

ISSUES TO BE RESOLVED FOR A SUCCESSFUL  
IMPLEMENTATION OF THE NUCLEAR WASTE POLICY ACT OF 1982

A State Legislator's Viewpoint

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ABSTRACT

The Department of Energy (DOE) should develop a good working relationship with the state legislators and seek their input on policy decisions concerning the repository. The Department could begin these efforts by learning more about how state government works and listening and responding to the states when issues of concern are raised.

ISSUES OF CONCERN TO STATE LEGISLATORS

- Department of Energy's lack of understanding of the federal-state division of government.

The Nuclear Waste Policy Act (NWPA) directs DOE to consult and cooperate with the affected states and tribes. DOE has "presented" information plans and documents to states when fully formed. There has been a perceived lack of input by states in most major decisions. DOE is always promising to "do better" until the next milestone or announcement, then repeats the same error. For example, DOE has missed and postponed several milestones, and yet, when the states sought an additional 60-90 days to comment on the draft environmental assessments, DOE refused because the program had to be kept on schedule. Congress and the states currently are awaiting the revised Mission Plan which will explain DOE's altered program postponing a second repository decision until the 1990s. The states would like to comment upon the Mission Plan revision before it is submitted to Congress, but such an opportunity is doubtful based upon past actions by DOE. In addition, DOE should develop some policy guidelines instead of relying on the same standard statement when asked whether it will comply with pertinent state laws on transportation and drilling; to comment that DOE will comply with state law so long as it is not incompatible with the NWPA and other federal laws is a satisfactory response for only a short period of time. DOE's staff should be researching and comparing state and federal statutes for inconsistencies now, instead of waiting until specific activities are ready to begin and the states resort to litigation to seek compliance with what they believe to be compatible state laws.

- DOE's lack of understanding of the executive-legislative division of government on both the federal and state levels.

DOE decided without Congressional mandate and legal authority, at least according to their own counsel's research, to indefinitely

postpone site specific activity on a second repository. Congress makes the laws and the executive branch agency is to carry out those laws, not pick and choose the parts they like. If DOE feels it cannot make deadlines or that projections of need for a second repository are lessened, it should take that information to Congress and ask for direction. By revising the Mission Plan and submitting it to Congress for approval, the Department is correcting its unilateral action several months after the fact. This action should, however, calm former second round states' concerns that their geologic formations could be reconsidered in the future.

DOE supplies most of its information to the executive branch of state government and seems unaware that the information also should be shared with the legislative branch. DOE's activities in information sharing with legislators and staff, to the present, consist of semi-annual meetings of the NCSL Legislative Working Group on High-Level Waste, appearances at committee hearings, and sponsoring public meetings at which legislators are present. DOE must understand that state legislatures, like Congress, make the laws to be enforced by state executive branch agencies, and that legislators need information in order to draft and enact legislation. State legislatures also share the right and responsibility of issuing a notice of disapproval should their state be selected as a repository site; informed legislators can make informed decisions.

DOE must initiate a "reeducation" effort of its personnel (engineers) in basic civics to understand both the federal-state division of government and the executive-legislative division of government (policy-makers).

- The lack of perceived coordination between DOE headquarters and project offices.

Headquarters and project office personnel often do not appear at the same information sharing meetings. DOE needs to make a

"united" effort to give the program credibility.

- The May 28, 1986, decision by Secretary Herrington has been perceived as a political move by all the states and tribes.

First round states feel betrayed and that DOE changed the rules in the NWPA.

Second round states feel that if DOE could unilaterally remove the second repository from further site specific study, the agency could just as easily decide to reintroduce the second repository and begin work in their states.

DOE must make an effort, with both the states and Congress, to repair the damage done to its credibility on this issue.

- Transportation of high-level waste is a national issue, which will involve all the 48 contiguous states to some degree.

DOE currently is approaching the transportation issue from a regional standpoint. The regions have similar points of view and should be encouraged to coordinate on this issue to develop proposals for a national transportation policy. DOE also should go back to Congress and request some authority to provide funding to corridor states from the NWPA so these non-repository states can provide input into a national transportation plan and develop a comprehensive emergency response plan and personnel training. An alternative would be for DOE to "funnel" financing to corridor states through the grants awarded to repository candidate states (for example, Washington has a sub-grant to Oregon, and Nevada is providing small grants to several western corridor states). The corridor states should not be asked to provide funding from their scarce resources to

prepare for emergency response and maintain and repair highways and railroads traversed by high-level waste shipments. Corridor states should not be forced to cooperate in a program in which they have not been allowed to participate in the developmental stages.

- Liability for transportation and disposal accidents.

No matter how small the risk, DOE must assume responsibility for an accident arising out of the repository program. The states realize that the chances of a radioactive emission of major proportions arising out of an accident are miniscule, but the physical damage and delay from an accident could be tremendous. To increase credibility with both the states and the public, DOE needs to support an amendment to the federal Price-Anderson Act which would confer full and absolute liability on the Department for the actions of its contractors.

- Resolving these issues:

The states have attempted, in good faith, to work with DOE and abide by the NWPA. As perceived by the first repository states, the Department has not always responded in kind, and this has resulted in litigation and legislation sponsored in Congress by the affected states' delegations. Both DOE and the states need to develop their skills in mediation techniques, but these issues cannot be resolved in a vacuum as there are too many external influences affecting the parties. The states and DOE must make a strong effort at issue resolution, but be realistic and know that some issues can be resolved only by litigation and interpretation of the NWPA by the judiciary.