INNOVATIONS IN COMMUNICATION BETWEEN STATE GOVERNMENT AND THE UNITED STATES DEPARTMENT OF ENERGY -- IMPLEMENTING THE CONSULTATION AND COOPERATION PROCESS OF THE NUCLEAR WASTE POLICY ACT OF 1982

David W. Stevens, Program Director
High-Level Nuclear Waste Management Office
Department of Ecology
State of Washington

ABSTRACT

Passage of the Nuclear Waste Policy Act of 1983 provides a unique opportunity for states to participate in the national program to site and develop two national repositories for high-level wastes. The role of state government is an integral part of the federal program. The realization of the national goal is clearly dependent upon state involvement. Congressional expectation of state input is evident from provisions in the Act that call for binding agreements between a potential host state and the U. S. Department of Energy to protect state review authority. These expectations have not been fully realized, in part due to public perceptions that such an agreement means acquiescence in the location of a repository. The state of Washington has identified a number of issues in its long negotiations with USDOE on a proposed agreement. Some issues have not been satisfactorily resolved and finalizing of a procedural document remains unclear.

State governments have long sought a broader understanding of the role that they play in the federal system. Too often federal legislation has been adopted in the past which assumes that a national problem dictates a federal government solution without adequate regard to the contribution, indeed the necessity of appropriate participation on the part of the states.

Currently, state governments have been provided a unique opportunity to participate and influence the program to find and develop two deep geologic repositories to dispose of the accumulated wastes from defense activities and spent fuel from nuclear power reactors. Throughout the several year effort to pass a national policy and a structural framework for permanent disposal of high-level nuclear wastes, states have been concerned whether they would be recognized as necessary participants. Discussions ongoing since 1977 have evolved from the concept of state consultation and concurrence, to the later and more realistic idea of consultation and cooperation. While some have felt that the states should be able to have an absolute veto over the federal program, others felt that a wiser approach in any national nuclear waste management policy would be to provide states the right to influence federal actions through a specific recognition of the right to monitor, review and evaluate federal actions, and through actions enabling the disapproval of final site recommendations subject only to a Congressional override.

During Congressional deliberations, the development of a satisfactory role for state governments and Indian tribes was one of several important elements of a comprehensive national nuclear waste policy. The level of state's participation and the dimensions of their responsibilities were not to be known until the latter days of December, 1982, when the Nuclear Waste Management Act was passed. Congressional debates reflected differing attitudes towards dealing with states, ranging from a full recognition of states as partners in the process, to concerns that any effective level of participation would cause serious delays, increased expense, and more difficulty in achieving a national goal of finding and constructing permanent disposal facilities.

Out of the lengthy deliberations emerged an historic piece of legislation that recognizes and solidifies state and tribal involvement and sets forth clear Congressional policy that requires continued attention to state concerns. The Nuclear Waste Policy Act is remarkable legislation. Parallels in terms of state involvement are difficult to find and none of similar magnitude are apparent. The Act contains clear, unequivocal language on the need for state action throughout the process of finding, approving, building, operation, closing and monitoring repositories. State participation was not described as "nice" to have, but "essential". The language describing state input is more than boilerplate. It represents the facts of life for the waste repository effort--that state involvement is not only important, it is integral to the program. Throughout the Act, there are numerous references relating to interactions by the Department of Energy and the states. Beyond these several references, there are rather elaborate requirements set for the establishment of formal, written procedures to insure the ability of states to carry out their authority to fully participate throughout the federal process.

Central to the Congressional interest in outlining and protecting state participation is the Acts directive that the Secretary of Energy enter into negotiations with potential host state to develop a binding agreement covering a variety of procedures to insure adequate capacity of state governments and Indian tribes to review and monitor federal program activity.

Development of these procedural agreements reinforces the role of the potential host states. States centrally involved in the repository development program can, through the vehicle provided by Congress, determine the adequacy, comprehensiveness, and technical sufficiency of the federal government's efforts. States are not, through the development of agreements, equally responsible for the conduct of the program, but are responsible to their citizens for determining the sufficiency of data, and of potential impacts on the enviornment, and public health and safety.

There is substantial federal technical skill in the repository investigations now ongoing, but not

an exclusive amount of technical expertness. Potential host states are developing substantial capacity to competently examine all facets of the federal program. It is to insure that state review efforts are not thwarted by a lack of clarity on the part of USDOE as to how the concept of consultation and cooperation works, that motivated the state of Washington to embark on the negotiation of a C&C agreement with the Department of Energy in July, 1983.

Analysis of the federal act convinced the Governor serving at the time, that the interests of the state were better served by the formatization of interactions with the federal government, even though the process of identifying locations for site characterization had not yet been concluded.

The issue that I would like to examine here before this Panel is the extent to which the negotiation and execution of C&C agreements can both improve federal program activity and protect state interests. I would also like to make some observations as to reactions of the public and by some legislative representatives as this process has unfolded.

Our state's request to negotiate followed an analysis of the federal act and a review of the potential merits or demerits of using this tool offered by Congress. Several reasons for conducting negotiations were identified. These included:

1. a desire to reinforce the right of the state to carry out a full technical review and monitoring of the federal program;

2. to provide specific procedures to gain access to information and data on a timely basis;

3. to establish a formal binding commitment from the Department of Energy to provide sufficient resources from the Nuclear Waste Fund to enable the state to carry out its review responsibilities;

4. to seek provisions to enable the state to cause a stoppage of work in the event of an imminent threat to public health and safety;

5. to provide specific ways to deal with conflicts and issues of state concern;

6. to recognize the need to support a broad state program of public involvement, with sufficient financial support to make it a reality;

7. to provide procedural detail in other areas of state interest to fully carry out the intent of the federal act for full and continuous state participation;

8. concern that while no decision had yet been made by the USDOE as to the three preferred sites for characterization, the amount of investigation of a possible repository site on the Hanford Reservation over the past eight years required the state to know better what was taking place.

There were also some arguments for not moving forward with negotiations:

1. the USDOE decision selecting sites for formal characterization had not yet been made and, therefore, was premature;

2. the Act did not require signing an agreement;

3. the federal government needed the agreement more than the state;

4. if there was no agreement, the federal government would be inhibited from moving forward in its deliberations;

5. no other state had started negotiations (although the Yakima Indian Nation did initiate a request prior to state action);

6. being the first agreement finished would mean that it would be the weakest.

7. the adoption of an agreement was an agreement to place the first repository in the state of Washington;

This last statement has been the most difficult to correct. The reporting of the state efforts to protect its rights of independent review has seldom been accurately reported. Recently a broad TV program overview of the possible location of a repository in the state of Washington concluded that the federal government was pressuring the state to sign a C&C agreement so that it (the federal government) would have the right to continue to study the proposed site in Washington State.

Our negotiations commenced following the designation of teams from both the state and USDOE. The regional office in Richland took the lead role for the Department following delegation of the responsibility by the Secretary of Energy. A state request for representation from the Office of Civilian Radioactive Waste Management was supported and a representative of the Secretary attended each of the formal negotiating sessions.

The state negotiating team was composed of both executive and legislative representatives--and several attorneys were included as members of both teams.

While there was an expectation that the process of developing an agreement would take some months, there was no clear timeline established. Congress appeared to feel that six months was sufficient to construct an agreement, as the Act requires a report to Congress by USDOE at the end of six months if no agreement had been finished, which includes the reasons while the process was not completed.

It became evident as the negotiating moved along that there was increasing legislative and public interest in this activity and this would require additional time in order that there be ample time for review. The team circulated a draft of its efforts in December, 1983 to the public and legislature. Completion of an acceptable agreement was dependent upon resolution of outstanding issues, and review by the state Nuclear Waste Board, the public and the legislature.

Substantial legislative time was spent on this issue and several related pieces of legislation were adopted during the 1984 legislative session. Among the new laws were instructions to the negotiating team to consider several specific issues (foreign wastes, liability). Another new act gave the Nuclear Waste Board new authority as a free-standing state agency and assigned the negotiations of such agreements, as the C&C, to the Board. The legislation also laid out requirements for at least two public hearings, and review and approval of a proposed agreement (and any non-technical amendments) before the Board could execute the agreement.

Following the session, the Board asked the existing team to continue their negotiations and bring a draft to the Board when the team felt that the negotiations were at that stage. In late summer of 1984 a draft document was submitted to the Board for review. After substantial examination and discussion over several meetings, late in 1984 the Board scheduled four public hearings for January, 1985.

With the emergence of the USDOE draft Environmental Assessment in December, 1984, it was determined that there would be considerable confusion if state hearings on the draft C&C document were held at the same time as the USDOE briefings and state workshops on the EA. Consequently, the hearings were postponed until the EA review process has been completed.

Early negotiations identified a number of issues to be resolved. These were of varying degrees of importance and timeliness.

Considerable attention was addressed to those issues that were of concern to the state, particularly during the period of pre-site characterization and site-characterization.

The state team also considered it of importance to identify all issues that were of public interest and affected the repository siting, construction, operation, and post-closure periods.

A few principal issues have resisted resolution and are deemed of such importance that the lack of acceptable resolution or a process for resolution jeopardizes the possible execution of a ducoment. Key issues that have not yet been resolved include full federal responsibility for accidents during transportation or repository operation, and the program for disposing of existing defense wastes on the Hanford Reservation.

The conclusion of the process has been made more difficult due to the inclusion of some issues that may not apply to existing federal activities, but are important in meeting citizen concerns and expectations. The state must be cognizant of all relevant issues, understand the extent of these issues, and insist on positions fully protecting the state's interests.

Our negotiations identified the interests of both parties in concluding an agreement, but with differing rationales. The USDOE has an interest in being able to demonstrate a willingness to deal with institutional issues and to carry out the mandate of the Act to support the right of independent review by a host state or affected Indian tribe. The state has a stake in having a mechanism that will enable it to carry out the authority contained in the Act and to ensure that the USDOE deals fairly and consistently with it. Rules of procedure can serve both to improve the credibility of USDOE as the sponsor of the program and to reaffirm the necessary role of a host state's ability to critique, and if necessary, disapprove of a site selection were it to be made.

In carrying out a comprehensive public involvement program to acquaint the public with the objectives of a C&C agreement, public hearings are a statutory directive in our state. As the state prepared itself for the hearings (now postponed to later in the spring), it was clear that the public was more interested in commenting on the entire question of the repository program, including site selection activities, rather than with the more narrow aspects of setting forth procedural commitments for the state to satiffy itself as to the adequacy, quality, and pertinence of federal data gathering and testing.

It will continue to be a difficult task to identify clearly what the agreement objectives are and what the expectation of negotiations has been. The public to date, and the media, generally, do not understand. Congress may not have been aware of the suspicion and concern that would arise as a by-product of formal negotiations between the state and USDOE. The continuing attitude has been that such an agreement must either: (a) provide approval for the location of a repository (as has been repetitively reported by local and national media), or (b) precursor of such approval. In the minds of many, the agreement carries the seeds of support regardless of the comments of the negotiators, the state Board, or other parties.

A C&C document may have to carry a burden beyond its capacity. While the state would appear to need the authority to undergird its capacity to watch and react to USDOE performance, through a C&C, the ability to consummate a written document of procedures and federal commitments may be impossible to achieve.

We have felt that the negotiations we have conducted, to the present, in the context of the authority contained in the NWPA, has offered a unique opportunity to formalize a state/federal relationship that can materially assist a potential host state. It could also serve to mature the ability of USDOE to become more accessible and responsive to legitimate inquiry and state investigation.

Our state experience and negotiation has proven beneficial in clarifying the need for state involvement and in the commitment of USDOE to recognize and deal with the issues we have identified.

The conclusion of the matter is inconclusive. We are building our capacity to fully review all federal activity as it pertains to a potential site at Hanford. We will also utilize every tool available to fully assure our role as an independent monitor and reviewer. Whether the C&C procedural document will be a part of that process will depend upon the perceptions of the public and the legislature as they review the work of those of us that have been involved in the negotiating process. We are unable to tell you whether we have achieved a passing grade in this effort.