THE POLITICS OF FEDERAL-STATE RELATIONS

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ABSTRACT

States' ability to reject siting of high-level waste repositories has rested on politics, technical judgment and the potential that procedural error could disqualify a project. Prior to enactment of the Nuclear Waste Policy Act, sites were rejected through parochial political action in Congress. The NWPA limited the ability of states to receive parochial assistance, but did not eliminate the potential for Congressional politics to dominate programmatic decisions. Technical and procedural opportunity for affecting siting have, however, increased.

Siting a high-level waste repository is a political task. Whatever the technical merits or deficiencies of sites may have been, the decision whether to stay in Kansas, or, subsequently, South Carolina or Michigan, was made in the Congress in deference to states. I addressed this issue in a paper delivered to the American Nuclear Society Winter Meeting in 1983, soon after enactment of the Nuclear Waste Policy Act. The point of that paper was that the NWPA did not create the states' political power to reject a repository; the Act merely recognized the paralyzing effect of the states' de facto veto rights, and attempted to institutionalize this authority within a set of rules. The object of this paper is to return to the intent of the NWPA, review the rules under which repository sites are being investigated, and consider from a purely political perspective the relative weight politics and substance have under the NWPA.

It is suggested by this review that the relative weight of these factors has shifted under the NWPA, and can continue to change. The potential for politics to dominate technical considerations in siting decisions on a national level can, however, be assumed constant.

In general, before and since passage of the NWPA, there have been three major acknowledged areas of activity determining whether a given site would remain a candidate for a high-level waste repository. These are politics, substance and procedure. The NWPA greatly affected the relative importance of these factors.

The changes most easily analyzed occurred in the Federal procedural context. Prior to enactment of the NWPA, the procedural requirements for repository siting were relatively straightforward. They were set primarily by the Administrative Procedures Act, the Nuclear Regulatory Commission's licensing rule, the National Environmental Policy Act and to some degree the Department of Energy Organization Act or predecessors thereof. The NWPA overlaid these procedural requirements with schedules, modifications, limitations and additions. In so doing, the Act greatly increased the potential that a site would be eliminated on procedural grounds.

The intent of Congress was, of course, to reduce the potential for litigation and procedural disruption. Had the program been conducted under the procedural rules that were in place without the NWPA, however, the Department of Energy could have pursued its plan under statutory rules that had been tested in court. Departmental estimates of the necessity of providing consultation, the adequacy of analyses and reports and the appropriate conduct of other programmatic affairs could have been based on precedent. The novelty of the NWPA procedures and the great number of twists and turns embodied in it--some of them highly ambiguous--create an uncertain procedural environment. The fact that it is not clear what the rules are can be assumed, in absence of final decisions interpreting the requirements, to increase the risk that some of them will be violated.

Two of three early court challenges relating to State and Federal relations under the NWPA have recently been decided against the Department of Energy. Since it has been the Department's official policy, as represented by testimony in Congressional and public hearings, to walk on the conservative side of the road in its relations with the states, these decisions against the Department underscore the difficulty of following the NWPA's procedural course. This is particularly the case when those procedures so often seem to defy the tight schedule and firm goal orientation also encompassed in the Act.

In an uncertain legal environment, the leadership of the Office of Civilian Radioactive Waste Management has turned to the Congress for support or re-direction, actively seeking guidance from the principles of the committees of jurisdiction, and responding to clear Congressional indications of discontent. The two most important examples of OCRWM response to Congressional criticism are the reorganization of the Basalt Waste Isolation Project at Hanford, Washington in 1983, following an Interior Committee hearing on inadequacies of the Draft Site Characterization Plan; and review of the ranking methodology for the selection of sites for characterization, following a critical hearing on the issue by the Energy and Commerce Committee.

These incidents should be qualified in two ways. First, they are the exception rather than the rule. The general message from the Congress to OCRWM has been one of support. Second, since Congress has been extremely slow to criticize the OCRWM program, incidents like these represent issues which have reached a level of very broad and profound discontent, where such conservative organizations as the United States Geological Survey, the Nuclear Regulatory Commission and the National Academy of Sciences have raised criticisms outside the usual informal channels. The point is that the Congress generally influences the program by not intervening strongly in its course.

Absence of overt political pressure for change does not indicate absence of political influence.

A second goal of the Congress in enacting the NWPA was to reduce the extent to which politics would govern the repository siting process, and to increase and protect the role substance would play in final decisions. In this, the Act is successful. The technical debate is increased in importance through the Act's financial support of the states' ability to challenge the Department's technical program, and as a result of reduced opportunity for states to politically extract themselves from the siting process. The Act did not, however, eliminate politics as a threat to technical judgment.

State perceptions of the relative effectiveness of technical and political activity vary, particularly between the states being considered for first round characterization, and those nominated for the second repository.

State response to the nomination of sites to be investigated for an Eastern repository indicated belief that the political process is a primary means of protecting a state from site investigations. Sen. John Warner of Virginia and Rep. Bill Hendon of North Carolina introduced legislation that would eliminate North Carolina, Virginia and Georgia from consideration if Tennessee is the location of a monitored retrievable storage facility. On February 21, Rep. Hendon introduced an amendment to a committee budget resolution that would have eliminated all funding for investigation of second repository sites. Rep. Olympia Snow of Maine has requested a Congressional inquiry into deficiencies at the Maine location. Gov. Rudy Perpitch of Minnesota has indicated he will sponsor legislation eliminating sites in that state from consideration.

This press for legislative relief exists despite the fact that beginning with the passage of NWPA, Congress has refused to act politically to eliminate sites from investigation for repositories. Continued attempts to get it to do so can be viewed in light of two general political facts.

One is that protection of territories from unwanted facilities--whether they be halfway houses for juvenile delinquents or underground submarine antennas--is considered a primary duty of any elected official. Thus, Governor Lamar Alexander of Tennessee must reject the monitored retrievable storage facility siting plan although he finds no safety problem with the facility but only a public perception problem and no overwhelming national need; Governor Perpitch vows in a press report that "As long as I'm governor, the state of Minnesota will do everything in its power to oppose the siting process," and Rep. Hendon promises to "fight 24 hours a day, 7 days a week for seven years" if necessary to get the Department of Energy program out of North Carolina. If the officials currently in office are not willing to take on this responsibility, the officials running against them will promise to do so. The absolute nature of this political responsibility is certainly perceived by all candidates for public office in targeted districts, who even in areas where there is popular support for a project due to its potential economic benefits, will run on no platform more welcoming than a "wait-and-see" sort of flirtation.

Another view of the Congressional maneuvering is that it is a legacy of the days when states did, in fact, get eliminated from consideration due to politics; a recognition of the potential for political power to again determine siting decisions, and a commitment given this potential to cover all possible bases, lest another state show that elimination can be accomplished politically, thereby emasculating the politicians of those states that did not show maximum political strength. This defensive political posturing is more typical of the first-round repository states. This could result from their experience with Congressional rejection of exclusion attempts during consideration of the NWPA, and Congress's general support of the OCRWM program, which together can be assumed to have reduced expectations that a political "fix" exists for their sites in the near term.

The second-round states, on the other hand, saw in 1985 that international politics clearly resulted in the elimination of certain Maine sites. Sites were eliminated in response to State Department pressure, resulting from intense Canadian pressure, prior to development of conclusive technical evidence that the sites could pollute Canadian waters.

Statements to the press by both first- and second-round states in the charged atmosphere of the second-round nominations which illustrate a defensive posture include:

> --A January 9 Portland Oregonian report that State Representative Mike McKraken "said he believed the DOE would find it politically expedient to put the repository at Hanford because of a national perception that the nearby Tri-Cities county would not object....(and that) States, Tribes and Congressional representatives in the region needed to make it clear to national decision-makers that the Tri-Cities attitude did not reflect concerns throughout the broader Northwest region," and
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> --A statement in the January 17 Minneapolis Star and Tribune by U.S. Rep. Vin Weber of Minnesota: "Frankly, I think they are going to put this thing where they feel the least resistance, so we've got to get together and fight it."

Passage of the NWPA did not eliminate the perception that siting decisions may be political, or the need to pursue political channels to reject a site. The NWPA did, however, escalate the importance and sophistication of the technical debate in siting decisions.

The notion that the technical arena is central to the siting process has become an accepted part of the socio-political view, as is evidenced by declarations that the siting battle will be fought on technical grounds by many of the same elected officials who identify politics as a major siting determinant. Governor Perpitch, for example, said that "The question of whether Minnesota bedrock is suitable (for a repository) is one of the most critical environmental challenges this state will face for the rest of this century."

Governor Sununu of New Hampshire said he will "prepare the strongest possible case" showing those sites unsuitable.

U.S. Rep. Arlan Stangeland of Minnesota said, according to press reports, that he will ask scientists and environmentalists at local colleges and universities to join him in finding scientific reasons against placing a repository in the region.

The commitment of the first-round states to make every possible technical case has been evidenced by their strong participation in OCRWM siting activities. The State of Nevada's recent suit demanding that Federal funds be made available for independent testing indicates the states will not only review the OCRWM case and look for procedural flaws or obvious technical gaffs, but actively prepare a full opposing case attempting to demonstrate unsuitability.

Even in this increasingly sophisticated and powerful technical battle, however, politics are a motivating force and a constant threat to faith in the primacy of technical judgment.

The NWPA provided an opportunity for states to object to Congress if their sites are selected for licensing. The objection can be overruled by a Congressional vote against the state. The extreme state concern with preparation of a technical case is not only in anticipation of the licensing process, but is acknowledgement of an expectation that the Congress will not support a state which does not have its technical case in order.

The Congressional veto process is not structured, however, to support a technical decision, but to reduce the power of individual states in the process. In the abstract, the political will of the majority would always overwhelm the interest of a single state. As a practical matter, however, politics in Congress tend toward protection of the particular. Absent any combination of countervailing forces, Congress will act not as an organism representing the will of the whole, but in the interest of some part which is moving along its own trajectory.

Broader objectives must come forth with organized force and leadership in order that a special or parochial interest be defeated. The characteristics of the organized leadership necessary to overcome parochial politics include the following:

--A commitment on the part of those players in leadership positions--primarily committee chairmen and ranking minorities--to a "national" rather than a parochial view,

--A support base for this commitment in the national institutions overseeing and influencing the Congress, including the press and public interest associations,

--An exceptionally well-developed and well-disseminated base of information on both sides of the issue, and

--Leadership control of procedure for consideration of the issue.

With respect to operation of the state veto opportunity for the first repository, were the vote to be taken today, the leadership conditions could almost certainly be met to override a state, particularly since the procedure for consideration is encompassed in the NWPA and provides no easy way to take procedural advantage of confusion or ignorance, which are the allies of special interest legislation. So long as a site selection process progresses toward the veto point without procedural failure in the courts, repository candidate states have little chance of success in Congress.

The question raised by this process is whether by creating a mechanism ensuring a national, rather than a parochial, decision, Congress has encouraged a technical, rather than a political, decision. It has not. The increased importance of technical argument to states results only from the relative reduction of political opportunity. The NWPA compensates states for this loss by increasing procedural opportunity and increasing their financial ability to participate in the technical process.

Congressional decisions outside the closely defined veto process under the NWPA are less protected from state political power. It is not unrealistic for states targeted for a second repository to attempt to organize to eliminate the entire second round. Some existing conditions would be favorable to such an effort.

The second-round states can argue, for example, that there is no national need for a second repository, since the first is technically capable of handling the waste projected to be produced by existing nuclear activities for the foreseeable future. Absence of national need will reduce the extent to which some committee principles and other members can withstand state or regional pressure.

Institutional support for the second repository is relatively weak. The national environmental interest groups have been weakened in relation to their local chapters, where local chapters have grown in power as a result of local repository opposition. The role played by national environmental interest groups in making possible the national-interest bias of the NWPA, if not appreciated in the past, should be noticed in its absence as affected Congressmen's positions on issues are increasingly guided by well-educated and politically powerful local environmental groups.

The national organizations representing nuclear utilities may also be subject to strains in their positions. If one repository is enough to solve a utility's spent fuel disposal problem, there may be little reason for a utility to openly cross a governor's efforts to free a second-round state from the repository process. The national nuclear lobby was the organizational engine driving the NWPA through Congress.

The potential for political disruption of the second-round program is likely appreciated by second-round states, and by the first-round states who will, if there is no second-round process, be stuck as the only alternatives for disposal, regardless of the technical merits of the debate.

The states can be concluded to have increased ability as a result of the NWPA to reject siting of a repository through building a technical case, or through inadequate procedural activity by the Department of Energy.

The first-round states have been largely shut out of the political process by two major facts: The national need for a disposal facility, and the NWPA's prescription of the veto process in a procedure the Congressional leadership can control. They are almost totally bound to technical and judicial leverage.

The second-round states are not so clearly bound, and can be expected to test in Congress the political opportunity to escape the siting process, as they are now beginning to do.