

IMPLEMENTATION OF STATE - FEDERAL AGREEMENTS:
OBSERVATIONS AND SUGGESTIONS FROM NEW MEXICO

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ABSTRACT

State - federal agreements have been authorized by Congress under the Nuclear Waste Policy Act of 1982 ("the Act"). The process for reaching such agreements as well as their content have been modeled after the State of New Mexico's experience with its lawsuit and resulting "Agreement for Consultation and Cooperation" with the United States Department of Energy (DOE) over the Waste Isolation Pilot Project (WIPP). New Mexico has been through the entire process, beginning with litigation and ending with a formal, written agreement with the federal government which addresses all aspects of a major nuclear waste repository within its borders. The process for reaching and implementing such agreements is not unlike the process for negotiating a treaty between countries. States entering into negotiations for such agreements should be aware of several important considerations which New Mexico learned the hard way. Avoiding the pitfalls inherent in this process is the key to producing a meaningful, working and enforceable document that protects the state's interests and affords a state continuing control over a long-term nuclear waste project within the state.

NEW MEXICO'S EXPERIENCE WITH WIPP

The State of New Mexico has been both the pioneer and the guinea pig in state - federal agreements over federal solutions to this nation's nuclear waste problems. In 1980, Congress authorized the construction and operation of a nuclear waste repository by the DOE near Carlsbad, New Mexico. WIPP was to be a research and development facility to demonstrate the safe disposal of radioactive wastes in the medium of salt. WIPP was designed for the permanent disposal of defense, low-level and transuranic waste, and for the temporary storage of high-level waste for experimentation. WIPP was also intended as a "fast-track" defense alternative to the much needed commercial repositories and was purposely exempted from the jurisdiction of the Nuclear Regulatory Commission. The statute authorizing WIPP (P.L. 96-164) granted New Mexico the right of "consultation and cooperation" over the project, but not a veto right. That law further required the Secretary of Energy to attempt to enter into a written agreement with the State which would provide the State of New Mexico consultation and cooperation with respect to the public health and safety aspects of the WIPP repository.

The scope of "consultation and cooperation" immediately became the battleground between New Mexico and the federal government. The DOE initially contemplated a very narrow concept, limited only to the site and project itself. New Mexico took a much more expansive view that required the federal government to address the myriad of off-site state concerns. Eventually, negotiations broke down and New Mexico filed suit in federal district court seeking to enjoin the project from proceeding. New Mexico maintained that WIPP was a unique and far-reaching federal project which would adversely and unconstitutionally impact upon the ability of the State to

maintain its sovereignty and properly carry out its traditional governmental functions.

In the litigation, the State sought a binding, judicially enforceable agreement that guaranteed the State a meaningful role in the decision-making process and in the monitoring of the safety of WIPP. Additionally, the State demanded that the federal government address the various off-site, state concerns and impacts of the project which, if ignored, would burden New Mexico with economic, social, and environmental costs.

On July 1, 1981, the State of New Mexico and DOE entered into a "Stipulated Agreement" filed in the court suit and a separate "Agreement for Consultation and Cooperation." Together they provided New Mexico with binding commitments from DOE for state review at critical stages in the project. The State also obtained additional scientific testing on the site and an effective role in deciding how and where WIPP was to proceed.

On December 27, 1982, a "Supplemental Stipulated Agreement" was entered into which addressed the State's off-site concerns. That agreement afforded New Mexico protection and monetary compensation in the areas of state liability, emergency response preparedness, transportation monitoring, environmental monitoring, and improvement of New Mexico's highways.

On November 30, 1984, New Mexico concluded further negotiations with DOE which resulted in a "First Modification" of its original "Agreement for Consultation and Cooperation". With this modification, New Mexico has succeeded in further restricting the WIPP mission by imposing numerical limitations on the quantity and quality of the waste forms to be emplaced at WIPP and by assuring that the high-level waste temporarily stored at WIPP can, and will, be retrieved and

disposed of elsewhere at the conclusion of the experiment.

The contents of New Mexico's agreement and court stipulations have now found their way into the new federal Act as the format and agenda for future state - federal agreements authorized under that statute. The lessons learned by New Mexico in its long and difficult effort to create and implement its agreement with DOE should not be ignored by any future state participant seeking to negotiate a similar state - federal agreement on nuclear waste projects. History is sure to repeat itself.

STATE - FEDERAL AGREEMENTS: WHAT PURPOSE DO THEY SERVE

Make no mistake about it, state - federal "turf" is the issue. What is being proposed (or federally imposed) is purportedly a "national" solution to our nuclear waste management problems. These solutions are unique and far-reaching federal projects with immense state impacts, both environmental and economic. As "national" as the solutions may be in concept, the unfortunate reality is that only a few selected states will bear a disproportionately heavy responsibility for their implementation. The real or perceived risks inherent in these nuclear waste solutions will, by necessity, come to those who are in close physical proximity to the permanent repositories, the temporary storage areas and the transportation routes. As a result, the siting of nuclear waste facilities in certain host states becomes a decision with as many political ramifications as scientific. Constitutional confrontations are sure to arise between the selected states and the federal government, and even between individual states.

A state's sovereignty and constitutional responsibility for the protection of the public health, welfare and safety of its citizens and environment are directly at stake. Increased tension and confrontation in the state - federal relationship are inevitable unless a state abrogates its statehood and chooses to become a federal "enclave" with respect to these proposed nuclear facilities and national waste management solutions. The National Waste Policy Act of 1982 recognizes this increasingly more complicated and controversial tug-of-war over state - federal prerogatives. The Act expressly provides a statutory mechanism for encouraging state - federal agreements which afford the opportunity for state consultation and cooperation with respect to both the on-site and off-site impacts of the proposed nuclear waste projects.

A state - federal agreement, if achieved, becomes a treaty between sovereigns, each of which possesses separate and independent powers, concerns and jurisdiction. This new statutory process seeks to recognize and coordinate these competing rights and responsibilities of the federal government and the affected state through compromise. The resulting agreement attempts to shift back to the federal government some of the disproportionate risk and negative impacts necessarily imposed on a host state.

Most important of all, the agreement strives to establish the state as an independent watchdog and defender of the state's environment and the public health and safety of its citizens. The credibility of the state in this role is absolutely essential. Like it or not, the public is now looking to the state as its protector and overseer of the safety of these projects. Unfortunately, the federal agencies involved are being viewed as proponents of the projects and no longer as the public's guardian. The state's role as an effective advocate for its citizens must be the outcome of the agreement or it will fail.

The present federal statute provides a good structure for channeling the many areas of confrontation into a recognized agreement process sanctioned by federal law. It does not, however, guarantee a successful outcome which preserves the credibility and the sovereignty of the state. That difficult task must be undertaken by the state and its negotiators. Litigation is an alternative to the agreement process but not a good one. Delay may be achieved through the courts, but in the end, state and federal officials, and not judges, will have to resolve these conflicts. No agreement at all may be a better result for a state than a weak agreement that only gives the appearance of a meaningful state role. However, in either case, a state runs the risk of being bypassed by the federal government in its decision-making on the project.

A state - federal agreement is a tremendous, creative challenge for a state. The stakes are high. New Mexico has learned several important lessons that may help future host states in successfully meeting that challenge. We offer the following observations and suggestions to assist in this undertaking.

LESSONS LEARNED BY NEW MEXICO

There are several fundamental considerations that state representatives should be aware of before commencing to negotiate and implement a state - federal agreement. The failure to satisfactorily address any one of these considerations will seriously undermine any attempt to achieve a credible, meaningful agreement that will work to a state's benefit over the long run.

Obtain a Binding, Enforceable Contract

The final document must be a binding, judicially enforceable agreement. The end result of the negotiation should be a written contract between the state and federal government that clearly establishes rights and obligations which are able to be enforced in court if breached. Beware of any substitute format that falls short of this. Attorneys should be called upon to review this aspect of the agreement to ensure its legal enforceability. Negotiators should be wary of such lesser alternatives as letters of intent, memoranda of understanding, statements of principle, etc., and they must be sure that the parties executing the document have the authority to bind those whom they represent. New Mexico repeatedly experienced what became known as the "perfumed letter syndrome"

in which many non-binding promises and assurances were made in formal letters which were later broken or altered by ever-changing federal officials and agencies. Because of the long-term nature of these projects it is to be expected and planned for that both federal and state officials will come and go over the life of the project. It is the institutions that are to be bound and not the individuals that represent them.

Phased Decisions Rather Than the "Big Green Light"

The duration of these projects spans many years. A project will proceed from site selection and characterization on through to construction, operation and finally to decontamination and decommissioning. A state must impose a phased decision-making process in order to have any type of meaningful role in, and effective control over, such projects. The state must avoid at all cost being put into the position of making a one-time decision which gives the "green light" to the project forevermore. As many review checkpoints as possible should be interposed at every critical juncture. They should be coupled with procedures for gaining full access to all information and the ability to pursue conflict resolution if major disagreements arise before the project proceeds to the next stage. The tremendous momentum of these projects, once begun, can be overwhelming to a state. Without formal, predetermined points for review, the state will soon lose control and will be left behind.

Independent Scientific Review

To be truly effective in the review of a nuclear waste project, the state must have competent and independent scientists. The scientific data and reports generated on projects of this size are enormous. An understaffed or unprofessional scientific review capability which is unequal to its federal counterpart can be detrimental to a state acting as a reliable watchdog. Legions of lawyers, administrators, or politicians simply can not perform this job. A state must be prepared to spend a substantial amount of money to hire and develop a respected scientific review capability. Without it, a state will be forced to rely on the federal government's scientists and data, and the state's role as an independent monitor will be reduced to mere window-dressing for the public. Finally, it is very important that the agreement consistently place the burden of proving the safety of the project squarely upon the federal government. If the burden is reversed, the state will forever be at a disadvantage in reacting to federal decisions. The state will never have enough resources to prove that a decision is unsafe, but it can function adequately if the agreement requires that the federal government prove the safety and appropriateness of its decisions to the state's satisfaction.

Limit the Mission With Specificity

A state should know the full scope of the project. It should not buy on to a "pig-in-a-poke". The state must define and

limit the mission of the project with as much specificity as possible. No one should rely exclusively on the mission definition provided in the environmental impact statements for the project. Those documents are neither final nor contractually binding. An environmental impact statement can be unilaterally supplemented and amended by the federal government to reflect an expansion of the mission. The establishment of precise, measurable limits and parameters which cannot be changed without the agreement of the state is essential. Like WIPP, the federal enabling statute for such future projects is sure to contain a broad mission statement that leaves to the DOE or another federal agency considerable latitude in exercising its discretion in actually defining the details of the ultimate mission of the project. This administrative discretion must be curtailed by the agreement as far as reasonably possible so that both sides know what the project will be and can thereafter accurately review and gauge its impacts. If not, the concept of the project will undergo a rapid and surprising metamorphosis as power-wielding officials, bureaucrats, and politicians change. The temptation to tinker and redefine the mission in one's image and likeness will be irresistible if the future opportunity to do so is left open. Admittedly, Congress may well alter the mission on its own, but it will be much more difficult to do so from a political point of view if the state and the public have long relied on a well-publicized, specific version of the mission set forth in a written, contractual agreement with the federal government.

Present a Unified Front

A state should take its time in negotiating and implementing the agreement. It should not start the negotiating process until it can present a unified position. Much preparation is needed to distill and reckon with the many internal conflicts and separate power bases within state government. The various state agencies and their policy-makers should not be split up, even though many state interests may be in contradiction. For example, the extraction of natural resources beneath or near a repository site should be limited in order to protect the integrity of the site. On the other hand, such limitations will reduce state royalties and hamper important private industries. Internal compromises and trade-offs are to be reached before appearing at the bargaining table. Negotiations will deteriorate if too many inconsistent positions are voiced. This can result in a very debilitating situation for the state. The different state groups will be played off against each other to finally eliminate any effective state role at all. It will also be a nightmare for the state's lawyers. "Official" letters taking opposite state positions must be eliminated or any later enforcement of the agreement in court will be impossible. In short, the state's house first must be put in order or the negotiations will be unproductive. If it is not, the project and the federal government will easily end-run the negotiators and leave them behind as a side-show debating society.

Provide for Conflict Resolution at Home

There will be conflicts. There should be a good number of them. Moreover, the parties may even agree to defer many important issues to later years when such issues will be more ripe for proper resolution. This is a sign of a healthy state role in the project. Without conflicts, the state may be perceived as a "joint-venturer" with the federal government. Conflict resolution procedures encourage constructive criticism and thus aid a state in continuing to be an effective advocate. It is essential to establish a clear, simple conflict resolution procedure that will work to the state's advantage. State negotiators should avoid binding arbitration with no recourse to the courts. The state should have an equal say in selecting the arbitration panel. Provision should be made to include scientists as the arbitrators rather than bureaucrats, particularly where the dispute is over scientific issues. More significantly, the state should fight tenaciously for the right to hold any arbitration or judicial proceeding on its home court. The expense and inconvenience of arbitrating or litigating back in Washington, D.C., can be prohibitive and is a tremendous disincentive to use the procedure at all. Local public scrutiny of the conflict resolution process will keep it moving and keep it fair. Finally, the conflict resolution procedure should not become a strategic weapon which can be used against the state. The state must not become bogged down in administrative hearings as the project continues to proceed in spite of its objections. The state should preserve the right to go to court to seek preliminary injunctive relief if irreparable injury will occur during the arbitration process by the project proceeding further.

Avoid the Propaganda War

It is incumbent upon a state to maintain its integrity, independence, and most of all, its credibility throughout the process of negotiating and implementing the agreement. A state cannot

function as an effective guardian for its citizens and environment if it is perceived as having lost its objectivity. It cannot risk being viewed as either an irresponsible obstructionist or as an enthusiastic cheerleader of the project. The state must stay out of the anti-nuclear/pro-nuclear propaganda war or it will fast become a casualty of it. Both the scientists and the policy-makers must be protected from being drawn into that dangerous arena. Misinformation is rampant there and each group is forever trying to capture the state and its reviewers into their corner and to use them to support their preconceived positions. Good scientific methods and objective analysis must be maintained and the full, untruncated story must be told to the public by the state itself. State officials, scientists and negotiators should also be prepared to be courted, pampered, denounced, praised, abused, loved and hated by both sides, often at the same time. Hopefully, in the end their credibility and independence will be maintained and, best of all, they will continue to be respected and listened to by the public they serve.

CONCLUSION

It is very unlikely that the states will ever be given the power of an absolute veto over future nuclear waste projects within their borders. A national waste management program could never survive it, and Congress is well aware of this. While the current federal law gives the states something less than total veto, the requirement of an agreement for state consultation and cooperation directly challenges a state to a far more important involvement in the decision-making process than can be achieved by a state through a one-time, all or nothing, yea or nay vote. Whether, and how well, each state meets this challenge may vary dramatically from state to state. New Mexico's experience was a first step in this area. No doubt its efforts can, and will be, refined and improved upon by other states as we all continue to strive for a safe, fair and rational nuclear waste management program for our nation.