AVOIDING LITIGATION IN THE HIGH-LEVEL WASTE PROGRAMS

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ABSTRACT

Litigation in the high-level nuclear waste programs cannot be avoided but there are opportunities to minimize law suits that include: (1) Having judicial review only when a final government decision or action has been taken; (2) Determining that a final decision or action comes only at the time of nomination, recommendation, or licensing of a site; (3) Using consultation and cooperative agreements to settle disagreements; (4) Using informal processes such as arbitration, appeal process or independent experts; (5) Requiring those who bring law suits to pay their own legal expenses; (6) Dealing effectively with public fears concerning risks.

INTRODUCTION

This paper would be precise and accurate if I simply stated that it is not possible to avoid litigation in the United States high-level nuclear waste programs. Sixteen cases have already been filed in the federal courts and certainly more will follow. (See Table I). However, it is useful to examine why this is occurring and how litigation might be minimized if not avoided.

In the first place, the process for choosing the site for the nation's first high-level nuclear waste repository is a long and complex one. The Nuclear Waste Policy Act of 1982 (NWPA) is designed to result by 1998 in one operational repository. Though the Act gives the Department of Energy (DOE) primary responsibility for implementing this task, it also mandates that other institutions review decisions made by DOE. DOE has issued draft environmental assessments for nine sites. It expects to formally recommend in April sites in three jurisdictions to undergo characterization. The Act provides that any interested individual or organization can bring suit when the final environmental assessments of the selected sites are published. Litigation can certainly be expected at that time, and although supposedly limited to the adequacy of the environmental assessment, could include other issues.

The characterization of sites will develop information enabling DOE to recommend to the President that a single site undergo repository development. The recommendation must be accompanied by an Enrivonmental Impact Statement. Again, interested individuals and organizations are entitled to bring suit at this point to determine the adequacy of the Environmental Impact Statement.

The President must recommend the site to Congress. The host state or Indian nation may issue a notice of disapproval that can be overriden by a joint Congressional resolution. If the recommendation is not disapproved, or if the disapproval is overriden, DOE must secure a license from the Nuclear Regulatory Commission (NRC). Avoiding litigation during this complex program will be impossible. People litigate because another party has taken an action or made a decision that adversely affects their interests. DOE and NRC must make decisions which virtually assure that people will believe they have been adversely affected or that their interests have not been adequately addressed by DOE or NRC.

LITIGATORS

Who are the likely litigants? The residents and local officials near any potential site are, of course, possible objectors, driven by both rational and irrational fears about the possible effects on health, environment and property valves. On the other hand, local people may determine that the social and economic benefits out-weigh possible risks. Litigation from this source may be avoided so long as such a favorable balance exists.

State governments have a duty to protect the public health and welfare within their state and some state officials believe a repository could threaten their public. The NWPA mandates state and Indian nation involvement in the repository program, although, the extent of that role is not clearly defined. Already, suits are being brought by state governments in order to define that role. The states have the financial resources to undertake litigation and if it is politically desirable will do so. Local support for a repository may reduce the state political motivation but the states will consider transportation issues in addition to siting concepts.

Environmental interest groups are likely litigants. They are motivated by concerns about the safety of a repository, and by an ideological objection to nuclear power. For them, cancelling or at least delaying the implementation of the program will be a key battle in their war against nuclear power. Since funding is a major concern for them, they will encourage the use of state resources to achieve their objectives.

Industry has already brought suit (Wisconsin Electric Power Co., v. U.S. DOE 777 F.2d 529 (9th Circuit 1985) and prevailed concerning the appropriate level of payments into the nuclear waste fund. They could be a litigant again depending upon the issues. Given that this controversial program will require DOE, NRC and other agencies to make difficult decisions affecting the health, safety and welfare of many people, is there any way to limit litigation surrounding this program?

CONGRESS

Congress could amend the NWPA to resolve some of the disputed issues, but this is unlikely. The NWPA was the product of a series of fragile compromises. Any effort to amend certain provisions of the NWPA would open the entire Act to reconsideration by Congress, and could result in the unraveling of all the compromises that were essential to the passage of the NWPA. Congress is unlikely to entertain these thorny questions except as a last resort.

SUPREME COURT

The U.S. Supreme Court could seize upon the first opportunity to resolve as many questions as possible, but, this also is unlikely. Traditionally, the Supreme Court will decide only the issue raised by the case before it. Additionally, it should be noted that the Supreme Court has been solicitous of states rights including where nuclear power issues are involved.

LIMITING LITIGATION

On the other hand, it is possible to limit the amount or extent of litigation by relying on the NWPA requirement that only a "final decision or action" of DOE is subject to judicial review. In the recently decided case of Texas v. U.S. DOE, 764 F.2d 278 (5th Cir. 1985), the state of Texas challenged DOE's selection of a site in Texas as potentially acceptable. Texas argued that the determination of whether a site was potentially acceptable or not should have been based on the DOE guidelines for site characterization. DOE had not published its guidelines when it labeled the Texas site potentially acceptable. Texas argued that the selection was therefore invalid. The Fifth Circuit Court of Appeals held that the selection of sites as potentially acceptable was "only a preliminary but necessary step in the nomination process." The Court noted that the NWPA provided for judicial review after sites were formally nominated. The Court held that given the statutory scheme, DOE's decision that a site was potentially acceptable should not be regarded as a final action subject to review by the courts. This decision helps limit the opportunity for judicial review of DOE decisions and this can be of assistance in avoiding pre-mature litigation or securing early dismissal of such litigation.

A consolidated case is currently before the Ninth Circuit Court of Appeals brought by the Environmental Policy Institute and several states against DOE. The challenge is to DOE's guidelines for site recommendation on both procedural and substantive grounds. DOE has argued that the promulgation of the guidelines was only a preliminary step in the site selection process; thus the guidelines should not be subject to review. If this argument is not accepted, the result will be a court review of the DOE guidelines. The entire structure of the guidelines will be subject to attack. Each state will be able to argue that the DOE guidelines fail to take into account a factor which would support the disqualification of a site in that state. DOE could be forced to rewrite the guidelines and re-analyze all potentially acceptable sites under the revised guidelines. The cost in both time and money could be very serious.

However, if DOE succeeds, it will have established that judicial review of its decisions should be limited to the nomination and recommendation steps. Under the Act, the subjects for judicial review at these steps should be limited to the adequacy of the environmental assessment or the environmental impact statement. However, other issues can be expected to be contested at the same time. The result of this case could be critical in determining the success of the program. A defeat for DOE could presage protracted litigation over each decision made by DOE in the implementation of this program. A victory for DOE will significantly limit the amount of litigation that could occur.

There are other ways in which litigation could be minimized. NWPA provides for Consultation and Cooperation agreements between DOE and the host states of sites recommended for characterization. Those agreements could help to avoid litigation by resolving questions about state involvement in the program. Progress has been made in the negotiation of an agreement between DOE and the State of Washington. The Nevada v. Herrington case, 777 F.2d 529 (9th Circuit 1985), indicates a judicial preference for a strong role for state governments. With this expectation, the Consultation and Cooperation agreements could be an opportunity to reach agreement on issues that otherwise may be litigated in the courts.

Another possibility for avoiding litigation could be the use of arbitration, a DOE appeal process or a panel of independent experts that could resolve disputes without resort to time-consuming litigation. Even if larger issues can not be resolved by these methods, there may be a benefit if more narrow issues were resolved in a more informal and expeditious forum.

Under the provisions of the NWPA, authority is provided to make financial grants to states. Congress

Table I

Law Suits Filed Against DOE Under NWPA.

	Case Name	Court	Issue
1.	State of Nevada v. Herrington	U.S. Court of Appeals for the Ninth Circuit	DOE's denial of Nevada's request for NWPA grant money to collect independent primary "site characterization" data
2.	State of Washington Nuclear Waste Board v. DOE, et al.	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines, and other DOE actions
3.	Environmental Policy Institute, et al., v. Herrington al.	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines, and other DOE actions
4.	State of Nevada v. Herrington	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines
5.	State of Minnesota v. DOE, et al.	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines, and other DOE actions
6.	State of Vermont v. DOE, et al.	U.S. Court of Appeals of the Ninth Circuit	DOE's action in promulgating siting guidelines, and other DOE actions
7.	State of Mississippi v. DOE, et al.	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines, and other DOE actions
8.	State of Texas v. DOE, et al	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines
9.	Power, Inc., et al v. DOE	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines
10.	State of Utah v. DOE et al.	U.S. Court of Appeals for the Ninth Circuit	DOE's action in promulgating siting guidelines
11.	Wisconsin Electric Power Co., et al. v. Herrington	U.S. Court of Appeals for the Ninth Circuit	Appropriate level of payment to be made into the Nuclear Waste Fund
12.	State of Texas v. DOE, et al., Devin, et al., v. DOE, et al.	Supreme Court of the United States	DOE's action in defining, and identifying and notifying the State regarding potentially acceptable sites
13.	General Electric Uranium Management Corporation v. DOE	U.S. Court of Appeals for the District of Columbia Circuit	Appropriate level of payment to be made into the Nuclear Waste Fund
14.	State of Tennessee v. Herrington	U.S. District Court for the Middle District of Tennessee	DOE's study of possible locations for an MRS facility
15.	State of Tennessee v. Herrington	U.S. Court of Appeals for the Sixth Circuit	DOE's study of possible locations for an MRS facility
16.	State of Maine v. Herrington	U.S. Court of Appeals for the First Circuit	DOE's comment period for second repository

Source: U.S. Department of Energy

has determined that the states should have the resources to be meaningfully involved in the process. However, if funds are also available to finance litigation of issues in dispute, then it must be expected that the funds will be used for that purpose. An important way to minimize litigation is not to permit the use of money from the waste fund for the purpose of financing legal expenses. Intervenors through the years have attempted to have Congress fund their activities against nuclear power in this country and consistently this proposal has been rejected based upon sound public policy that the government should not be required to fund the legal opposition to its decisions. In order to minimize litigation, those who intend to use the courts to resolve disputes should pay the legal expenses associated with it.

An important motivation for litigation could be reduced if DOE and the nuclear industry were able to dispel the public's fears about the effect of the repository on health and the environment. DOE's public meetings at potential sites are helpful. Every effort must be made to communicate evidence establishing the safety of the repository and of transportation. The public wants to know of the risks and of the efforts taken to minimize those risks. If industry and DOE do not deal with those fears, but allow them to be exploited by the ideological opponents of nuclear energy, the result can predicably be increased litigation.

CONCLUSION

While litigation can not be avoided, through these efforts the amount of litigation could be minimized. If an atmosphere of cooperation and concensus can be developed, litigation could have a reduced effect on the overall success of the high-level waste disposal programs.