A WASTE PROGRAM SHOW-STOPPER:

LAWSUITS, WHAT THEY CAN DO TO YOU, AND HOW AGREEMENTS CAN HELP

Perry B. Seiffert
Partner
Doub and Muntzing, Chartered
Washington, D.C. 20006

ABSTRACT

Nuclear waste program lawsuits are likely to harm the U.S. Department of Energy (DOE) waste program, but federal/state agreements can reduce the risk.

There are likely to be many lawsuits filed under the Nuclear Waste Policy Act of 1982. Some of these lawsuits may harm significant parts of DOE's programs. Non-lawyers often underestimate the risk of damage by lawsuits. While the effects of lawsuits are uncertain, we can assess their risk. The Waste Act encourages early agreements for consultation and cooperation between DOE and the states. These agreements, if they can be negotiated with the potential of lawsuits in mind, can significantly reduce the risk of lawsuits.

INTRODUCTION

Nuclear waste program lawsuits are likely to harm DOE's program, but federal/state agreements can reduce the risk of this harm. The sponsors of this conference included a session during the opening day on the agreements process. While there may be many agreements signed pursuant to the Waste Act, the most significant are agreements for consultation and cooperation contemplated under Section 117 of the Waste Act. I shall focus on specific litigation, or lawsuits under the Waste Act, and link those lawsuits with the agreements process. After considering this carefully, I reach four conclusions:

1. There are likely to be many lawsuits filed under the Waste Act.

2. Waste Act lawsuits are likely to harm significant parts of DOE's program, and non-lawyers often underestimate this risk.

3. The effects of lawsuits are uncertain, but we can assess their risk.

4. If federal/state agreements can be negotiated, they can reduce the risk of lawsuits.

I assume that the reader of this paper is a scientist, engineer or technician working with a contractor on DOE's waste program. Accordingly, I will try to avoid lawyer's language because it can be incomprehensible to others.

Many Lawsuits Expected

I expect there will be many lawsuits filed under the Waste Act. There are several reasons for this, some likely to be familiar and some unfamiliar. Among the familiar reasons is that states and localities are generally opposed to hosting a repository. A lawsuit is one the best ways they perceive to oppose it. They know that courts have power greater than the program manager, and that courts can impede or stop the part of the program to which they object.

Other familiar reasons are that filing lawsuits often provides considerable publicity, which a repository opponent can find useful in gathering support. Moreover, waste program activities affect many groups. Thus, there are many groups who will perceive they are affected, and who might file a lawsuit. For example, nearly any state can claim to be affected by proposed transportation of spent fuel to a repository.

There are also a number of less common reasons why I expect many lawsuits. These reasons are worth identifying in order that you may appreciate properly the risk of lawsuits. The first of these less common reasons is that the Waste Act facilitates lawsuits. For example, Section 119 of the Act identifies the actions you can appeal in a lawsuit, where to appeal them, and when. With many Acts of Congress, a person who claims a violation cannot be certain what actions he can appeal, where, and when. A second reason is that the Act is so procedural and detailed, it creates many opportunities for opponents of a repository to claim DOE has violated its provisions.

Helping to prove my point about the many Waste Act lawsuits expected, there already have been several lawsuits filed. These have been filed before DOE has made its most significant Waste Act decisions, and before the Waste Act clearly allows such suits. I will describe some of those lawsuits shortly. Their importance here is to suggest how many more lawsuits are likely to be filed when DOE does take its most significant actions.

Lawsuits Probably Harmful

A Waste Act lawsuit could harm significant parts of DOE's program, and non-lawyers often underestimate this risk. Historically, lawsuits filed by objecting

states and localities have delayed or stopped significant federal government construction proposals. Undoubtedly, this strategy will again be followed.

Nuclear waste program contractors are vulnerable. A lawsuit can delay or possibly end their part of the program, and contractors have little control over the outcome. Therefore, it is important not to underestimate the risk of harm. On the other hand, lawsuits can benefit contractors. A court could require DOE to generate more technical information before DOE can make a decision, for example, that a site is suitable for a repository.

There have been three recent Waste Act lawsuits filed, all in December, 1984. You might be interested to hear briefly who filed them and what they are asking the court to do. The important question here is, what would it do your program if the court handed down an order agreeing with the person who filed suit.

The first of these lawsuits I will discuss is by the State of Texas against DOE. Texas filed suit in the U.S. Court of Appeals for the Fifth Circuit, located in New Orleans. In February, 1985, DOE filed a motion to dismiss the case. Texas's response is due in late March, 1985. Texas is asking the court to review DOE's decision identifying two candidate sites in Texas. The court could order DOE to reconsider its decision. At worst, the court conceivably could find that no present candidate site in Texas is suitable. That would probably terminate all waste program work in Texas at these sites.

The other two suits were filed in the Ninth Circuit, located in San Francisco. In one, the Environmental Policy Institute (EPI) and others asked the court to review DOE's repository siting guidelines. In this case, the court conceivably could decide that DOE's guidelines do not comply with the Waste Act. If so, DOE would have to do them over. This would delay DOE for several months in nominating five candidate sites, as the Waste Act requires. Under Section 112 of the Act, each nomination requires an environmental assessment or EA. The EA must conclude that the site complies with the guidelines. Without valid guidelines, DOE cannot issue an EA.

In the third suit, the State of Nevada asks that it be entitled to nuclear waste fund aid from DOE in order to conduct independent research at the repository site. The court could award Nevada a large sum and allow it to do independent research. Nevada's work could conceivably delay or impede DOE's on-site research. Moreover, other repository states could expect similar rights.

The important point is not the facts of these cases, but their implication that many other cases will come up. It is important to look at each case, and apply risk assessment principles to determine what that lawsuit could do to your program, if the court's decision were as harmful as possible.

Lawsuit Uncertainty and Risk Assessment

Scientists, engineers and other technical persons often underestimate the risk of damage from lawsuits. As an engineer turned attorney, I have an idea why this is true. Technical persons are generally inclined to believe a technical objective is achievable. When someone files a lawsuit apparently attacking a technical conclusion, it can leave the technical person angry and perplexed. He or she is often certain the conclusion is technically correct. Then a law judge, usually not technically trained, may enter the picture and decide the technical issue, in a way adverse to the program. If I am correct that scientists and engineers tend to underestimate the risk of lawsuits, it would be wise for them to spend a bit more time to seek an expert risk assessment of what lawsuits can do to their programs.

I can conceive a second reason why lawsuits are perplexing to a technical person. We all know that the effect of lawsuits usually is uncertain. Important questions about lawsuits, such as when and where they will be filed, how they will come out, and when they will be decided, cannot be predicted with certainty. We have the unfortunate combination of high potential consequences and low predictability. Scientists and engineers may be comfortable with technical uncertainty, but they tend to be uncomfortable about the sort of political uncertainty inherent in lawsuits.

There are a number of reasons for the unpredictability of lawsuits. There is a saying in the law, "reasonable men differ." Judges, as reasonable men, will differ in how they resolve a conflict. Moreover, a person filing a lawsuit often has a choice of courts in which to file, so he has some choice of his judges, and the choice multiplies the uncertainty. The Waste Act provides this choice explicitly. Other uncertainty is due to lawsuits taking so long that they allow intervening events which can influence the court's decision.

I have conceived a technical model familiar to most of you which may help me illustrate the uncertainty. The model is a golf driving range. Imagine yourself walking out on this driving range. The lawsuits are like golf balls, and the golfer is the person filing the suit. You can expect there will be many golf balls hit in your general direction. Most of the balls will miss you. Obviously, one could hit. It will almost certainly not kill you, but it could harm you. It will probably hurt, and it will probably slow you down for a while.

Adding to the uncertainty on the driving range is the skill of the golfer. The golf pro can hit a ball harder and more accurately, but he will still probably miss any one particular person walking out on the driving range. On the other hand, even an amateur golfer could hit a ball that hits you and hurts for awhile. If many people are walking out there, equivalent to the many activities DOE is funding under the Waste Act, the odds increase that a golf ball will hit one.

Under the Waste Act, lawsuits are a bit less uncertain. The Act provides a simplified and expedited procedure for lawsuits. For example, Section 119 of the Act allows a party to file his lawsuit directly in a U.S. Court of Appeals. This eliminates the usual step of first filing in the U.S. District Court, with appeal rights to the U.S. Court of Appeals. This provision cuts out one of the normal stages of the appeal process.

Further expediting lawsuits, Section 119 requires a party to file his lawsuit within 180 days, about six months after the date of the decision, action, or failure to act, involved. Normally, the time limit to file lawsuits would be in the order of two, three or more years. The Act also simplifies lawsuits by identifying which acts by DOE are ready for court review. For example, Section 112(b) provides that issuance of a final environmental assessment is final agency action subject to court review. Without such a provision, a

party filing suit would be uncertain about what stage of the EA development process was appropriate for court review.

While the uncertainties about a lawsuit are real, there are ways to reduce the risk. A skilled attorney can make some risk assessments or educated guesses about important questions related to a lawsuit. Before a lawsuit is filed, the attorney can guess what events are likely to trigger a lawsuit, who is likely to file a lawsuit, when that person will file, where they will file, and what relief they will seek. After a lawsuit is filed, the attorney can learn what the court's record has been in similar cases, he can guess the options the court has, roughly what the odds are of the court choosing each option, and when the court will decide. The attorney can also make some guess, if you lose the lawsuit, as to the odds that you will prevail on appeal. Conversely, if you win, the attorney can guess what the odds are your opponent will prevail on appeal.

I urge waste program contractors to keep informed on litigation and litigation risks that could affect their programs. They might begin by having an attorney who understands the waste program and also the litigation process, provide answers to questions such as those that I have identified above.

As an example of such risk assessment, I will make a few predictions about future lawsuits, through the end of the site characterization period. I will identify four events or periods in the program, in addition to those which have already occurred, which I believe are most likely to trigger lawsuits. For each event, I will suggest what the person filing suit is likely to ask the court to do, and what the harm might be to the program if the court agrees.

1. On issuance of final environment assessments (EAs). Person filing suit is likely to ask the court to find the EA does not comply with the Act's criteria for EAs, at Section 112(b)(1)(E), e.g. impact assessment is inadequate. Harm would be, if court finds the EA inadequate, DOE would have to correct it, and DOE's recommendation of that site could be held in abeyance in the meantime.

2. During site characterization activities. Likely to ask the court to find DOE is not conducting these activities so as to minimize environmental impact, as Section 113(a) requires, or that DOE has not given the state or tribe sufficient financial assistance to review DOE's activities as, for example, Section 116(c)(1)(B) requires. Harm could be that court could halt DOE's activities until it decides DOE is complying with the Act.

3. After site characterization. Likely to ask the court to find that DOE, in recommending a site for a repository under Section 114, did not comply properly with Section 114(a) criteria, or with the environmental impact requirements of the Waste Act or the National Environmental Policy Act (NEPA). Harm could be that a court could agree that DOE cannot recommend that site for a repository without further study, and court could possibly find that DOE should have chosen another site.

4. After characterization, if DOE finds that less than three sites are suitable. Likely to ask the court to order DOE to characterize more sites until DOE finds that at least three are suitable, as Section 114(f) arguably requires. Harm would be that court could order DOE to characterize more sites. This could halt DOE's program for the several years it would require to characterize more sites.

Agreements Preclude Lawsuits

If federal/state agreements can be negotiated, they can reduce the risk from lawsuits. Agreements or lawsuits are merely two ways of resolving a conflict. Agreements are better than lawsuits in some respects. However, agreements also have some relative drawbacks. Fortunately, model agreements are available.

When our objective is conflict resolution, agreements and lawsuits are two alternative solutions. Agreements raise conflicts early and try to resolve them early, by negotiations only by the two parties involved. On the other hand, lawsuits raise conflicts later, and leave them to a court to resolve, sometimes much later.

Agreements are better than lawsuits for several reasons:

- An agreement gives the parties more control over the outcome. There is no third party, like a court, involved.
- Parties to the agreement develop a relationship which often can help them resolve later conflicts.
- Agreements usually resolve conflicts earlier than lawsuits.
- Courts are arguably not well suited to resolve sophisticated technical or scientific arguments. Some courts do a creditible job, considering their lack of background. But I believe we file lawsuits in court because courts are available, and they are perceived as fair, and not because the judge is more knowledgeable about the technical subject then you and your opponent.

At the same time, agreements have a number of drawbacks:

- Perhaps the chief problem is that they look like the state is agreeing to a repository. State officials responsible for negotiating with DOE often cite this perception as their prime objection.
- Agreements require more initiative by the parties involved than lawsuits do.
- One party may not want to come to an agreement.
- Agreements seem like a formidable objective. There are so many issues involved, it seems difficult to cover them all well. However, it is not impossible.
- Agreements merely reduce, but do not eliminate, the risk of lawsuits.
- If a lawsuit has already been filed, which has been the case by the States of Nevada and Texas recently, the lawsuit tends to sour relations

to a degree which will be hard to overcome in later negotiations toward an agreement.

Notwithstanding the drawbacks, agreements have significant advantages, and reaching agreement is indeed possible. We have model agreements available, so DOE and repository candidate states need not begin to negotiate with a blank sheet of paper. For example, the DOE agreement with the State of New Mexico regarding the Waste Isolation Pilot Plant (WIPP) facility provides a model that has worked well so far. Following a lawsuit against DOE by the State of New Mexico, the parties reached an agreement some years ago. Now, shafts are sunk and many of the tunnels and drifts are finished. DOE plans to begin heater tests in a couple of years. This agreement, followed by on-site progress, shows that agreements are possible.

Moreover, the recent draft agreement between DOE and the State of Washington is an attempt at a comprehensive agreement. It could provide a starting place for DOE agreements with other repository candidate states.

CONCLUSION

My purpose has been to make Waste Act lawsuits a little more understandable, thus a little less frightening to scientists, engineers, and other technical persons involved in the waste program. There are likely to be many lawsuits filed under the Waste Act. Some of them may harm significant parts of DOE's programs. Non-lawyers, who often underestimate the risk of lawsuits, would be wise to appreciate this. The effects of lawsuits are uncertain, but we can assess their risk so that it becomes manageable. If federal/state agreements can be negotiated, they can reduce the risk of lawsuits.

The one message I hope you will recall is that nuclear waste program lawsuits are likely to harm DOE's program, but the federal/state agreements can reduce the risk.