

DOE PROJECT OFFICE PERSPECTIVE
OF THE
CONSULTATION AND COOPERATION AGREEMENT PROCESS

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ABSTRACT

The U. S. Department of Energy (USDOE) and the State of Washington (State) have been interacting on the commercial high-level nuclear waste program since 1978 on an informal basis. Negotiation of a formal Consultation and Cooperation (C&C) Agreement under the provisions of the Nuclear Waste Policy Act (NWPA) was initiated in July 1983. Even though an agreement has not been reached at this time, the negotiations have substantially defined the consultation process and those understandings are guiding ongoing interactions. USDOE continues to display a willingness to negotiate in good faith in an attempt to reach an agreement; however, there does not appear to be sufficient desire or support within the State Government to conclude an agreement.

Background and Historical Overview

The Basalt Waste Isolation Project (BWIP) was initiated in 1976 and site characterization work has been ongoing since that time. When the NWPA was passed in January 1983, the USDOE and the State had been interacting on the commercial high-level nuclear waste program since 1978 on an informal basis.

In the spring of 1979, Governor Dixy Lee Ray and USDOE Richland Operations Office Manager, Alex Fremling, established an Intergovernmental Basalt Waste Isolation Project Working Group as a means of keeping the State informed on the status of BWIP and the National Waste Terminal Storage Program. This Working Group met periodically until August 1982 when Governor John Spellman issued an Executive Order establishing a State of Washington High-Level Nuclear Waste Management Task Force, a Citizens Advisory Council, and a Technical Advisory Group to interact with the USDOE on the high-level nuclear waste program. In October 1982 the State requested financial assistance and a grant was established to support its activities related to the commercial high-level waste program.

Subsequent to passage of the NWPA, state legislation was enacted in May 1983 which transferred primary responsibility for review of the high-level waste program to the State Department of Ecology. In the 1984 legislative session, another state law was passed which shifted these responsibilities to a Nuclear Waste Board and required all agreements to be approved by the legislature. During this period financial assistance grants have continued which to date total over 2.5 million dollars.

Requirements of the Nuclear Waste Policy Act

The NWPA requires that the USDOE seek to enter into a written agreement and to begin negotiations

on such an agreement within 60 days after the approval of sites for characterization or the written request of the state or affected Indian tribe. The NWPA also requires that the written agreement be completed within six months or a written report be sent to Congress on the status of negotiations and the reasons why the agreement has not been completed. In addition to schedule requirements, the NWPA also specifies procedures which the agreement must define, including:

1. Study, determine, comment on and make recommendations on possible public health and safety, environmental, social and economic impacts
2. Respond to comments, including time limit for response
3. Agreement modification
4. State impact report and request for assistance
5. Assistance in resolving offsite concerns
6. Consultation and cooperation on a regular basis; timely schedule for state review
7. Notify state prior to transportation of high-level waste or spent fuel
8. State monitoring and testing
9. Sharing of technical and licensing information
10. Public notification procedures
11. Resolution of disputes through negotiation, arbitration, or other appropriate mechanisms

Purpose and Objective of Agreement

The objective of the consultation and cooperation process as defined in the NWSA is to "consult and cooperate. . . in an effort to resolve the concerns of such States and any affected Indian Tribes regarding the public health and safety, environmental, and economic impacts of any such repository." Also, the USDOE "shall take such concerns into account to the maximum extent feasible and as specified in the written agreement."

Although an informal process of consultation with the State has been ongoing for a number of years, these interactions were on an ad hoc basis without a mutual understanding of the objectives, scope or process for carrying out the consultation. USDOE's expectations were that the negotiation of an agreement would focus and define the consultation process and the written agreement would document that process and the procedures for its implementation. In addition, with the consultation groundrules defined, it was expected that the process would proceed more effectively for both parties with less conflict and, if differences did arise, there would be a procedure for resolving them.

Implementation Experience

In June 1983, the State requested that the negotiation of an agreement be initiated, and the first negotiating session was held in July. The Richland Operations Office was assigned the responsibility for negotiating the agreement with the State and the Operations Office Manager was delegated the authority to sign the agreement. These actions were coordinated with the Office of Civilian Radioactive Waste Management, USDOE Headquarters, and with their concurrence.

To negotiate the agreement, both parties designated a negotiating team made up of program and legal staff members and, in addition, the State team had representatives from the legislature. These negotiating teams met to identify topics to be covered by the agreement and then to establish wording which was mutually acceptable. During these sessions a willingness to negotiate in good faith was exhibited by both parties and essential agreement was reached on all but one article of the proposed agreement.

The one article on which agreement was not reached involved issues dealing with liability. In this case the State's policy position was that the United States should be strictly and absolutely liable, without regard to fault and without any dollar limitations for any nuclear incident associated with operation of a repository. In the absence of Congressional action, however, USDOE was without authority to offer liability protection in addition to that authorized by the Price-Anderson Act, as amended, or the Federal Tort Claims Act. These different positions were acknowledged and wording drafted for the proposed agreement which reflected these differences.

By December 1983, within the six month period the NWSA allotted for negotiations, a draft agreement was available which the negotiating teams presented to their respective principals. Because of prior coordination and concurrence on policy issues, there were only minor comments from USDOE on the draft agreement and execution could have taken place. However, the State's situation was much different. As indicated in the Background Section, at that time

several state legislators became involved in the process. Through their comments on the draft, legislative hearings and eventually passage of legislation which required legislative approval of such agreements, the process was substantially changed and the role of the State's negotiating team was reduced. As a result, little progress has been made since that time on the agreement.

In November 1984, the State Nuclear Waste Board issued the draft agreement for public comment and scheduled five hearings around the State on the draft agreement. Those hearings were cancelled and have not been rescheduled because of threats of legal action from a special interest group opposed to the repository program and the agreement. This group contends that the State must prepare an Environmental Impact Statement before taking action on the agreement.

The issues associated with State interactions on defense waste at Hanford also affect the agreement on civilian waste. The State has recently indicated that it will not agree to the NWSA C&C Agreement until it has an acceptable agreement on defense waste. Negotiating teams for USDOE and the State have been established and negotiations have been initiated. At this time, it is not known what impact the defense waste agreement will have on reaching an agreement on the commercial waste program.

Even though a C&C Agreement has not been concluded at this time, the negotiation has substantially defined the consultation process and those understandings are guiding the ongoing interactions. From USDOE's perspective, the absence of an agreement will not alter the program being conducted to characterize the site and the informal consultation process with the State will continue. However, the absence of an agreement reduces the effectiveness of the consultation process. USDOE continues to be available to negotiate in good faith to complete the agreement. However, at this time the State has the action to define any outstanding issues and a process by which agreement can be reached.

Constraints on Negotiating Process

Mutual trust and respect between the negotiating parties is essential in achieving positive results. Both parties represent different interests. Understanding and respecting those interests and honest and open discussion of the issues is necessary to obtain mutually acceptable agreements that will withstand the test of implementation. From the USDOE's perspective, such an atmosphere did develop between the negotiating teams for the State of Washington agreement.

A number of program constraints also can delay negotiations. The commercial high-level waste program is a large national program with a number of separate projects and Headquarters Offices. Legal, policy, or programmatic issues which affect or set precedence for the overall waste program of other USDOE programs must be carefully considered and agreement reached at the appropriate management level within the Department. Similar issues require careful State consideration prior to establishing a negotiating position. Reaching agreement on such issues may require several iterations and can be time-consuming.

The biggest constraint on reaching a timely agreement exists when the negotiating teams lack the

authority to represent their respective principals. This has been the case with the State since the State Legislature has exercised control over the process, and it remains the primary obstacle in achieving an agreement.

Relation of Agreement to Litigation

The agreement establishes a procedure for conflict resolution without resorting to litigation. However, nothing in the agreement precludes the State from seeking judicial review at any time during the conflict resolution process.

Consequence of Failure to Negotiate Agreement

Failure to negotiate a timely agreement requires a written report to Congress as indicated earlier in

the section on Requirements of the Nuclear Waste Policy Act. The absence of an agreement will not alter the program being conducted to characterize the site, and a cooperative informal consultation process with the State will continue.

Initially, some members of State government believed that not having an agreement would constrain the program from proceeding and others have questioned the advantage to the State of having an agreement. USDOE believes that a written agreement would be mutually advantageous and would not place the State in a compromising position. We believe that establishing the agreement will permit more effective interactions with the State and that the State will be better able to meet the objectives of the consultation and cooperation process stated in the earlier section on Purpose and Objectives of the Agreement.