A STATE'S PERSPECTIVE ON THE FIRST THREE YEARS OF THE NUCLEAR WASTE POLICY ACT: WHERE DO WE GO FROM HERE?

Robert R. Loux
State of Nevada
Nuclear Waste Project Office
Carson City, Nevada 89710

ABSTRACT

The Nuclear Waste Policy Act (NWPA) of 1982 established an interdependent, albeit adversarial, relationship between the United States Department of Energy (DOE) and potential host states for high-level nuclear waste repositories. Such states and DOE have separate yet equally important roles to play in the repository siting process established under the NWPA. DOE has failed to recognize that its own waste management efforts will be successful only to the degree that potential host states are successful in fulfilling their roles as guardians of the public interest and repositories of public confidence in and acceptance of the DOE program. The history of the repository program over the past three years is characterized by DOE attempts to thwart states' efforts to fully exercise their obligations under the Act. Unless balance is restored to the DOE/states relationship, DOE may find itself in a situation where it is unable to develop the level of public confidence essential to success in this controversial undertaking. It is suggested that the states, DOE and the nuclear industry have a common and pressing interest in seeing that the Nuclear Waste Policy Act is implemented according to the original intent of Congress.

INTRODUCTION

Two years ago, at Waste Management '84, Gary Downey of Virginia Tech's Center for the study of science in society, very astutely pointed out that the Nuclear Waste Policy Act represents a major innovation in Federal/State relationships with regard to national decision-making. Downey noted that the Act "formally recognizes DOE (the Federal Government entity) and the potential host states as formal adversaries." In so doing, Downey said, "what has increasingly become a political reality since the 1970's is now a legal reality". It was Downey's contention that, by establishing potential host states as representative of local interests (i.e., public interests), the act freed DOE from the necessity of having to represent both sides of the nuclear waste issue and, thus, allowed DOE to "act more decisively in selecting repository sites". It logically became the States' job to scrutinize DOE's site selection activities and see that the siting process is carried out in a technically sound and objective fashion. In a very real sense, states such as Nevada, which contain potential repository sites, have become guardians of the public interest with regard to the high-level radioactive waste disposal program.

How have the two adversaries fared-or, more appropriately, how has the Nuclear Waste Policy Act fared-since the President signed the Act into law in January of 1983? From a States' perspective, that question is fundamental to an understanding of where they are heading and whether or not that direction is synchronous with the direction needed to assure that a high-level nuclear waste repository can, in fact, become a reality.

In it Nevada's contention-one that is shared by many, if not all of the first round repository states-that the finely crafted relationship established between DOE and the States in the act has broken down, and that this breakdown treatens to render the purpose and framework of the act inoperative, even moot. Nevada further contends that the cause of this failure rests strictly with the Department of Energy and stems directly from DOE's inability or unwillingness to understand the fundamental nature of the State/Federal (i.e., DOE) relationship under the Act. For whatever reason, DOE has chosen to pursue its role as program decision-maker with relish-as it has every right and responsibility to do. However, at the same time, the Department has attempted, at every opportunity, to thwart the States' efforts to fully exercise their obligations as guardians of the public interest. Unless balance is restored-and restored quickly-to this critical relationship, DOE will find itself in a situation where it is unable to develop the level of public confidence essential to success in this controversial undertaking.

What DOE has failed to grasp in over three years of NWPA operation is that the States (by this I mean potential repository states under the Act) do not exist simply as obstacles in the path of its repository juggernaught. States have a role to play that is every bit as crucial as DOE's because they are, in a sense, public repositories-repositories of public confidence and acceptance. While State relationships with DOE are-and should be-adversarial, it is only out of this adversity that a firm basis of public confidence in DOE's handling of the waste program can emerge.

DOE's waste management actions and decisions since 1983 present very clear evidence that the Department has never grasped the significance of the States' role in furthering the Department's own interests and purposes under the Act.

Almost from day one, the Department has attempted to frustrate State involvement in the siting process. In developing its guidelines for siting high-level nuclear waste repositories, DOE engaged in an elaborate charade wherein States' input was solicited only to be disregarded when it did not coincide with preconceived DOE decisions about how the site selection process should be handled. The result was a set of guidelines that are overly subjective and which failed to adequately discriminate between potential sites when applied in the various draft environmental assessments. Had DOE heeded State concerns about the guidelines early on, it

would not now be faced with a situation where it is trying frantically to build objective technical measures into a set of standards that are inherently flawed. Instead, DOE now faces litigation by numerous States relative to the adequacy of the guidelines.

The draft EA's themselves are another example of DOE intransigence when it comes to State involvement in key decision areas. Nevada and other States consistantly asked DOE for nearly two and one-half years for the opportunity to participate in the development of the draft EA documents, especially in the design of the ranking methodology that would be used to discriminate between sites. DOE steadfastly refused to allow States the opportunity to influence the form or substance of those documents until they were issued in draft form-and until DOE was already so committed to decisions relative to content, methodologies, and the like that it was unable (and unwilling) to give more than lip service to State concerns as finally expressed in formal comments. The result-environmental assessments that are inadequate for substantiating DOE claims relative to site suitability and which bind the Department into an inflexible and extremely limited view of the various sites under consideration. Instead of public confidence and acceptance being enhanced by the EAS-as they would have been had State concerns been addressed early on-DOE is left to defend a set of decision documents that are themselves objects of skepticism and public decision.

DOE's management of the nuclear waste fund has likewise been aimed at limiting, whenever and whereever possible, state access to funds needed to fully carry out NWPA responsibilities. DOE's performance in this regard is especially reflective of how the Department has approached other key aspects of the repository program. Simply put, DOE interprets the Act according to its own interests-regardless of the intent of Congress or even the letter of the law itself. The recently decided law suit brought by Nevada over the State's right to use waste fund monies to conduct independent, confirmatory studies relative to site suitability is an excellent example of this DOE "stonewalling" strategy. Ignoring the language of the act and the obvious intent of Congress that potential repository States be able to engage in reasonable studies and other activities to assure that DOE's conclusions about the suitability of sites are, in fact, accurate, DOE issued a set of internal policy guidelines that expressly prohibited States from conducting any such independent analyses. When the ninth circuit court of appeals clearly decided the matter in Nevada's favor, saying unequivocally that "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", DOE immediately attempted to again thwart Nevada's efforts by issuing new "guidelines" that require new and different hoops for the State to jump through. As a result, Nevada and DOE are back in court over this issue. Meanwhile, the State falls further and further behind in its ability to oversee *DOE technical* efforts relative to the Yucca Mountain site, and the public is left with the indelible impression that DOE has something to hide-that it fears its technical work and conclusions will not stand close scrutiny and that, as Hamlet might have put it, "something is rotten in the State of DOE".

As pointed out earlier-and as the examples sited demonstrate-the DOE approach to implementing the NWPA has been to interpret the act only in ways that support pre-act siting decisions and to limit and interfere with the role prescribed for potential repository states. What DOE has failed to grasp is the essential element of mutuality between DOE and these States. Nevada submits that the Act-and DOE-will be successful only to the degree that the States are successful in carrying out their role as overseers and as custodians of the public interest. DOE and potential host states may be adversaries, but States are <u>both</u> necessary for the success of the repository program.

Another fundamental characteristic of the NWPA-one that is crucial to the success of NWPA objectives-is the finely balanced and interdependent nature of the compromises which bind the fabric of the act together. The States' role in the repository program represents one such compromise. Another involves the requirement for DOE to make a preliminary determination of suitabilty relative to three alternative sites upon the completion of site characterization. The preliminary determination requirement was built into the NWPA as a key compromise that allowed DOE to be exempted from certain burdensome aspects of the National Environmental Policy Act (NEPA). Essentially, the compromise meant that DOE could use three sites for which (1) characterization has been completed and (2) a preliminary determination has been made that those sites are suitable for development as repositories, as alternatives for the purpose of its NEPA review. Without this compromise, DOE would have been required to do Environmental Impact Statements for all sites considered and to compare the one actually chosen as the preferred repository site to all other sites. The compromise assured that there would be at least three sites found preliminary suitable after characterization. It satisfied state and public concerns that DOE not be allowed to railroad a predetermined site through the characterization process. It also assured that DOE would have to be very careful to see that sites selected for characterization are actually viable ones and not "ringers".

Instead of recognizing the preliminary determination requirement for the crucial element it is in the fabric of the NWPA, DOE has taken its standard "meat ax" approach and is preparing to completely sever the form of the PDs from its substance and significance in the Act-and in the overall repository effort. Last summer, Mr. Rusche announced that DOE would not honor the commitment it made to the NRC at the time of NRC's concurrence in the siting guidelines that the PDs would be made only after characterization is completed. Instead, Mr. Rusche indicated that DOE will make this determination at the same time it nominates the three sites for characterization.

Obviously, making the PDs before any characterization studies have even begun completely voids the entire purpose of this NWPA requirement, and it strikes at the very heart of a crucial compromise that allowed the Act to become law. It means that DOE can, essentially, select the site it wants for a repository along with two "bogus" sites for characterization, allow the bogus sites to drop out early in the characterization process, and end up with one site that may very well be only marginally suitable after characterization is completed. Obviously such an outcome will not promote needed public confidence in the repository siting process. What it will do is breed open conflict, lead to unnecessary and divisive litigation, and, perhaps, damage, irrepairably, the entire NWPA effort.

It is obvious from the remarks so far that there is a disturbing trend pervading DOE's implementation of the repository program. If DOE consciously wanted to

eventually crapple the nuclear waste repository effort, it could not have embarked on a better course during the past three years. It is needed to only look to the past for examples of just this type of self-destructiveness in a number of the Nation's nuclear programs.

All, I'm sure, are painfully familiar with the litany of failures that have become part of the baggage carried by the U.S. Department of Energy-and the nuclear industry in general. Environmental groups and others across the country point to instances of technological failures at places like Hanford, Washington, West Vally, New York, Lyons, Kansas, Maxey Flats, Kentucky, Beatty, Nevada, even Three Mile Island as proof that nuclear waste cannot be managed, stored or disposed of safely.

What these and other nuclear waste critics consistently hold up as examples of inherent flaws in the Nation's waste disposal programs are, in reality, examples of failures and inadequacies in the way those programs have been managed. Poor, inadequate or inappropriate management invariably results in poor program decisions-be they technical, economic, political or legal.

The high-level nuclear waste disposal program currently being implemented by DOE under the provisions of the Nuclear Waste Policy Act has many of the characteristics that foreshadowed problems for past AEC, ERDA and DOE efforts. The program is driven by a schedule that is itself propelled by a fixed and, some would argue, unrealistic target date. The framework by which siting and suitability decisions will be made (the siting guidelines) is, as pointed out, overly general, lacking in specificity, and prone to subjective application. Political pressures on the program are enormous and constant, and the management structure of the entity (OCRWM) established to oversee the project has been in a state of constant change almost from the beginning.

There is one single factor that accounts for much-if not all-past and present turmoil in Federal high-level waste disposal efforts. That common element is the absence of consistently good and effective management decisions and good management is the key to success, not only in the technical components of the undertaking, but in the economic, political and other areas as well. Good management means competence, and competence translates into appropriate, solid and defensible decisions. It is the cornerstone of the entire waste management program and the bedrock upon which public confidence in the effort must rest.

Given the history of DOE's past efforts, the question of "where do we go from here?" Becomes more important daily as the program continues along in a manner which undermines the States role and which likewise undermines what little, if any, public confidence that exists.

Nevada believes-as do other potential repository states-that drastic changes are needed if the Nation is to avoid major unheavals in the high-level waste disposal program. It is not clear that those changes must involve alteration of the Nuclear Waste Policy Act itself. Rather, it is believed that the needed changes must come about in the manner in which the Act is being implemented. This is not an undertaking that can be entrusted to a business-as-usual attitude. If DOE is to be successful as implementor of NWPA objectives, it must fully commit itself to go beyond what may be minimally required; to resist the temptation to piecemeal the Act according to its own interests and preconceptions; and to dedicate itself to level of excellence and competence comensurate with the magnitude of the undertaking. Nowhere is the commitment more crucial that in the area of promoting State participation in waste program decision making. If allowed to function as the Act intended, States can become key quality control elements within the program and key contributors to the task of reaching a common goal-a safe and publically acceptable solution to the country's nuclear waste problem.

In this regard, there is a substantial area of common ground between States like Nevada and the commercial nuclear industry, which is, after all, footing the bill for this enormous undertaking. Like the States, the industry has a major stake in seeing that the entire repository program is not only technically and managerially competent, but that it also promotes the level and public confidence and acceptance that is essential if a repository is to be successfully sited, constructed and operated. For the industry, failure on DOE's part could prove devastating to the future of nuclear power in this country. For the states, failure by DOE which results in inappropriate siting or waste management decisions could have catastrophic health, safety, environmental and economic consequences.

During the coming year, crucial decisions will be made that may unalterably set the course for the repository program towards ultimate success or failure. Industry, together with the States, has a unique opportunity to influence the outcome of this undertaking. That opportunity does not necessarily mean changing the Nuclear Waste Policy Act. It does not mean doing DOE's work or interferring in any way with repository activities. What can be done together is work towards seeing that the framework and provisions of the Nuclear Waste Policy Act are adhered to both in letter and spirit in the implementation of the Act.