INSTITUTIONAL AGREEMENTS UNDER THE NUCLEAR WASTE POLICY ACT OF 1982

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ABSTRACT

The provision for institutional agreements covered in the Nuclear Waste Policy Act of 1982 provide states, Indian tribes, local governments, utilities and other federal agencies by specific provision, or by implication, a large and prominent role. The most important agreement is the Consultation and Cooperation (C&C) agreement described in Section 117(c) of the Act.

The Department of Energy is aware of a broad difference of opinion as to the value and implementation of the C&C agreement but feels that the agreement is necessary, useful and a realistic approach to this controversial program. Further, DOE believes that this agreement benefits all parties and that program activities will proceed with or without an agreement in place.

It is part of the very nature of living together in human society, where people from different backgrounds, with different needs, seeking different objectives, and often concerned with different problems must somehow live and work together unencumbered by paralyzing disruption and divisiveness, that agreements of one sort or another--tacit, covert, overt, long-lasting, of short duration, for remuneration, based only on principle--are so crucially important. Some of these agreements--agreements that help determine how people live and work with one another-are written and signed and, so-to-speak, set in concrete; most are not. But all have one very similar purpose in mind: to help life proceed in a more or less coherent and rational manner with controllable amounts of anxiety.

Agreements that help rationalize how people interact and help make those interactions more efficient and effective are of even greater significance in environments where honest differences of opinion and viewpoint are bound to arise; such might be expected in the siting, construction and operation of the Nation's first nuclear waste repository.

In the Nuclear Waste Policy Act of 1982, institutional agreements between the Department of Energy (DOE) and affected parties--States, Indian tribes, local governments, utilities, other federal agencies--play, by specific provision or by implication, a large and prominent role.

These agreements are of at least two kinds. There are those that form the very financial basis of the program and without which the program could not proceed or affected parties participate. In this category are included for example, the contracts stipulated under Sections 302(a) and (b) of the Act between the DOE and producers of electricity from nuclear power--the one mil per kilowatt-hour charge that helps pay for the nuclear waste management program. Also included in this category are provisions under Section 116(c) (3) that require the DOE to make Grants-in-lieu-of-Texas to States and units of general local government (as well as Indian tribes, where a repository is sited on their land) once site characterization begins as well as the impact assistance grants under Section 116(c) (2) (A) that the DOE is required to make to States containing a site for which the Nuclear Regulatory Commission (NRC) has authorized construction of a repository.

There are those agreements of a more general and comprehensive nature which help define how the DOE and affected parties might interact in implementation of the program. The most important agreement of this kind is the Consultation and Cooperation (C&C) agreement described in Section 117(c) of the Act.

For those people who are not familiar with the provisions of the C&C agreement, it can be summarized thusly:

Following approval of a site by the President for site characterization, or following a written request by a State or affected Indian tribe where a potentially acceptable site has been named, whichever occurs first, the Secretary of Energy is required to seek to enter into negotiations leading to a binding written agreement between the DOE and the affected party on a series of issues of mutual interest to both. If within six months following the beginning of negotiations an agreement has not been reached, the Secretary is required to report to Congress the status of negotiations and the reasons why such an agreement has not been finalized. The affected party in question may review and comment on the report and such comments will be included when the report is sent to Congress.

The Act sets out eleven areas in which procedures between affected parties and the DOE should be developed as part of the agreement. These areas include, among other things, review and comment on program documents and time frames for such review, submission of an impact report and request for impact assistance, the resolution of offsite concerns both at the State and general local government level, identification of key events, milestones, and decision points, notification of the transportation of high-level waste and spent nuclear fuel within a State, reasonable independent monitoring and testing (the word "reasonable" is in the Act), sharing of licensing and technical information, facilitation of permiting procedures, joint project review, conflict resolution provisions, periodic modification of the agreement, and so on.

To date, two negotiations for C&C agreements have begun, one with the State of Washington and the other with the Yakima Indian Nation. No agreement has yet

been signed, though considerable progress has been made on the Washington agreement. The other five States and two affected Indian tribes of the first repository program eligible under Section 117(c) to begin negotiations have not yet done so. Several second repository states have requested that negotiations begin on C&C type agreements though, because of the earlier phase of the second repository program, these would not be conducted under Section 117(c) provision.

There seems to be a broad range of opinion among affected parties concerning the value of Section 117(c) C&C agreements. While some see their usefulness, others have raised questions concerning their relevance and utility. Some have asked, "Why do we need to sign an agreement with out own government? And why need it be written and binding? Isn't a handshake good enough?" Others are afraid that signing such an agreement would limit their recourse to litigation in the courts on matters that might become irreconcilable. Still others feel that a series of informal agreements would be just as useful and would not pose the political problems that getting a large and very visible C&C agreement through legislative review and public hearings might entail.

The DOE is aware of this broad range of opinion and is especially cognizant of the problems that some affected parties have with merely beginning negotiations--what that sort of commitment can often mean to the political leadership within a State or Indian tribe. On the whole, however, the DOE feels that the C&C agreement provisions, as set out in the Act, are necessary and useful and are reflective of Congress's realistic view of the problems inherent in a controversial program. The DOE feels, further, that there are special features of a C&C agreement that can make such an agreement especially attractive to all parties concerned. For example,

- The agreement is infinitely modifiable. It can change with changing needs, and can serve as the focal point for the development of new agreements throughout the course of the program.
- The agreement may contain procedures for conflict resolution. This means that it can establish mechanisms for the resolution of problems that can be used prior to a decision to embark upon a course of lengthy and costly litigation. This does not mean that it can prevent litigation, if a party so chooses. It merely means that it places litigation as the final, last ditch step in the negotiating process.
- The agreement allows broad interpretation of Section 116(a) grant provisions. That section allows for grants to be made "authorized by agreement entered into pursuant to subsection 117(c)." This means that grants can be negotiated covering a wide range of activities that seems reasonable and useful to both parties. All other references to grants in the Act are quite specific and limited.
- Finally, the agreement provides order, stability and consistency to the overall program process. It also provides a great measure of continuity. Handshake agreements are fine, but in a program that will last sixty or seventy years the informal commitment by one governor or Secretary might not mean very much to his or her successor.

Does this mean the DOE believes that without a C&C agreement in place that program activities will not be able to proceed?

No. The DOE does not believe that. Program activities will proceed with or without an agreement in place. But what the DOE does contend is that a C&C agreement will make its job and the job of affected parties much easier; that it will help bring an orderly process to complex program activities as well as a coherence and rationality to day-to-day interactions, and that, in the long run, these benefits in the eyes of affected parties will be seen to greatly outweigh concern and trepidation about the political costs such agreements might initially entail.