AGREEMENTS IN RADIOACTIVE WASTE MANAGEMENT:

AN OVERVIEW

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ABSTRACT

There are three major kinds of agreements in high-level radioactive waste management: contracts for disposal of spent fuel and/or HLW, interagency memoranda of understanding and Consultation and Cooperation agreements. Comparing these with ordinary business contracts reveals the importance of their underlying political rather than contractual nature and suggests how disputes might develop and be resolved.

INTRODUCTION AND GENERAL POINTS

I am going to use my position as the opening speaker in this session "Institutional Interactions: The Agreements Process" to offer some personal perspectives on agreements, negotiations and disputes and apply them broadly to the three kinds of agreements you will hear about from the other speakers. These agreements are: Contracts for Disposal of Spent Fuel and/or HLW; Interagency Memoranda of Understanding; and Consultation and Cooperation Agreements.

My general points will draw on a few very basic concepts from contract law, recent literature on negotiations such as Fisher and Urey's *Getting to Yes* and Howard Raiffa's *The Art and Science of Negotiation* and my own understanding of the major features of the agreements themselves.

While our collective topic is the agreements, it is well to note that disputes and negotiations are important in their own right. For example, a given agreement may be a means of resolving a dispute. By the same token, disputes may arise in developing or in implementing an agreement. Similarly, negotiations are common in reaching an agreement, but they can also continue throughout implementation. Indeed, it may be useful to think of any protracted relationship, especially a contractual one, as a continuing set of negotiations. On the other hand, some agreements involve essentially no negotiations.

All of this is to say that the three concepts are both independent and closely related, my first general point. My second is that an essential reality of the agreements in radioactive waste management is that some of the major disputes and negotiations concerning them have and will take place outside the agreements themselves and often not directly among the parties.

For example, the initial price of waste disposal services was set by Congress in the Nuclear Waste Policy Act (NWPA) as a result of legislative negotiations among its members and with the various groups which lobbied them. The individual utilities and their associations participated in this lobbying and DOE supplied information and views about what the fee should be, but the fee was not negotiated directly between the affected parties.

My third general point is very basic: agreements are effective only to the extent they fit the parties' interests. As the interests diverge, the likelihood rises that an agreement will be broken. Even though a central thrust of contract law, and the legal sanctions it creates, is to ensure that agreements are kept, the law does not completely overcome the dynamics of changing interests. For example, legal disputes over contracts result in damage awards much more often than court orders compelling performance. A corollary point is that it is advantageous to each party to assure that the agreement serves the interests of each, including its own.

A variety of factors can influence whether interests diverge. A major one is bargaining power. Agreements freely reached among parties with equal power are much more likely to be fulfilled than those which reflect differences in strength. At the extreme, coercive agreements lose their legal potency.

A second such factor is simply time. The longer it takes to carry out an agreement, the more likely it is that the parties' interests, and thus the value of the agreement, will change. And change is more likely to disrupt than to strengthen an agreement. A closely related factor is instability in one or more of the parties. Radioactive waste management is marked by instability on all sides.

The first high-level waste repository will be licensed under new, and therefore untested NRC rules. Both technical and regulatory novelty imply uncertainty and, with it, instability. DOE itself is a relatively new organization with little experience in obtaining NRC licenses. DOE's future as a separate agency at the Cabinet level is somewhat unsure. The Office of Civilian Radioactive Waste Management (OCRWM) is quite new and has shown some of the change in staff, internal organization and program that marks any new organization. Important program decisions, such as need for and function of MRS or use of civilian repositories for defense waste are still pending.

Uncertainty about how many nuclear power plants we will have and when we will have them creates uncertainty about the extent of demand for repository capacity. These uncertainties may strongly affect planning and financing the waste management system.

One would expect instability to diminish over time, particularly as OCRWM matures and its relationship with NRC evolves. However, the waste program is subject to intense political concern, especially with respect to siting facilities and to transportation. The lengthy development process for waste facilities implies inevitable change in the dynamics of these political concerns as the cast of public officials raising them changes as the result of future elections. Thus a fair degree of instability is inherent and may

affect the implementation of the various waste management agreements.

I want to turn now to the agreements themselves. The thrust of my analysis is to compare these agreements, at least implicitly, with the model of an ordinary business agreement freely arrived at by equally potent parties and intended to be legally binding. I do not suggest that the radioactive waste agreements should or even could be modified to fit the business model. I want to use the comparison to place the agreements in context, understand them better and help highlight some of the specific points about purposes and implementation you will hear from the other speakers in this session.

THE PART 961 DISPOSAL CONTRACTS

Let me start with the agreements for disposal of spent nuclear fuel and/or high-level radioactive waste, promulgated by DOE as Part 961 of Title 10 of the Code of Federal Regulations. These take the form of standardized written contracts with a set of provisions one might find in a contract between two businesses. There are, however important differences. I want to discuss some of them and their implications for management of disputes arising under the contracts. This will be a speculative discussion, since I am not aware of any disputes thusfar.

First, the "961" standard contract is hardly the result of normal negotiations; it is a Federal rule implementing NWPA and having some force of law. Major provisions of the contract are mandated by the statute, including the fee for waste disposal. There is little choice about signing: as a condition of NRC license issuance or renewal NWPA requires either a contract or a statement by the Secretary of Energy that good faith negotiations are underway. Finally, a utility has little power should DOE fail to perform its obligations under the contract, particularly taking spent fuel on time. The only Part 961 remedy available for delay is adjustment in fees and schedules.

The "961" contract appears to favor DOE. In ordinary business relations, the combination of a standard set of terms written by the stronger party and inability of the weaker party to avoid signing could lead to questions about enforceability, should a dispute occur. But of course these are not ordinary business contracts. They are devices to implement a statute. The negotiations behind them were held primarily in a political and legislative context rather than a contractual one. And those who must sign the contracts generally supported the legislation.

Presumably contract disputes under Part 961 will use standard DOE procedures, with resort to the courts if these fail. In the event of general disputes, as opposed to those involving only one utility, direct negotiations and DOE appeals procedures are likely to be supplemented by lobbying aimed first at the Secretary of Energy, selected Congressional committees, subcommittees, individual members and staff, and perhaps OMB, and then spreading to the White House and conceivably to Congress as a whole.

In short, these formally contractual, but largely political and legislative agreements will be subject to political and legislative dispute resolution. Three important consequences flow from this. First, individual signers of the agreements will be much less important in resolving disputes than collections of them, such as the utility industry as a whole or its associations. Second, political dispute resolution, especially before a legislature, opens the door to participants who simply could not become involved in an ordinary legal proceeding. Third, the door also opens to linking issues which may have no direct hearing on the dispute at hand, the scope of the agreement itself, NWPA or even radioactive waste.

Dispute resolution in an open political arena can be more difficult to focus and to control than the normal business practices of direct negotiations or even litigation among the parties. Yet the apparent inequality in bargaining power between DOE and any individual utility and the underlying nature of the "961" disposal contract may create major disputes out of issues that could ordinarily be managed through direct negotiation. Utilities with contract problems may, perceiving they have limited power to negotiate directly, quite reasonably turn to lobbying as a first rather than as a last resort. The existence of an able and extensive network of trade associations, working groups and individuals tracking implementation of NWPA provides a ready institutional channel for this approach, further increasing the likelihood of its use.

INTERAGENCY MEMORANDA OF UNDERSTANDING

The second kind of agreement are memoranda of understanding among federal agencies concerned with radioactive waste management. They serve the general function of spelling out how the two or more agencies involved will implement their statutory responsibilities, often under more than one statue.

While such agreements serve to specify the conduct of statutory mandates, they are generally not explicitly required in the same way that the disposal contracts are. Each agency negotiating does so voluntarily, in the sense that it acts on its own interpretation of the laws affecting it. Moreover, bargaining power will be fairly equal, both because of the voluntary nature of the bargaining and because in general the participating agencies are independent of each other in such important matters as formal structure and budget. In these senses, therefore, interagency agreements resemble ordinary business contracts.

These are not, however, contracts in a legal sense. They create no legal obligations and one agency cannot sue another for failing to perform. Instead, they are really expressions of mutually agreed upon agency policy. Their negotiation and resolution of disputes concerning them will be through policy channels. Unlike the disposal contracts, these channels lie primarily within the executive branch. If two agencies are unable to resolve a dispute, they are likely to look up the administrative ladder, and ultimately to the Executive Office of the President, particularly the Office of Management and Budget, rather than going to Congress or seeking to generate help from external constituencies.

I might add another consideration. No matter how clear the chain of command or tight the management, government agencies are not monolithic. Arriving at policy decisions normally involves a variety of participants with differing interests. In light of this, it is useful to think of negotiations between two agencies as involving three separate set of negotiations: the direct interagency discussions and negotiations internal to each of the agencies. The mere existence of these latter discussions explains something of why government appears to act slowly relative to business.

Against this broad sketch of interagency agreements, I want to add two points about those that will

be formed under NWPA, each of which erodes somewhat the general equality of bargaining power. The first concerns DOE-NRC agreements. NRC's role as DOE's regulator would appear to give the Commission power over the Department, since failure by DOE to address NRC concerns within the framework of their agreement may create difficulties in licensing. As an independent commission, NRC is less directly accountable to the Administration than is DOE and therefore has some added increase in bargaining power. Second, interagency agreements involving the transfer of funds carry with them some of the influence associated with ordinary government contracting. However, such influence is constrained. For example, the scientific prestige accorded USGS gives it substantial independence in arguing its point of view on studies conducted with DOE support.

CONSULTATION AND COOPERATION AGREEMENTS

Finally are the Consultation and Cooperation agreements between DOE and states or affected Indian tribes. These agreements are creations of Section 117(c) of NWPA which mandates that they be written, sets out a schedule for their negotiation and describes major provisions. Thusfar negotiations between DOE and the State of Washington have lead to a draft agreement. There appears to have been limited negotiation between DOE and tribes or other states to date; although approval of a site for site characterization, the statutory trigger date for negotiations, has yet to occur.

NWPA requires negotiation of such agreements, but not necessarily their completion. DOE must seek the agreements and must report to Congress on progress in negotiations, but states and tribes have no obligation to bargain. The mandated provisions address issues of state and tribal participation in repository development, a degree of participation which DOE may not, and perhaps could not, have offered but for NWPA. Thus the agreements seem primarily intended to benefit states and affected tribes, rather than DOE.

C&C agreements are meant to be binding, presumably meaning that legal remedies would be available if one party did not perform. The draft Washington State agreement has fairly elaborate provisions for conflict resolution and clearly envisions use of the courts to address disputes. Generally, disagreements which cannot be resolved by a C&C agreement's procedures will result in states or tribes seeking to force DOE to do things they view as required by an agreement; requests for monetary damages seem unlikely. It is conceivable, but doubtful, that DOE might take legal action to compel a state or tribe to fulfill its obligations under a C&C agreement.

As with disputes in the other agreements of interest here, C&C agreements may well be adjudicated by Congress. For example, Congress explicitly retained an oversight role for C&C negotiations not completed within six months of approval of site characterization. Occasional oversight hearings and annual appropriations decisions of the NWPA's Waste Fund will provide other opportunities for review.

The most important Congressional involvement will come in the event of a state or tribal Notice of Disapproval. While involvement at this point would be explicitly focused on the site selection decision, an objecting state or tribe would probably build its case on both technical and procedural bases. Among the latter would be whatever record could be assembled of unresolved issues and, in the objector's view, inadequate DOE behavior in negotiating and implementing the C&C agreement.

In short, Congress' reserving to itself the role of final arbiter in siting provides an additional, and potentially very important, forum for addressing disputes arising under the C&C agreements. An interesting set of tactical calculations results: should a state or tribe, or DOE for that matter, seek to resolve disputes as they arise or reserve them until Congress considers a Notice of Disapproval? If there is no such notice, disputes are likely to be moot. If there is a disapproval, it is unclear where tactical advantage lies. Presumably a record of reluctance to enter into good faith dispute resolution would weaken any party's case before Congress.

However, Congress may provide a more sympathetic forum than either C&C agreement provisions for conflict resolution or the courts, in part because its function is explicitly political. Here again, it is difficult to predict how things might go: there may be very great solicitude for state and tribal interests or Congress may be so relieved to have a site proposal that it will override state or tribal objections.

It does not seem likely that such considerations would affect state or tribal willingness to enter negotiations. Presumably, failure to negotiate in good faith would seriously weaken a state or tribe's posture in arguing for Congressional support of its Notice of Disapproval. Moreover, it seems quite possible that litigation addressed to questions of state or tribal participation, or other areas within the scope of a C&C agreement, would not succeed if the state or tribe bringing the suit had not made at least a convincing try at reaching a C&C agreement. In general it is difficult to see compromises in state or tribal legal options by entering C&C agreements; especially since the agreements are a central mechanism in NWPA's scheme for providing an extraordinary degree of external participation relative to Federal projects.

There are some other significant features of C&C agreements. One of these is that the agreements seem unlikely to be entirely independent of one another. DOE will be a party to each of them. It will presumably seek a fairly standard set of provisions; although it has decidedly less power to do so than it has in negotiations with utilities under Part 961.

States and tribes can be expected to seek provisions specific to their own concerns. For example, Washington State's concern about defense waste at Hanford lead to a provision that seems quite unlikely to arise elsewhere. Conversely, states and tribes can be expected to look at experience in negotiations elsewhere, consult among themselves, and seek agreements which combine the most favorable provisions gained by any other state or tribe with special provisions addressing their own particular interests. The result may be a systematic push to some form of least common denominator from the point of view of DOE's interests. One might read the article in the Washington State agreement requiring DOE to notify it of agreements reached elsewhere as foreshadowing such developments.

Ratification, as opposed to negotiation, of C&C agreements may be difficult, especially for states. The agreements will be negotiated by teams from DOE and the state or tribe involved, with the bargaining teams unlikely to be empowered to close the deal. In DOE's case, such power will go to a single official, possibly the relevant Operations Office manager. Similarly, a Governor may designate a single official to sign or may chose to do so himself. The Washington legislature, however, has taken ratification unto

itself, both complicating the process and making its outcome less certain.

Finally, conditions in a state or tribe may well change in ways that affect implementation of a C&C agreement. Washington State has a new Democratic Governor; its draft C&C agreement was negotiated under his Republican predecessor. There are some signs of change in the state's posture, change which may bring increased difficulty in negotiations.

SUMMARY

Let me close with a brief review. I have discussed the three kinds of agreements important in waste management, comparing them to the mode of an ordinary business agreement. While each of the three has features like the model, their inherent political nature is their most important characteristic. And it is likely that the political process will be the avenue taken for resolution to the serious problem.

REFERENCES

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