

STATE PERSPECTIVES ON HIGH LEVEL WASTE SITING

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ABSTRACT

This paper presents the states' perceptions of the Nuclear Waste Policy Act of 1982 (NWPA) and comments on the states' opinions as to the implementation of the Act. In general, the states feel that the concept of consultation and cooperation between federal and state governments is not well defined and not uniformly interpreted. Therefore, there will be continued conflict between the governments as the NWPA is implemented.

The purpose of this paper is to present to you the states' perspectives on implementation of the Nuclear Waste Policy Act of 1982. The session title "Perspectives and Progress in Siting High Level Waste Repositories", is well chosen to indicate that present and future progress is very differently perceived depending on whether the observer represents the states, the Department of Energy (DOE), industry, or public interest groups. It is intended in this paper to review the key provisions and objectives of the Nuclear Waste Policy Act and gauge the present situation against state expectations.

States interpret the Nuclear Waste Policy Act as granting them different, but equivalent, participation in the process which will lead to the operation of high level waste facilities. It is appropriate to quickly review the adoption of the NWPA and its major provisions and then provide the state's scorecard on how the program is progressing.

The NWPA represents the first congressionally-mandated resolution of the technical and institutional issues involving high-level waste. From the state's perspective, it is important that the bill contains an extensive role for states. This was not accidental. The high-level waste bill received four years of extended consideration in Congress; and, in the end, Congress accepted the state role as integral to the program in recognition. The bill represents a consensus arrived at among federal agencies, states, industry and public interest groups. It recognizes in its provisions that the task is both political and institutional. It should be emphasized that the Act would not have passed without state support; and, without it, Congress could still be debating what the federal program on high-level waste should be.

The state endorsement of a high-level waste bill represented a bargain with the other interested constituencies that the state role in the process was to be institutionalized in law and sustained throughout the lifetime of the program. The consensus which was achieved in passing the bill must be maintained throughout the lifetime of the program. It was not a temporary marriage of convenience to pass a bill, but rather an on-going, dynamic coalition, whose continued existence is essential to successful implementation of the program.

From the states' perspective, the philosophical key to the act is the concept of consultation and cooperation. The states interpret Congressional intent as mandating substantial state participation throughout the process leading to the selection and construction of new HLW facilities. States are not alone in this interpretation. The most recent GAO report on the status of DOE's HLW program remarks:

"Given the prominence that the NWPA prescribes to the affected parties, probably no one factor is more crucial to the successful completion of the nuclear waste program than the maintenance of good relations between the federal offices responsible for implementing the act and affected states and Indian tribes."

The states heartily endorse that statement and feel the maintenance and expansion of state/federal consultation represents the only assured avenue to success for the program.

Ben Rusche (USDOE) has acknowledged in Congressional testimony the importance of state concerns explaining that "the interests of states, Indian tribes and other affected and interested parties must be considered fully." Again the states concur with the sentiment, but have some substantial differences with the interpretation as the GAO noted in their last report; consultation and cooperation have not been formally defined. This has contributed to continuing tension between DOE and the states and frequent state dissatisfaction with DOE performance.

While there is no particular mystery as to the origins of the tension, we would suggest that a resolution to the interpretation of consultation and cooperation is essential to the continued orderly progress of the program.

To the States' mind, the concept of consultation and cooperation is both explicit and implicit throughout the act. Thus, the states and tribes interpret the Congressional intent in a broad and permissive fashion. We place primary importance on the institutional framework established in the act and justify that emphasis by citing the detail with which Congress reviewed debated institutional provisions. The dates provided in the act are intended as general targets rather than absolute deadlines to be met at any cost. While institutional provisions are customarily cited as the reason for the HLW program proceeding behind schedule, many of the documents and decisions which have been delayed are technical in nature and the additional time taken has allowed for technical improvements as well.

In contrast to the states' view of a pervasive view of consultation and cooperation, the DOE - more intent on meeting the deadlines and on unilateral planning - has adopted a much more narrow view of consultation and cooperation. This fundamental difference in interpretation has been the root cause of much of the tension between states and the DOE since passage of the act.

States recognize that they and DOE have very different roles in the high-level waste program but

are convinced that Congress gave them a substantial role as participants in the process. To states, consultation and cooperation is not simply being presented with largely completed documents and offered an opportunity to comment in a limited time frame. Rather states anticipate the opportunity for states and tribes to enter, in a meaningful way, the DOE planning procedure and decision process at an early stage when guiding principles and approaches are being developed so they may have the ability, through to discussion, to influence program planning and policy development.

States feel that such involvement would measurably improve the institutional and technical performance of the program. Consultation and cooperation of this nature would not eliminate all conflict; but, it could reduce the growing distance which seems to be developing between the states and DOE as the program advances.

Keeping the states' view of consultation and cooperation in mind, it is interesting to review several past and present aspects of the high-level waste program, where differences have occurred between states and the DOE.

- Guidelines:

- States felt they should have been involved in early discussions rather than being given a DOE-generated document for comment.
- As a result, interaction from the early stages dwelled on states' efforts to correct major presumptions (procedural and technical).
- Despite thousands of pages of state comments, some states' concerns were only resolved in NRC/DOE discussions.
- States were distressed by precedent that major documents are internally generated by DOE before early state involvement.

- Mission Plan

- The procedure for state involvement represented something of an improvement in that states were given an early version for comment.
- States feel that the Mission Plan still lacks essential elements.
- States recommend a more realistic timetable which acknowledges potential delays.
- States strongly feel monitored retrievable storage (MRS) justification and its relationship to the high-level waste program must be covered more extensively in the Mission Plan.
- States observations are supported in a recent OTA study.

- First Round Site Screening Methodology

- Among 1st round states, concerns remain regarding the guidelines and how they apply to candidate sites. States felt that Congress intended the guidelines to be reflective rather than encompass all sites under consideration. Guidelines seem derived from

characteristics of available sites rather than technically derived.

- Data among 1st round states is not equivalent among all sites making comparisons difficult.
- Many of these issues are now under litigation.

- Monitored Retrievable Storage (MRS)

- States are not allocated the same role in the development of MRS as for the repository.
- States feel that potential MRS host states should be given full participation.
- In addition, given the major role which the MRS is scheduled to play in HLW program, repository states should also be involved in receiving the impact of the MRS.

- State Technical Review

- Recently the states and DOE have encountered differing interpretations of the scope of state technical review.
- DOE feels there are limits on state collection of primary data.
- States, however, feel there is considerable latitude for them to undertake independent review.
- States consider the technical review, provision along with the judicial review of the Environmental Assessments (EA's), one of the two most important state-oriented provisions of the act.
- It is well to remember that the language of the act precludes only "unreasonable" interference and delay with DOE plans.
- While the states agree that there is some question as to when states may begin this independent technical review, the Congressional intent is clear and this issue of state technical review must be resolved soon.

- Liability

- The issue of limits on liability has emerged as a principal concern of host states. They insist that they not incur additional burdens above and beyond hosting the high-level waste facility.
- This issue will probably be addressed in reviewing the Price-Anderson Act.

Despite differences with DOE on above points, states have nonetheless been active participants in debates on all the above issues. States have submitted thousands of pages of comments on DOE documents. Some observers have labelled their efforts as evidence of state intention to delay or obstruct the HLW program.

This is a misinterpretation of state intent. It is much easier to turn immediately to litigation. Yet states rather have chosen to provide detailed

critiques of DOE documents. The record shows then that states thus far have played an active and beneficial role in the HLW program.

There exists among states some disenchantment with DOE responsiveness. As noted above, an amplified interpretation of consultation and cooperation is essential to restore the support for the HLW process which marked passage of the NWPA.

Having reviewed the past and present, consider some of the dynamics of the NWPA which will influence state-federal relations in the future.

The selection process for both the 1st and 2nd round high-level waste sites will lead to a steadily diminishing number of states being under consideration. Twenty-three states were under consideration at the time of passage of the NWPA. The 1st cuts in the 1st tier have occurred already and in the next year further cuts in both 1st and 2nd rounds will take place. Because these states knew they were under consideration, and what the consequences of selection were, a HLW repository, they were very effective in including substantial participation rights for potential host states in the legislation.

But the act covers far more than repositories; and other categories of states-MRS host states, transit corridor states, states where reactors are storing spent fuel, and adjacent states-will be affected. As the program progresses, these categories of states will grow in number and become better known.

As noted earlier, the institutional provisions of the NWPA are not as extensive for these states as for repository states. This does not mean that institutional problems will be less. In fact, one can predict that as public awareness grows in these states, their demands for institutional involvement will grow. Furthermore, for some categories of states such as transit corridor states, their number will remain large and their clout in Congress will be formidable.

Returning to the earlier points made on the lack of institutional provisions in the act relating to these other categories of states, only an expanded interpretation of consultation and cooperation can accommodate these other categories of states.

In summary, there continues to be a presumption that institutional issues represent the principal impediment to implementing the HLW program on schedule. While states have been strong advocates of full institutional participation, the states contend that

there remain major technical questions about the unprecedented step of siting and constructing the world's first HLW repository. Thus, the states support the principle of technical conservatism in pursuing the HLW repository and suggest that past and future delays in the program may result from technical as well as institutional concerns.

To be realistic, even a perfectly conceived consultation and cooperation process will not resolve all conflicts. The NWPA recognizes the inherent conflict between DOE efforts to site and construct a repository and states' resistance to such a facility. Congress established a framework for an exchange of views and for conflict resolution; but, the inevitability of irresolvable differences was acknowledged. Environmental assessments were made subject to judicial review and Congress is scheduled to vote on a states' objections to the DOE plan for a repository. Thus, in at least two instances, Congress foresaw the need for outside arbiters.

While some of the differences between states and DOE have resulted in constructive changes to date, the states foresee plenty of outright confrontation, where it may be difficult to see any creative outcome. It is better at this point, however, to recognize this as inevitable in the highly politically-charged atmosphere that occasions the selection of HLW repository. States, governors and intervenor groups will utilize the mechanisms available to them to challenge federal decisions. All parties should use those mechanisms in the act to minimize conflict and try to preserve and expand the spirit of cooperation which led to the passage of NWPA in 1982.