CURRENT AND POTENTIAL LITIGATION

UNDER THE NUCLEAR WASTE POLICY ACT OF 1982

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ABSTRACT

This paper deals with challenges to the validity of various implementation actions taken by federal agencies under the Nuclear Waste Policy Act (NWPA). It focuses on (1) pending or recently concluded litigation in the federal court system challenging certain federal agency actions and (2) actions to be taken in the relatively near future by those agencies that may well be tested as to their validity in judicial review proceedings.

JUDICIAL REVIEW UNDER THE NUCLEAR WASTE POLICY ACT

NWPA, Section 119 (42 U.S.C.A. § 10139)

The only section of the NWPA that expressly authorizes judicial review of a federal agency action taken under the Act is section 119. See also section 221. Section 119 provides:

> (a) JURISDICTION OF UNITED STATES COURT OF APPEALS.--
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> (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action--
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> (A) for review of any final decision or action of the Secretary, the President, or the Commission under this subtitle;
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> (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this subtitle;
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> (C) challenging the constitutionality of any decision made, or action taken, under any provision of this subtitle;
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> (D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.) with respect to any action under this subtitle, or as required under section 135(c)(1), or alleging a failure to prepare such statement with respect to any such action;
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> (E) for review of any environmental assessment prepared under section 112(b)(1) or 135(c)(2); or
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> (F) for review of any research and development activity under title II.
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> (2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.
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> (c) DEADLINE FOR COMMENCING ACTION.--A civil action for judicial review described under subsection (a)(1) may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after such party acquired actual or constructive knowledge of such decision, action, or failure to act.

Note that the section provides for direct review in a federal appellate court. Litigation in the federal court system is normally initiated in a federal district court, a trial court. Further, note that this section does not include actions of the United States Environmental Protection Agency (USEPA) even though it is required to implement one very important aspect of the NWPA's program. That agency is required by section 121(b) to promulgate

> generally applicable standards for protection of the general environment from offsite releases from radioactive materials in repositories.

Standard of Judicial Review

In reviewing the agency actions, federal courts do not "simply impose their own construction on the

statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question before the court is whether the agency's answer is based on a permissible construction of the statute." Courts must, however, "reject administrative constructions of a statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." Nevada v. Herrington, 777 F.2d 529 (9th Cir., December 2, 1985; Slip Op. 3-4.)

Limitations on a Court's Review Under the NWPA

The NWPA contains one limitation pertaining to the scope of court review of an action taken by the United States Department of Energy (USDOE). In relation to challenges to the validity of "environmental assessments" prepared by USDOE pursuant to section 112 of the NWPA, section 112(b)(1)(F)(i) provides:

> The issuance of any environmental assessment under this paragraph shall be considered to be a final agency action subject to judicial review in accordance with the provisions of chapter 7 of title 5, United States Code, and section 119. Such judicial review shall be limited to the sufficiency of such environmental assessment with respect to the items described in clauses (i) through (vi) of subparagraph (E). [Emphasis supplied.]

LITIGATION

Litigation Initiated from 1983 to Present

Since 1983, litigation has been initiated challenging the NWPA's implementation by USDOE primarily by states or environmental groups.[a] The areas of this litigation cover a broad range--from the (1) refusal to provide funds to a state to conduct independent monitoring and testing, (2) selection of "potentially acceptable sites" for a repository, (3) adoption of "siting guidelines," and (4) proposed location of a "monitored retrieval storage" site. USEPA's failure to timely adopt standards pertaining to offsite radioactive releases from repositories was also challenged, as well as the standards which were finally adopted.

Finally Decided Cases.

In Nevada v. Herrington, supra, 777 F.2d 529 (9th Cir., decided December 2, 1985), states won a significant victory when Nevada successfully challenged USDOE's refusal to fund independent monitoring and testing, as well as provisions of the Department's Internal General Grant Guidelines.

The Court in Herrington held:

> The findings and general purposes of the statute support funding of the state's pre-site characterization studies. In addition, because such backup studies are essential to the "statement of reasons" that must accompany the state's disapproval of a site recommendation, see § 116(b), the studies are "required by § 116" and therefore fundable under the catch-all provisions of § 116(c)(1)(A).
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> Because DOE's Guidelines seek to "minimize" independent collection of primary data, and require DOE approval before any federally-funded tests can be run on the primary data that DOE has collected, they undermine the independent oversight role that Congress envisioned for the states. Nevada is entitled to funding of its relevant pre-site characterization activities subject to the limitations defined herein. The sections of the Guidelines which govern site characterization are unlawful." (Slip Op. 15.)

In reaching that conclusion the Court focused on two purposes evident from a reading of the NWPA: that the costs of nuclear waste disposal "should be the responsibility of the generators and owners of such waste," and, at the same time, that state and public participation in the planning of repository sites "is essential to promote public confidence." The Court then said:

> [T]aken together, these dual purposes show that Congress intended the generator-fed nuclear waste fund, not the state, to pay the costs of any state "participation" --such as evaluative testing--in the choice of sites. The independent oversight and peer review which only the states are poised to provide would immeasurably "promote public confidence" in general and among Nevada residents in particular. Slip Op. 4-5.

The Court thus concluded that even pre-site characterization activities must be funded, so long as they are essential to an informed statement of reasons in support of a Notice of Disapproval. After site characterization has commenced, funding is authorized for "any monitoring, testing, or evaluation," subject to certain limitations. Those limitations, applying both to pre- and post-site characterization independent monitoring and testing, are that any such activity must be reasonable, scientifically justifiable, performed by demonstrably

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[a] Two cases have been filed by industry challenging the USDOE's method of assessing fees for the Nuclear Waste Fund. See General Electric Uranium Mgmt. Corp. v. United States Department of Energy, 764 F.2d 896 (D.C. Cir. 1985); WEPCO v. Department of Energy, ___ F.2d ___ (7th Cir. 1985). We do not intend to discuss those cases here, however, since they do not materially affect the USDOE's program in identifying, selecting and developing a nuclear waste repository.

competent contractors, and *cannot* unreasonably interfere with or delay USDOE's own activities at the site.

In invalidating those provisions of the Department's Internal General Grant Guidelines which purported to prohibit states from collecting "primary data," the Court said:

> By "minimizing" independent collection of primary data, and then restricting state tests of primary data that DOE has collected, the Phase III Guidelines eviscerate the independent oversight role that Congress envisioned for the states. Permitting DOE to "guard the chicken coop" alone would violate the statutory finding that state participation and oversight of DOE is "essential in order to promote public confidence in the safety of disposal of [nuclear] waste." Slip Op. 14.

In Texas v. United States Department of Energy, 764 F.2d 278 (5th Cir., June 10, 1985), cert. den. ___ U.S. ___ (December 2, 1985), Texas challenged the process followed by USDOE in determining under the NWPA, section 116(a), that two areas in Texas' "panhandle" were "potentially acceptable sites" for the location of a repository. The merits of Texas' contention were never reached for the federal court of appeals agreed with the USDOE, in the context of a motion to dismiss filed by the federal agency, that the Court lacked jurisdiction. This ruling was based on concepts of "finality." See discussion infra.

Pending Cases.

USDOE's Siting Guidelines

The validity of the "siting guidelines" regulations, adopted by USDOE in 1985, has been challenged by ten states and several environmental groups. The foundation guidelines, mandated by section 112(a) of the NWPA, were challenged on numerous grounds ranging from a lack of specificity to inadequate transportation criteria to the omission of ranking methodology.

All of these cases have been transferred to the United States Court of Appeals for the Ninth Circuit in San Francisco. Attention now centers on Environmental Policy Institute v. Herrington, 9th Cir. No. 84-7846, and Washington v. United States Department of Energy, 9th Cir. No 85-7128. The USDOE has (as it did in Texas v. USDOE, supra) moved to dismiss the two cases on finality grounds. All other guidelines cases have been stayed pending a decision on this motion. The essence of the United States' position is that the action of USDOE in adopting the siting guidelines regulations (1) is not a "final action or decision" within the meaning of section 119 (quoted supra), and (2) even if USDOE's action is, the siting guidelines are not "ripe" for adjudication by the Court. As to contention (2), USDOE argues that any challenge to the siting guidelines' validity should be in the context of a challenge to environmental assessments prepared later by USDOE pursuant to the NWPA, section 112(b)(1)(F)(i) quoted supra.

The ripeness doctrine is a creation of the federal court system. Its basic rationale is to prevent courts from "entangling themselves in abstract disagreements over administrative policy, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 401 U.S. 190, 200 (1983) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). As stated in Nevada v. Herrington, supra, quoting Abbott Laboratories at 149, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."

USEPA's Radioactive Release Standards

Four states and several environmental groups have challenged the validity of standards for offsite releases from radioactive materials from repositories adopted by USEPA as required by section 121(b) of the NWPA, quoted supra. Natural Resources Defense Council v. United States Department of Energy, 1st Cir. No. 85-1915; Minnesota v. United States Department of Energy, 8th Cir. No. 85-5168; and Texas v. United States Department of Energy, 5th Cir. No. 85-4881. The invalidity challenges, while not precisely described as yet, are likely to center on the standards' ground water protection element, 40 C.F.R. § 191.16, and the procedures followed in the regulation's adoption.

Monitored Retrievable Storage (MRS) Facility

In Tennessee v. Herrington, No. 3-85-0959, (U.S.D.Ct., M.D. Tenn., filed August 20, 1985), USDOE's proposed location of an "integrated" MRS facility in Tennessee last July has been challenged by that state. (Section 141 of the NWPA deals with a MRS site.) The challenger's primary contention is that the procedures followed by USDOE in proposing the location of the MRS facility were defective. The district court's denial of a USDOE motion to dismiss on jurisdictional grounds is now on appeal to the United States Court of Appeals for the 6th Circuit.

NWPA ACTIONS POTENTIALLY SUBJECT TO LITIGATION

There are several actions to be taken in the near future under the NWPA which are potential subjects of judicial review. Two of the most likely areas for litigation are the following:

Preliminary Determinations of Suitability (PDS)

Section 114(f) of the Act, 42 U.S.C. § 10134(f), provides, in part, that for purposes for complying with NEPA, "the Secretary shall consider as alternate sites for the first repository to be developed under this subtitle three candidate sites with respect to which (1) site characterization has been completed under § 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 § 112(a)."

USDOE, in Volume 1 of its Mission Plan issued last summer, stated as follows:

> As an additional consideration affecting the site-characterization phase, the Act requires the DOE to have three candidate sites for which a preliminary determination of suitability for respository development can be made by the Secretary of Energy on the basis of siting guidelines. The Secretary will make this preliminary determination of site suitability at the time he recommends three sites to the President for site characterization on the basis of the evaluations contained in the final environmental assessments. The DOE considers that, if during or after site characterization a site is found to be unsuitable for further consideration, the DOE can nonetheless proceed with a recommendation to the President of one of the other two sites as the proposed repository site. If three sites must be found to be suitable after site characterization, then the selection of the repository site could be delayed by up to 5 years while a replacement site is selected and characterized, depending on the replacement host rock. [Emphasis supplied.]

The states and others, however, feel strongly that this language requires that the PDS should be made only after characterization is substantially completed in relation to the three sites selected by the President. If USDOE persists in its interpretation and makes the PDS at the commencement of characterization, litigation will undoubtedly follow.

"Environmental Assessments"

Later this year, USDOE proposes to recommend three sites to the President for characterization as candidate sites. NWPA, section 112(b)(1)(C). These three sites are to be selected from a group of nine proposed sites, each of which has been subjected to an environmental impact review embodied in an "environmental assessment." NWPA, section 112(b)(1)(E). Several of these assessments will, almost certainly, be the subject of litigation.

Other potential areas of litigation for the near future include, among others:

Defense Wastes. USDOE takes the position that certain decisions relating to the ultimate disposition of "defense" high-level wastes now temporarily stored on federally owned lands are not subject to the deep-geologic disposal program of the Nuclear Waste Policy Act. This interpretation may be the subject of litigation on the ground that the NWPA does not provide for these "defense waste" exceptions to the NWPA.

Water Rights. USDOE has taken the position that, with regard to the proposed repository site on the federal Hanford reservation in Washington, it now holds "reserved" water rights that were established under federal law when the reservation was created in the 1940's. Washington State believes this conclusion is suspect and has so notified USDOE. In response, USDOE stated that, without modifying its position but acting in a spirit of comity, it will submit water right applications to Washington if the Hanford site is selected for site characterization.

Litigation Funding. The USDOE has, consistent with an OMB circular which provides that grants cannot be used to support "claims against the United States," taken the position that grants from the Nuclear Waste Fund cannot be used to support judicial review under the Nuclear Waste Policy Act. The states and tribes, of course, strongly disagree with that position, and it is a virtual certainty that the issue of so-called litigation funding will be the subject of judicial review in the near future.

Miscellaneous

In addition to the above, it is also quite likely that various states, both potential repository host states and so-called "corridor states," will eventually litigate issues involving the transportation of spent fuel and high-level nuclear waste, such as the extent of federal preemption in that area, liability for emergency preparedness, response, and clean-up, etc. Various challenges to departmental actions can also be expected from the so-called "second round" states, the most obvious potential lying in the area of the USDOE's screening methodology.

POTENTIAL IMPACTS ON THE REPOSITORY PROGRAM

Several of the either actual or potential categories of litigation discussed in this paper have the potential for serious, even crippling, impacts on the success of the USDOE's efforts to site, develop, construct, and operate a repository. If, for example, the challenge to the validity of the siting guidelines succeeds, those guidelines presumably would have to be rewritten, perhaps in their entirety. In that case, they would be subject to further notice and comment rulemaking under the Administrative Procedure Act. That, alone, would result in substantial (on the order of magnitude of from 1 to 3 years) delay. The environmental assessments, which apply those guidelines, would thus also fall, and the process of nomination and recommendation for characterization, and thus the entire repository program, would come to a screeching halt.

Likewise, if any environmental assessment, particularly that of a site recommended for characterization, is declared invalid, that assessment will have to be rewritten, perhaps substantially, and the entire process of characterization would also come to a halt.

Finally, as a further example, if the USDOE persists in its interpretation of § 114(f) of the Act and makes its preliminary *determination* that three sites are suitable for development as a repository at the beginning of characterization, and if that interpretation is subsequently challenged, as it undoubtedly

will be, and determined to be incorrect, the potential exists that the entire program, at least for the first repository, could face substantial delays.

Assume the following hypothetical. The USDOE nominates and recommends for characterization three sites in the spring of 1986, and follows its recommendation almost immediately with a preliminary determination that those three sites are suitable for development as repositories. That decision is challenged within the 180-day limitation provided by § 119(b) of the Act. During the pendency of judicial review (and a final judicial determination could easily take from three to five years), one or more of the three sites are determined to be unsuitable and drop out of the process. The final judicial determination results in a decision that not only must the USDOE make its preliminary determinations of suitability upon the completion or at least substantial completion of characterization, but that a minimum of three sites must be found to be suitable for development as repositories. In that event, even if the USDOE were on the verge of recommending one site to the President and applying to the NRC for its construction authorization, the entire program would be halted, perhaps for a period of five to seven years, while one, two, or perhaps more additional sites were characterized to insure that the Secretary had, as the states feel the Act requires, three genuine alternatives from which to choose, in recommending a site for the first repository to the President.

CONCLUSION

This paper has focused on litigation which has already arisen and been decided, or is currently pending, under the Nuclear Waste Policy Act, as well as attempted to look into what the authors feel to be a fairly clear crystal ball and suggest further decisions of the USDOE and milestones in the program which will result in further judicial review.

While many questions and uncertainties remain to be resolved in this entire repository siting process, one thing appears to be clear. As the USDOE reaches each significant milestone in this process, its actions and decisions will almost certainly be subjected to judicial scrutiny.