanied by documentation of the eligibility of the tribe and the authority of its representatives. This section is designed to retain the principle of assuring that representatives are properly identified. With respect to States, a change is needed to reflect the fact that proposals will no longer need to be signed by the Governor. In the case of Indian tribes, the determination by the Secretary of the Interior that it is "affected" eliminates the need for the Commission to be concerned with its eligibility.

#### *Commissioner Asselstine's Additional Views*

Commissioner Asselstine would retain the present requirement in 10 CFR 60.11 for NRC review of the site screening and selection process which DOE must now include in the environmental assessments. He would cite as the Commission's authority to review the draft environmental assessments the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National Environmental Policy Act

of 1969, as amended, and the Nuclear Waste Policy Act of 1982, and not just the NRC/DOE Procedural Agreement.

Commissioner Asselstine would also retain the present requirement in 10 CFR 60.11 for NRC issuance of the draft site characterization analyses for public comment.

Commissioner Asselstine would appreciate comment on whether these two elements should be retained in the Commission's regulations.

#### *Environmental Impact*

Pursuant to section 121(c) of the Nuclear Waste Policy Act, this proposed rule does not require the preparation of an environmental impact statement under section 102(2)(c) of the National Environmental Policy Act of 1969 or any environmental review under subparagraph (E) or (F) of section 102(2) of such act.

#### *Paperwork Reduction Act Statement*

This proposed rule contains information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et. seq.). This rule has been submitted to the Office of Management and Budget for review and approval of the paperwork requirements.

#### *Regulatory Flexibility Act Certification*

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule relates to the licensing of only one entity, the U.S. Department of Energy, which does not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act.

#### *List of Subjects in 10 CFR Part 60*

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and recordkeeping requirements, Waste treatment and disposal.

#### *Issuance*

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the Nuclear Waste Policy Act of 1982, and 5 U.S.C. 553, the Nuclear Regulatory Commission proposes to adopt the following amendment to 10 CFR Part 60.

### **PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES**

1. The authority citation for Part 60 continues to read as follows:

Authority—Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2082, 2083, 2095, 2111, 2201, 2232, 2233); secs. 202, 208, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); sec. 121, Pub. L. 97-425, 96 Stat. 2226 (42 U.S.C. 10141).

For the purposes of Sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.71 to 60.75 are issued under Sec. 161a, 68 Stat. 950, as amended (42 U.S.C. 2201a).

2. Section 60.2 is revised by removing the definitions of "Indian tribe" and "Tribal organization" and inserting, in the appropriate alphabetical location, a definition of the term "affected Indian tribe" to read as follows:

#### **§ 60.2 Definitions.**

As used in this part—

"Affected Indian tribe" means an affected Indian tribe as defined in the Nuclear Waste Policy Act of 1982.

#### **§ 60.10 [Redesignated as § 60.15]**

3. Section 60.10 is Redesignated § 60.15.

#### **§ 60.11 [Removed]**

4. Section 60.11 is Removed.

5. Sections 60.16 through 60.18 are added to read as follows:

#### **§ 60.16 Site characterization plan required.**

Before proceeding to sink shafts at any area which has been approved by the President for site characterization, DOE shall submit to the Director, for review and comment, a site characterization plan for such area.

#### **§ 60.17 Contents of site characterization plan.**

The site characterization plan shall contain—

(a) A general plan for site characterization activities to be conducted at the area to be characterized, which general plan shall include—

(1) A description of such area, including information on quality assurance programs that have been applied to the collection, recording, and retention of information used in preparing such description.



(2) A description of such site characterization activities, including the following—

- (i) The extent of planned excavations;
- (ii) Plans for any onsite testing with radioactive or nonradioactive material;
- (iii) Plans for any investigation activities that may affect the capability of such area to isolate high-level radioactive waste;
- (iv) Plans to control any adverse impacts from such site characterization activities that are important to safety or that are important to waste isolation; and

(v) Plans to apply quality assurance to data collection, recording, and retention.

(3) Plans for the decontamination and decommissioning of such area, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities, if such area is determined unsuitable for application for a construction authorization for a geologic repository operations area;

(4) Criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act of 1982 (or in the case of a geologic repository that is not subject to the Waste Policy Act, such other siting criteria as may have been used by DOE), to be used to determine the suitability of such area for the location of a geologic repository; and

(5) Any other information which the Commission, by rule or order, requires.

(b) A description of the possible waste form or waste package for the high-level radioactive waste to be emplaced in such geologic repository, a description (to the extent practicable) of the relationship between such waste form or waste package and the host rock at such area, and a description of the activities being conducted by DOE with respect to such possible waste form or waste package or their relationship; and

(c) A conceptual design for the geologic repository operations area that takes into account likely site-specific requirements.

#### § 60.18 Review of site characterization activities.<sup>1</sup>

(a) The Director shall cause to be published in the Federal Register a

<sup>1</sup> In addition to the review of site characterization activities specified in this section, the Commission contemplates an ongoing review of other information on site investigation and site characterization, in order to allow early identification of potential licensing issues for timely resolution. This activity will include, for example, a review of the environmental assessments prepared by DOE at the time of site nomination. A procedural agreement covering NRC-DOE interface during site investigation and site characterization has been published in the Federal Register, 48 FR 38701, August 23, 1983.

notice that a site characterization plan has been received from DOE and that a staff review of such plan has begun. The notice shall identify the area to be characterized and the NRC staff members to be consulted for further information.

(b) The Director shall make a copy of the site characterization plan available at the Public Document Room. The Director shall also transmit copies of the published notice of receipt to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe. In addition, the Director shall make NRC staff available to consult with States and affected Indian tribes as provided in Subpart C of this part.

(c) The Director shall review the site characterization plan and prepare a site characterization analysis with respect to such plan. In the preparation of such site characterization analysis, the Director may invite and consider the views of interested persons on DOE's site characterization plan and may review and consider comments made in connection with public hearings held by DOE.

(d) The Director shall provide to DOE the site characterization analysis together with such additional comments as may be warranted. These comments shall include either a statement that the Director has no objection to the DOE's site characterization program, if such a statement is appropriate, or specific objections with respect to DOE's program for characterization of the area concerned. In addition, the Director may make specific recommendations pertinent to DOE's site characterization program.

(e) If DOE's planned site characterization activities include onsite testing with radioactive material, the Director's comments shall include a determination regarding whether or not the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under § 60.22 of this part.

(f) The Director shall publish in the Federal Register a notice of availability of the site characterization analysis and a request for public comment. A reasonable period, not less than 90 days, shall be allowed for comment. Copies of the site characterization analyses and of the comments received shall be made available at the Public Document Room.

(g) During the conduct of site characterization activities, DOE shall report not less than once every six

months to the Commission on the nature and extent of such activities and the information that has been developed and on the progress of waste form and waste package research and development. The semiannual reports shall include the results of site characterization studies, the identification of new issues, plans for additional studies to resolve new issues, elimination of planned studies no longer necessary, identification of decision points reached and modifications to schedules where appropriate. DOE shall also report its progress in developing the design of a geologic repository operations area appropriate for the area being characterized, noting when key design parameters or features which depend upon the results of site characterization will be established. Other topics related to site characterization shall also be covered if requested by the Director.

(h) During the conduct of site characterization activities, NRC staff shall be permitted to visit and inspect the locations at which such activities are carried out and to observe excavations, borings, and in site tests as they are done.

(i) The Director may comment at any time in writing to DOE, expressing current views on any aspect of site characterization. In particular, such comments shall be made whenever the Director, upon review of comments invited on the site characterization analysis or upon review of DOE's semiannual reports, determines that there are substantial new grounds for making recommendations or stating objections to DOE's site characterization program.

(j) The Director shall transmit copies of the site characterization analysis and all comments to DOE made by him under this section to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe. When transmitting the site characterization analysis under this paragraph, the Director shall invite the addressees to review and comment thereon.

(k) All correspondence between DOE and the NRC under this section, including the reports described in paragraph (g), shall be placed in the Public Document Room.

(l) The activities described in paragraphs (a) through (k) above constitute informal conference between a prospective applicant and the staff, as described in § 2.101(a)(1) of this chapter, and are not part of a proceeding under the Atomic Energy Act of 1954, as

amended. Accordingly, neither the issuance of a site characterization analysis nor any other comments of the Director made under this section constitute a commitment to issue any authorization or license or in any way affect the authority of the Commission, the Atomic Safety and Licensing Appeal Board, Atomic Safety and Licensing Boards, other presiding officers, or the Director, in any such proceeding.

8. Subpart C is revised to read as follows:

#### Subpart C—Participation by State Governments and Indian Tribes

##### § 60.61 Provision of information.

(a) The Director shall provide to the Governor and legislature of any State in which a geologic repository operations area is or may be located, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made by the Commission with respect to the site characterization, siting, development, design, licensing, construction, operation, regulation, permanent closure, or decontamination and dismantlement of surface facilities, of such geologic repository operations area.

(b) For purposes of this section, a geologic repository operations area shall be considered to be one which "may be located" in a State if the location thereof in such State has been described in a site characterization plan submitted to the Commission under this part.

(c) Notwithstanding paragraph (a), the Director is not required to distribute any document to any entity if, with respect to such document, that entity or its counsel is included on a service list prepared pursuant to Part 2 of this chapter.

(d) Copies of all communications by the Director under this section shall be placed in the Public Document Room, and copies thereof shall be furnished to DOE.

##### § 60.62 Site review.

(a) Whenever an area has been approved by the President for site characterization, and upon request of a State or an affected Indian tribe, the Director shall make NRC staff available to consult with representatives of such States and tribes.

(b) Requests for consultation shall be made in writing to the Director.

(c) Consultation under this section may include:

(1) Keeping the parties informed of the Director's views on the progress of site characterization.

(2) Review of applicable NRC regulations, licensing procedures, schedules, and opportunities for state participation in the Commission's regulatory activities.

(3) Cooperation in development of proposals for State participation in license reviews.

##### § 60.63 Participation in license reviews.

(a) State and local governments and affected Indian tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter.

(b) In addition, whenever an area has been approved by the President for site characterization, a State or an affected Indian tribe may submit to the Director a proposal to facilitate its participation in the review of a site characterization plan and/or license application. The proposal may be submitted at any time and shall contain a description and schedule of how the State or affected Indian tribe wishes to participate in the review, of what services or activities the State or affected Indian tribe wishes NRC to carry out, and how the services or activities proposed to be carried out by NRC would contribute to such participation. The proposal may include educational or informational services (seminars, public meeting) or other actions on the part of NRC, such as establishing additional public document rooms or employment or exchange of State personnel under the Intergovernmental Personnel Act.

(c) The Director shall arrange for a meeting between the representatives of the State or affected Indian tribe and the NRC staff to discuss any proposal submitted under paragraph (b) of this section, with a view of identifying any modifications that may contribute to the effective participation by such State or tribe.

(d) Subject to the availability of funds, the Director shall approve all or part of a proposal, as it may be modified through the meeting described above, if it is determined that:

(1) The proposed activities are suitable in light of the type and magnitude of impacts which the State or affected Indian tribe may bear;

(2) The proposed activities (i) will enhance communications between NRC and the State or affected Indian tribe (ii) will make a productive and timely contribution to the review and (iii) are authorized by law.

(e) The Director will advise the State or affected Indian tribe whether its proposal has been accepted or denied, and if all or any part of proposal is denied, the Director shall state the reason for the denial.

(f) Proposals submitted under this section, and responses thereto, shall be made available at the Public Document Room.

##### § 60.64 Notice to States.

If the Governor and legislature of a State have jointly designated on their behalf a single person or entity to receive notice and information from the Commission under this part, the Commission will provide such notice and information to the jointly designated person or entity instead of the Governor and legislature separately.

##### § 60.65 Representation.

Any person who acts under this subpart as a representative for a State (or for the Governor or legislature thereof) or for an affected Indian tribe shall include in his request or other submission, or at the request of the Commission, a statement of the basis of his authority to act in such representative capacity.

Dated at Washington, D.C. this 10th day of January, 1985.

For the Nuclear Regulatory Commission,

Samuel J. Chalk,

Secretary of the Commission.

[FR Doc. 85-1401 Filed 01-16-85; 8:45 am]

SELLING CODE 7500-01-02

#### DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD 06-84-08]

Drawbridge Operation Regulations;  
Sabine River (Old Channel), TX

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

**SUMMARY:** At the request of the Livingston Shipbuilding Company, the Coast Guard is considering a change to the regulation governing the operation of the pontoon bridge on the Old Channel of the Sabine River, mile 9.5 behind Orange Harbor Island, in Orange, Texas to provide that the draw need not open on signal from 7:00 a.m. to 12:00 midnight Monday through Friday except federal holidays, and to open on signal at all other times if at least eight hours notice is given. This proposal is being made because no requests have been made to open the draw since 1970. This action should relieve the bridge owner of the burden of having a person available to open the draw.



ENCLOSURE G

COMPARATIVE TEXT  
PART 60 - DISPOSAL OF HIGH-LEVEL  
RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

1. The authority citation for Part 60 [~~continues~~] is revised to read as follows:

AUTHORITY:

1246 (42 U.S.C. 5842, 5846); Secs. [~~10-and-24~~] Sec. 10, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. [~~2021a-and~~] 5851).

2. Section 60.1 is revised to read as follows:

§60. 1 Purpose and Scope

This part prescribes rules governing the licensing of the U. S. Department of Energy to receive and possess source, special material, and byproduct material at a geologic repository operations area sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982. This part does not apply to any activity licensed under another part of this chapter.

§60. 2 Definitions

"Affected Indian tribe" means [~~an-affected-Indian-tribe-as-defined in-the-Nuclear-Waste-Policy-Act-of-1982~~] any Indian tribe - (a) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located; (b) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of

congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: provided, that the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe.

§60.15(c) As provided [~~in §-56.40 of this chapter~~] by Section 113 of the Nuclear Waste Policy Act (42 U.S.C. 10101), DOE is also required to conduct a program of site characterization, including in situ testing at depth, with respect to alternate sites.

#### §60.18 Review of site characterization activities.1

(b) The Director shall make a copy of the site characterization plan available at the Public Document Room. The Director shall also transmit copies of the published notice of receipt to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe. The Director shall provide an opportunity, with respect to any area to be characterized, for the State in which such area is located and for affected Indian tribes to present their views on the site characterization plan and their suggestions with respect to NRC comments on thereon which may be made by NRC. In addition, the Director shall make NRC staff available to consult with States and effected Indian tribes as provided in Subpart C of this Part.

(i) The Director may comment at any time in writing to DOE, expressing current views on any aspect of site characterization. In particular, such

In addition to the review of site characterization activities specified in this section, the Commission contemplates an ongoing review of other information on site investigation and site characterization, in order to allow early identification of potential licensing issues for timely resolution. This activity will include, for example, a review of the environmental assessments prepared by DOE at the time of site nomination. [A procedural agreement covering NRC-DOE interface during site investigation and site characterization has been published in the Federal Register 48 FR 38701, August 25, 1983.] and review of issues related to long lead time exploratory shaft planning and procurement actions by DOE prior to issuance of site characterization plans.

comments shall be made whenever the Director, upon review of comments invited on the site characterization analysis or upon review of DOE's semiannual reports, determines that there are substantial new grounds for making recommendations or stating objections to DOE's site characterization program. The Director shall invite public comment on any comments which the Director makes to DOE upon review of the DOE semi-annual reports or on any other comments which the Director makes to DOE on site characterization.

(j) The Director shall transmit copies of the site characterization analysis and all comments to DOE made by ~~[him]~~ the Director under this section to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe.

§60.61(c)

Notwithstanding paragraph (a) of this section, the Director is not required to distribute any document to any entity if, with respect to such document, that entity or its counsel is included on a service list prepared pursuant to Part 2 of this chapter.

§60.22(c)

(2) Review of applicable NRC regulations, licensing procedures, schedules, and opportunities for State and tribe participation in the Commission's regulatory activities.

(3) Cooperation in development of proposals for State and tribe participation in license reviews.

§60.65

Any person who acts under this Subpart as a representative for a State (or for the Governor or legislature thereof) or for an affected Indian tribe shall include in ~~[his]~~ the request or other submission, or at the request of the Commission, a statement of the basis of his or her authority to act in such representative capacity.



ENCLOSURE H

## STAFF RESPONSE TO COMMENTS OF THE ACRS

1. Much of the public comment on the proposed amendments has centered on the deletion of a draft site characterization analysis, and the fact that there continues to be a requirement for a final site characterization analysis has perhaps received less attention than otherwise. However, the proposed rule itself is explicit on this requirement; 60.17 (c) states that;

"The Director shall review the site characterization plans and prepare a site characterization analysis with respect to such plan. In the preparation of such site characterization analysis, the Director may invite and consider the views of interested persons on DOE's site characterization plan and may review and consider comments made in connection with public hearings held by DOE."

60.17 (d) states that;

"The Director shall provide to DOE the site characterization analysis together with such additional comments as may be warranted."

The rule calls for the Director to give notice of the availability of the site characterization analysis in the Federal Register [60.17 (f)].

The staff believes that 60.17 as written is sufficiently clear on the requirement for a site characterization analysis.

2. The language in 60.17 (a)(3) is essentially the same as that in the Nuclear Waste Policy Act, Sec. 113(b)(A)(iii). The comment correctly notes that this language calls for plans for the decontamination and decommissioning of a candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if the site is determined unsuitable for application for a construction authorization for a repository. This seems to ignore instances where a candidate site may be found suitable for an application for a construction authorization, but was not selected for an application.

However, 60.17 deals with the site characterization plan, which must be submitted in advance of actual site characterization activities. It would be during the course of site characterization activities or subsequently that a site selected for characterization would be found unsuitable. At the point in time when the site characterization plan must be submitted, there is the potential for any such site to be found unsuitable. The requirement in 60.17(a)(3) follows the NWPA in requiring the site characterization plan to address this contingency.

What site restoration is required is a separate issue. The NWPA does not address this in detail, and the Commission's authority to establish

requirements for site restoration which do not involve radiological issues is not apparent. The inclusion of an item in the plan does not itself indicate that review by NRC is required, as the NWPA calls for the site characterization plans to go to states and Indian tribes for comment. For these reasons, the staff prefers not to specify any such requirements in the rule.

The staff considers the meaning of "decontamination and decommissioning" as it appears in the NWPA and 60.17(a)(3) to be the same as reclamation. Elsewhere in Sec. 113 of the NWPA, "reclaim" is used to describe the same activities referred to above as "decontamination and decommissioning". Sec. 113(c)(4) states that the Secretary (of DOE)

"shall take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities."

The staff believes that the continuation of the use of the NWPA language is desirable for the purpose of consistency with the NWPA.

Some additional guidance is contained in Proposed Revision 1 to Regulatory Guide 4.17 - Standard Format and Content of Site Characterization Plans for High-Level Waste Geologic Repositories. The staff can adopt other language in the Final Revision 1 in referring to activities described in 60.17(a)(3) should "decommissioning and decontamination" prove to be misleading terminology.

3. These comments support the staff's position that the rule should not call for an independent evaluation by NRC of the site screening and selection process used by DOE, and that no draft site characterization analysis should be required of NRC.

1/9/86

SCHEDULING NOTES

TITLE: PRESENTATIONS BY PARTICIPANTS ON PROPOSED AMENDMENTS TO  
PART 60

SCHEDULED: 9:30 A.M., FRIDAY, JANUARY 24, 1986 (OPEN)

DURATION: APPROX 3 HRS

SPEAKERS: \* STATE PANEL 25 MIN  
(TENTATIVE) NEVADA  
TEXAS  
UTAH  
CONNECTICUT  
MINNESOTA

\* TRIBAL PANEL 15 MIN  
YAKIMA INDIAN NATION  
COEUR D'ALENE TRIBE OF IDAHO  
NATIONAL CONGRESS OF AMERICAN INDIANS

10 MINUTE INTERMISSION

\* PUBLIC INTEREST GROUPS 15 MIN  
ENVIRONMENTAL POLICY INSTITUTE  
NATURAL RESOURCES DEFENSE COUNCIL  
ECOLOGY ALERT

\* FEDERAL AGENCY PANEL 10 MIN  
DEPARTMENT OF ENERGY  
DEPARTMENT OF INTERIOR

\* INDUSTRY AND PROFESSIONAL ASSOCIATIONS 10 MIN  
EDISON ELECTRIC INSTITUTE  
SCIENTISTS AND ENGINEERS FOR SECURE ENERGY

DOCUMENT: SECY-85-333



# HARMON & WEISS

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TELEPHONE  
(202) 328-3500

November 27, 1985

Nunzio J. Palladino, Chairman  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

RE: Proposed Amendments to 10 CFR Part 60

Dear Chairman Palladino:

On April 17, 1985, Yakima Tribal Council Vice Chairman Melvin R. Sampson wrote the Commission requesting that the Commission convene a public meeting to hear comments of interested parties on the proposed amendments to 10 CFR Part 60. Unfortunately, the Commission denied that request.

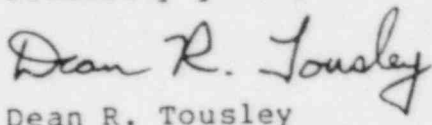
As it is our understanding that the proposed amendments are currently before you for a vote, we are writing again now to renew our earlier request. We understand that the Commission recently granted a similar request to the American Mining Congress in the Commission's mill tailings rulemaking. The equities are even stronger in favor of your grant of this request than was true in the case of the American Mining Congress, since we--and several state governments--have already made a timely request for this meeting.

Substantively, the deficiencies in the proposed amendments to Part 60 have only become more apparent since our initial request. DOE's interpretation of the timing of the preliminary determination of suitability, and the promulgation of weakened final EPA standards, have resulted in a virtual regulatory vacuum as far as scrutiny of DOE's site selection process is concerned. Consequently, the arguments for careful NRC review of that process are even stronger than before.

Nuzio J. Palladino  
November 27, 1985  
Page 2

For the reasons above, as well as those set forth in our April 17 letter, the Yakima Indian Nation urges the Commission to hold a public meeting to accept comments by interested parties before voting on amendments to 10 CFR Part 60. As we stated in our previous letter, both the process and your rule can only be strengthened by your grant of this opportunity.

Sincerely yours,



Dean R. Tousley

ASSOCIATE ATTORNEY FOR  
THE YAKIMA INDIAN NATION

cc: Melvin Sampson  
Russell Jim  
Jim Hovis  
Catherine Russell

CONFEDERATED TRIBES AND BANDS

*Yakima Indian Nation*

POST OFFICE BOX 151  
TOPPENISH WASHINGTON 98948

(17)  
GENERAL COUNCIL  
TRIBAL COUNCIL

JACKET NUMBER  
PROPOSED RULE PR-60  
CALCULATED (50 FR 2579)  
USNRC

April 17, 1985

'85 APR 18 AM 1:53

OFFICE OF SECRETARY  
BOOKING & SERVICE  
BRANCH

Honorable Samuel Chilk, Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Re: 10 CFR Part 60 Amendments

Dear Secretary Chilk:

On January 17, 1985, the Commission issued for public comment proposed amendments to 10 CFR Part 60. Licensing Procedures for Disposal of High-level Radioactive Waste in Geologic Repositories, 50 Fed. Reg. 2579. Because of the coincident deadlines for submission of comments on these proposed amendments and on the draft environmental assessments for proposed repository sites, the Yakima Indian Nation filed its comments on these amendments late, on April 8, 1985.

As detailed in our comments (enclosed), the Yakima Indian Nation feels strongly that the proposed amendments, if adopted as proposed, would seriously undermine the Commission's ability to fulfill its statutory responsibilities in the nuclear waste program. Moreover, the proposed amendments would greatly increase the likelihood that the national nuclear waste disposal program would experience very significant unnecessary delays or outright failures in its implementation. In brief, we believe the Commission staff's reluctance to engage in a thorough review of the Department of Energy's site screening and selection process constitutes a fundamental abdication of the Commission's public health and safety and environmental protection responsibilities under the Atomic Energy Act, the National Environmental Policy Act, and the Energy Reorganization Act. Moreover, contrary to the Commission's position expressed in the proposed amendments, nothing in the Nuclear Waste Policy Act either requires or suggests such deference by the Commission concerning the selection of sites for characterization.

Because these issues have such profound implications for the Commission's responsibilities in this crucial national program and for the success of the program itself, the Yakima Nation feels that they deserve a higher degree of scrutiny than the Commission might ordinarily devote to such a rulemaking. For this reason, we

APR 22 1985


Acknowledged by card.....  
dp

Honorable Samuel Chilk, Secretary  
April 17, 1985  
Page 2

request that the Commission schedule a public meeting before voting on promulgation of a final rule to receive oral comments on this proposed rule from the staff, affected states, Indian tribes, and representatives of the general public that have submitted comments on the proposal. Such a session, similar to the ones which the Commission held during its consideration of the concurrence in DOE's general siting guidelines, would serve to illuminate the issues in this vital rulemaking for the Commissioners' benefit, and, whether or not it changed the outcome, would result in a better-informed Commission decision.

The Yakima Nation urges your favorable consideration of this request.

Sincerely yours,

  
MELVIN R. SAMPSON,  
Vice Chairman  
Yakima Tribal Council

MRS:ls

Enclosure



## ANALYSIS OF PROPOSED REVISIONS TO 10 CFR PART 60

### Summary

The purpose of the proposed revisions to 10 CFR Part 60 is to revise the regulations that treat state and Indian tribal participation in the siting and licensing process to conform with the provisions of the Nuclear Waste Policy Act of 1982. The portions of 10 CFR Part 60 that are proposed for revision to make the regulations conform with the provisions of the Nuclear Waste Policy Act of 1982 include:

| <u>Section</u> | <u>Existing Section Title</u>               |
|----------------|---|
| 60.2           | Definitions                                 |
| 60.10          | Site Characterization                       |
| 60.11          | Site Characterization Report                |
| 60.61          | Site Review                                 |
| 60.62          | Filing of Proposals for State Participation |
| 60.63          | Approval of Proposals                       |
| 60.64          | Participation by Indian Tribes              |
| 60.65          | Coordination                                |

The Nuclear Regulatory Commission (NRC) is required by law to cooperate with the states, and the NRC recognizes the value of state participation in siting and licensing decisions. However, the cooperation between the NRC and the states, as presently defined, consists mainly of issue definition and information exchange. The states are not granted a full advise-and-consent role in the decision process under current interpretations of the applicable statutes (The Atomic Energy Act of 1954, as amended; Reorganization Plan No. 3 of 1970; and the Nuclear Waste Policy Act of 1982) or regulations (10 CFR Part 60).

Another problem with the way that the 10 CFR Part 60 regulations are structured is that the NRC's role is basically only advisory until after site characterization is completed, as the Department of Energy (DOE) is not required to obtain any type of license or formal approval from the NRC until after site characterization is completed. The NRC does not become involved in the process for a particular site until after a site characterization plan is submitted by the DOE for that site. State involvement is tied to NRC involvement, as a State is not considered an interested party for purposes of these participation provisions until after the State is identified within a site characterization plan. This is well after the conclusion of the environmental assessment process.

It is not clear in the Act or in the regulations what role, if any, State comments prior to the site characterization phase have in influencing either NRC or DOE decision processes. As the Act and the regulations both define the commencement of the site characterization phase as the beginning of shaft sinking, there apparently is no regular mechanism available to the States to influence activities that occur prior to that time. Though many serious environmental consequences can result from these "preliminary"

activities, the only redress if the DOE or the NRC ignore State concerns about such activities appear to be through the courts under the provisions of Section 119 of the Nuclear Waste Policy Act.

#### Specific Changes Proposed for 10 CFR Part 60

Specific changes in 10 CFR Part 60 (and their implications for the State of Utah) are summarized below.

The changes proposed for Section 60.2 (Definitions) do not affect state participation in the siting and licensing process. In order to provide conforming definitions with the Nuclear Waste Policy Act, the definitions of "Indian tribe" and "tribal organization" have been dropped, and a definition of "affected Indian tribe" is added. The definition of "affected Indian tribe" is the same as that provided in the Nuclear Waste Policy Act.

The "preapplication review" portions of 10 CFR Part 60, which deal with site characterization activities, have been extensively revised. Substantively, these revisions define the contents of the site characterization plan that DOE must submit to the NRC prior to the commencement of the DOE's site characterization activities. In addition to information required under the old version of the "preapplication review" regulations (old 10 CFR 60.10 and 60.11), the DOE must submit plans for decontaminating and decommissioning the site characterization area, including plans for mitigation of any significant environmental effects, if the area is deemed to be unsuitable for development as a repository. The DOE must also submit its criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act for repository activities covered by that section of the Act, or other siting criteria utilized by the DOE for other types of sites, utilized for determining the suitability of sites for location of a geologic repository. The level of information required for waste forms or waste packages has been upgraded from a description of the research and development efforts related to waste packaging to a requirement that the DOE provide a description of the waste form or package and its relationship to the natural barrier systems peculiar to an individual site. The conceptual design for the repository that the DOE must submit must take into account "likely site-specific requirements." (See proposed 10 CFR 60.15, 60.16, 60.17, and 60.18). The language for these additional regulatory requirements is quoted directly from Section 113 of the Nuclear Waste Policy Act.

Also, it is important to note that both the Act (Section 113(b)) and the regulations (new 10 CFR 60.16) require that the site characterization plan be submitted to the NRC "before proceeding to sink shafts at any candidate site." Previously, the NRC required the DOE to submit site characterization plans as early as possible in the DOE's planning process. This implies that certain preliminary activities, such as drilling and seismic exploration, as well as construction of access, could occur prior to DOE submission of the site characterization plan. Thus, the only effective opportunity available to the NRC or the states and tribes for review and comment on such activities (if it is available at all) is at the Environmental Assessment stage.

Once the NRC receives a copy of DOE's site characterization plan for a given site, the NRC must prepare a site characterization analysis and make this analysis available to the public for comment. This analysis must be transmitted to the host state and affected Indian tribes, along with an invitation to comment. In both the old and new versions of the rule, the NRC will publish a notice of opportunity for comment in the Federal Register, and will afford a reasonable comment period, "not less than 90 days," for comment by interested parties, including states.

The NRC must provide the site characterization analysis to the DOE, together with whatever comments the NRC feels are important, and the NRC must include a statement either that the Director of the NRC has no objection to the DOE's proposed site characterization program, or specific objections to and/or recommendations about the DOE's proposed program. These new provisions are similar to those in the old version of the rule.

Additional sections have been added requiring the DOE to include a description of and justification for any planned onsite testing with radioactive materials (NRC approval of such planned testing is required), and a requirement for semiannual progress reports by the DOE to the NRC during site characterization activities. The use of radioactive materials at the site characterization stage is governed by the Nuclear Waste Policy Act (see Section 113(c)(2)(A) and (B)). The requirement for a semiannual progress report appears to be an NRC requirement not explicitly covered in the Act, justified by the NRC's interest in expediting licensing decisions. The new sections of the rule make mandatory reporting of progress and issues by the DOE to the NRC. The NRC may, when it receives these reports or comments from other interested parties or on its own initiative, comment to the DOE at any time during the site characterization process, and the NRC may also raise objections to the DOE's conduct of the characterization process. In both the old and new versions of the rule, copies of any such correspondence are to be made available by the NRC in its Public Document Room.

The final portion of this section in both the old and new versions of the rule indicate that consultations between the NRC and the DOE are informal consultations and are not regarded as a part of a proceeding under the provisions of the Atomic Energy Act of 1954, as amended. The new version of the rule adds a disclaimer stating that the conduct of informal conferences does not imply that the NRC will issue a license or any other authorization, and that the authorities of the NRC, the Atomic Safety and Licensing Boards and Appeal Board, and the presiding officers or NRC Director are unaffected.

Subpart C of 10 CFR Part 60 defines and orders participation by States and Indian tribes in the site characterization and licensing process. The Nuclear Waste Policy Act contains several explicit sections treating State and Indian tribal participation at various points in the process. Unfortunately, except for the State "veto" provisions (Section 116(b)(2)), which can only be implemented after a site is formally recommended by the President to the Congress, this participation is mainly limited to information and communication. Neither the statute nor the regulations at 10 CFR Part 60 appear to offer the opportunity for true interactive cooperation, coordination, and decisionmaking between the NRC, the DOE, and the States and Indian tribes.

Old 10 CFR 60.61 will be retitled "Provision of Information", and the revised "Site Review" provisions have been moved to 10 CFR 60.62. The section on provision of information provides that States and affected tribes will be notified regarding NRC determinations or plans made with respect to site characterization or other geologic repository activities. However, these provisions are not triggered until a geologic repository "may be located" within a State. For the purposes of this section, a repository "may be located" within a State when such State is identified in a plan submitted to the NRC by the DOE.

The "Site Review" section has been moved to 10 CFR 60.62, and the old section 60.62, entitled "Filing of Proposals for State Participation," has been eliminated. The site review provisions are not triggered until an area has been approved by the President for characterization and a request for consultation is submitted in writing to the NRC by either the State or an affected Indian tribe. Consultation is defined as keeping the parties informed of the Director's views on the progress of site characterization; review of applicable NRC regulations, procedures, and schedules; and cooperation in developing State proposals for participation in licensing reviews.

Old section 60.63, entitled "Approval of Proposals," has been eliminated. A new section, entitled "Participation in License Reviews," has been substituted. Participation in licensing reviews is defined by the rules of practice before the NRC provided in 10 CFR Part 2 (Subpart G). States and affected Indian tribes may submit proposals to the Director of the NRC for participation in the review of site characterization plans or license applications. The State or tribe may also request meetings with the NRC regarding any such proposal. The NRC may then, subject to the availability of funds, approve all or part of the proposal. To be approved, proposed activities must be suitable in light of the type and magnitude of potential impacts, must enhance communications between the NRC and the state, must make a timely and effective contribution to the review, and must be authorized by law.

Old section 60.64, entitled "Participation by Indian Tribes," has been eliminated, as Indian participation has now been incorporated in the various sections dealing with State participation. A section entitled "Notice to States" has been substituted. This section provides that the Governor and legislature of a State may jointly designate a person or entity to receive information and notification from the NRC on their behalf.

Old section 60.65, entitled "Coordination," has also been eliminated. This section allowed the Director of the NRC to take into account the desirability of avoiding duplication of effort in acting upon multiple participation proposals. However, the Nuclear Waste Policy Act now specifically grants participation rights to the States and affected Indian tribes, and Indian participation, for example, cannot be foreclosed even though a proposal for State participation has been submitted. Thus, the old section is no longer applicable. Old section 60.65 is now titled "Representation," and it requires any person or entity acting in a representative capacity for a tribe or a State to submit a basis for such authority upon request by the NRC.



### Recommendations

The currently proposed revisions to 10 CFR Part 60 for the most part include minor wording changes that conform the existing regulations to the provisions of the Nuclear Waste Policy Act. The NRC appears to be utilizing a restrictive interpretation of its authorities under the Act in order to avoid duplicating DOE authorities and responsibilities. The State of Utah would like to encourage the most liberal interpretation possible of the NRC and State participatory role in the DOE's siting and licensing activities.

Under both the Act and the proposed regulations, the opportunities for State participation with NRC in the siting portions of the process have been restricted. The States cannot formally propose participation in the process until after a site characterization plan is received by the NRC. This is in contrast to earlier versions of the regulations, which encouraged submission of site characterization plans to the NRC at the earliest possible point in the process. As plan submittal triggers State participation, State participation was thus potentially available at an earlier point in the process under the old regulations. As the language in the proposed rule dealing with this issue is quoted verbatim from the Act, it appears unlikely that this restrictive requirement can be relaxed in the proposed rule.

Under the proposed rule, the DOE is not obligated to submit plans to the NRC until the DOE plans to commence shaft sinking; "preliminary" activities are not covered by these plans. A clear definition should be added to the regulations of what, exactly, constitutes "preliminary" activities, as these pre-plan activities may be environmentally disruptive and may also trigger State regulation or require State permits. For example, is site preparation and construction of access prior to commencement of actual shaft sinking considered to be "preliminary," and thus exempt from the participation requirements, or is it considered to be a part of the shaft sinking? The latter interpretation is preferred, as the DOE would then have to submit plans for such activities to the NRC (and the NRC would have to solicit State participation) before large-scale disturbances (and consequent environmental damage) occur.



NUCLEAR WASTE PROJECT OFFICE

Capitol Complex  
Carson City, Nevada 89710  
(702) 885-3744

December 3, 1985

Mr. Nunzio J. Palladino, Chairman  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Chairman Palladino:

As you are aware, some time ago the State of Nevada requested that the Commission convene a public meeting to hear the comments and concerns of affected states and tribes on the proposed amendments to 10 CFR Part 60, and that request was denied. As consideration of the aforementioned proposed amendments is before the Commission, and the Commission has granted a similar request in this regard to the American Mining Congress relative to the Commission's mill tailings rulemaking, I am therefore, at this time, renewing my request that the Commission hold the aforementioned public meeting. We are making this renewed request again in the spirit of cooperation, and hope that the Commission will see the value in conducting such a public meeting.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert R. Loux", with a stylized flourish at the end.

Robert R. Loux  
Director

RRL/gjb