

THE AGREEMENTS PROCESS:  
PROBLEMS AND OPPORTUNITIES FOR THE STATES

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ABSTRACT

The Nuclear Waste Policy Act of 1982 (the Act) directs the Secretary of the U. S. Department of Energy (USDOE) to "consult and cooperate with the Governor and legislature" of each state within which a candidate site for a nuclear waste repository may exist. The Act further directs USDOE to begin negotiations and to seek to enter into a binding written agreement to address specific concerns of any candidate state which requests such an agreement or within which a site has been approved for site characterization. The written agreements are to address at least the eleven topic areas specified in the Act and are to be completed within six months if possible.

The author has been a negotiator for the State of Washington in the repository siting agreements process over the past year. The experience of the author has shown that the agreements process as contemplated by the Act bears little resemblance to the institutional interaction process of the state and federal government on matters relating to consideration of the state for a nuclear waste repository. This paper seeks to analyze the agreements process as it has developed in one state, and identify the problems and opportunities in that process so that other states and USDOE may learn from that experience.

BASIS FOR INVOLVEMENT IN THE AGREEMENTS PROCESS

The Nuclear Waste Policy Act of 1982 (the Act) contains several provisions that direct USDOE to "consult and cooperate with states and Indian tribes". These provisions address the interim storage program, monitored retrievable storage, test and evaluation facilities, and the siting of a deep geological repository. The agreements process varies slightly for each program. This paper addresses only the agreements process for siting of a deep geologic repository.

The critical sections describing state participation in this process are Sections 116 and 117 of the Act. Section 116 is important because it provides for the state notice of disapproval and directs USDOE to make grants to candidate states. This section thus provides the incentive for USDOE to utilize the agreements process and the means by which the state may participate in the agreements process. Section 117 describes an information sharing process and the consultation and cooperation process. The information sharing provisions of Section 117 (A) provide that a state may request information from USDOE relating to "determinations or plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation or decommissioning of such repository". If this information is not made available by USDOE, a written response setting forth the reasons it cannot be made available must be provided. If neither action is taken in 30 days, the state may object to the President. If after an additional 30 days there is still not a response USDOE must cease activities in the state until the response is provided. Section 117 (a) thus provides an additional incentive for USDOE to develop an institutionalized information sharing system through an agreements process.

Section 117 (b) and (c) describe the cooperation and consultation process itself. These sections direct USDOE to develop a written agreement to "take into account to the maximum extent feasible" the concerns of a state relating to "public health and safety, environmental and economic impacts" of a repository. The written agreement is to address eleven specified areas. These include procedures:

1. for a state to comment on USDOE actions;
2. for USDOE to respond to state comments;
3. for how any agreement may be modified;
4. for which impact assistance is to be determined;
5. by which USDOE will assist the state in resolving offsite concerns;
6. for an ongoing cooperation and consultation process;
7. for USDOE notification to the state of high level waste transport;
8. for state testing of activities on the site;
9. for information sharing;
10. for public notification of procedures specified above; and
11. for resolving objections of the state.

The Act contemplates that the state and USDOE will each have incentives to enter into a cooperation and consultation agreement. The incentives for USDOE are to institutionalize an information sharing program to avoid delays which may otherwise occur in repository siting and to address early on the concerns of the state to avoid a notice of disapproval from being filed with Congress. Even the term "cooperation and consultation" to describe the agreements process evokes a concept of acquiescence in USDOE decisions.

The incentives of the state to enter into an agreement are less clear. The possibility of delay and notice of disapproval are the primary means by which the state can affect the repository selection process beyond the "review and comment on" documents provisions. If the agreement does nothing more than put into a separate document the rights of the state to participate in the repository siting process that are already described in the Act, then there is little incentive for the state to seek an agreement. If, however, the agreements process allows the state to resolve substantive concerns not otherwise addressed in the Act, then the incentive to participate becomes greater. The extent to which the agreements allows this is discussed in Section 3 of this paper.

#### PRELIMINARY ISSUES - WHO SHOULD BE INVOLVED AND WHEN?

##### Who is "the state"?

The concept of "the state" for purposes of institutional interactions is not clearly defined in the Act. Various sections of the Act use varying terms when referring to the state. Some sections contradict others. Other sections allow the possibility of the Governor to seek one thing and the legislature another when interacting with USDOE. For example: Section 101 (b) of the Act provides that "the state" is entitled to the rights of participation and consultation described in Sections 115 through 118 of the Act; Section 116 (c) provides that USDOE must make grants to "each state" to carry out its activities; Section 117 (a) (2) authorizes "the Governor or the legislature" to make requests for information; Section 117 (b) provides that the concerns of "the Governor and the legislature" must be addressed; Section 116 (b) allows "the Governor or the legislature" to exercise notice of disapproval whereas Section 115 (b) states that the designation of a site as a repository is effective unless "the Governor and the legislature" exercise a notice of disapproval.

The definition of state in the Act as "each of the several states" offers no aid in determining who may exercise the various rights and opportunities for participation specified in the Act.

Even if the definition of state were consistent within the Act, there are questions within each state as to who speaks for the legislature and the Governor and how that concern or disapproval is communicated to USDOE. While most states have an established process for the Governor to interact with the federal government, the role of the legislature under the Act as part of the state/federal interaction process is unique. Must the communication be by resolution of both houses of the legislature or may any member of the legislature request information and participate in an agreements process? What is the authority of legislative staff? Who must USDOE respond to in the consultation and cooperation process? Is there a possibility of a separate agreements process with the Governor and another agreements process with the legislature? Must there be separate grant agreements with the legislature and the Governor?

These issues were quite prominent in the initial interactions of the State of Washington with USDOE in part due to a Republican Governor and a Democratic legislature at that time. These issues were resolved to a large extent by the

adoption of legislation in 1983 creating a Nuclear Waste Board to represent the state in its interactions with USDOE on high level waste matters. That legislation provides for a fifteen member Board comprised of eight legislative members, six agency directors, and the chairman of the Board who is appointed by the Governor.

The legislation directs the Board to, among other things, carry out review activities to enable the state to effectively evaluate federal actions; participate in the consultation and cooperation process provided for in the Act; disseminate information regarding high level waste; serve as spokesman on behalf of the citizens of the state on matters relating to the disposal of high level radioactive waste and to monitor activity in Congress and the federal government related to the disposal of high level radioactive waste. The Board is directed to be the lead agency in negotiations and to negotiate agreements and modifications with the USDOE. The Board is also directed to review the decision of the federal government if a repository site is recommended in the state. The Board is to develop recommendations on the acceptance of an agreement and on whether a notice of disapproval is to be filed with Congress. Those recommendations must then go to the legislature and to the Governor. A review process by the legislature and the Governor is established in the state statute.

While the adoption of the legislation has not resolved all conflict as to who is the state, it has enabled the State of Washington to interact with USDOE in a less confused manner in the agreements process.

##### Timing of the Agreements Process

The Act provides that USDOE shall begin negotiations with and seek to enter into a binding written agreement "not later than 60 days after (1) the approval of a site for site characterization for such a repository under Section 112 (c), or (2) the written request of the state . . . to the secretary, whichever first occurs." Section 117 (c). Under this section, the state is given a choice as to when to begin negotiations or whether to begin them at all. USDOE has no choice but must begin efforts to negotiate as soon as the state desires and is required to "seek to enter into a binding written agreement". Section 117 (c). USDOE, however, is not obligated to negotiate an agreement with the state which the state will desire to sign. The Act contemplates good faith efforts not binding arbitration.

The decision of whether the state should begin negotiations at all with USDOE is influenced primarily by a good faith perception factor. If a state perceives that USDOE is not interested in responding to the concerns of the state in a substantive way, (as discussed in Section 3 of this paper) there is little incentive for the state to become involved in a negotiation process. In Washington State, involvement in negotiations was characterized by many in the state and by USDOE at public meetings as a cooperative approach or one that would facilitate the siting of a repository in the state. This potential political liability represents a disincentive for either the Governor or the legislature to become involved in cooperation and consultation discussions with USDOE. If on the other hand the state perceives that its con-

cerns will be addressed by USDOE in the cooperation and consultation process, it would have an incentive to participate in the agreements process.

Development of a good faith perception by the state toward USDOE is necessary if the state is to participate in an agreements process. USDOE appears to be compelled under the Act to develop incentives for the state to participate. In the State of Washington there were some efforts by USDOE to condition continued federal funding on the signing of an agreement. Another effort was to introduce an agreement signed with New Mexico regarding the Waste Isolation Pilot Project as evidence that the state will get what it wants. Both efforts failed to develop the good faith perception.

Efforts that would be more successful include involvement of USDOE headquarters personnel in the agreements process and timely responses to state positions. The agreements process in Washington failed in both areas. There was little direct contact by the state with the USDOE personnel who developed the positions taken in negotiations. Response to state positions such as liability, defense waste and economic risk analysis was characterized by slow and vacillating reactions. Thus, before a state gets involved in an agreements process there should be assurances of continued funding independent from negotiations, direct contact on regular intervals with USDOE decision making personnel, and timely responses to state positions as a condition of continued discussions.

If the state does decide to get involved in the agreements process, early involvement (prior to the site being approved for characterization) could allow greater educational opportunities and more involvement by the citizens of the state. The State of Washington found the agreements process allowed exposure to USDOE thinking that would otherwise be difficult to access. The negotiation process also allowed members of the state negotiation team (which included two attorneys general, the chair of the Nuclear Waste Board, and legislative staff for the Radioactive Waste Subcommittees of the legislature) to become knowledgeable on the issues surrounding the siting decision. Finally, the State of Washington is required by state law to circulate a draft agreement for public review and comment prior to execution resulting in increased opportunities for public education.

#### ISSUES IN THE AGREEMENTS PROCESS

USDOE in its negotiations with the State of Washington interpreted Section 117 in a way which prevented them from addressing substantive concerns of the state. USDOE's interpretation is that only procedural issues related to the eleven areas specified in Section 117 could be addressed in the agreements process. This interpretation is based on language of Section 117 (c) which states that "such written agreement shall specify procedures . . ." to address the eleven specified areas.

The State of Washington had the rather unusual position of spending much of its time attempting to convince USDOE that its authority was greater than it believe so that it could address in a written agreement the substantive concerns of the state in a substantive way. The state's interpretation of the Act is based on Section 117 (b) which states that "in carrying out his duties under the subtitle, the secretary shall take such concerns into

account to the maximum extent feasible and as specified in written agreements entered into under Subsection (c)." "Such concerns" refers to the previous sentence of that section where the concerns are broadly listed as "regarding the public health and safety, environmental, and economic impacts of any such repository". Furthermore, Section 117 (c) states that what results from the agreements process shall be a binding written agreement "setting forth (but not limited to) the procedures under which the requirements of Subsections (a) and (b) and the provisions of such written agreement, shall be carried out". Inability of the state and USDOE to resolve the fundamental issue of agreement authority led to multiple conflicts in the agreements process in Washington State.

In retrospect, the issue of authority should have been resolved before any issue area was discussed and, if resolved adversely to the state, negotiations should have ceased.

Some of the issue areas which remain unresolved are:

#### Liability

The liability issue involved more time than any other in the agreements process. USDOE's position was that the Price Anderson Act limitation on liability covers a repository while at the same time USDOE was seeking Congressional authorization to extend these provisions of Price Anderson to repositories. The state believed that Section 117 (c) (5) authorized USDOE to address the liability issue as an "offsite concern."

#### Defense Wastes

The issue of existing defense wastes is of special concern to Washington State. USDOE, however, could find no specific authority in the Act to address defense wastes. Again, this authority could be found in Section 117 with the interpretations suggested by the State. The directive given in Section 8 (c) of the Act to treat commingled defense wastes in the same way as commercial spent fuel would buttress the state's position especially in light of USDOE's position on commingling.

#### Transportation

Section 9 of the Act states that nothing in the Act shall affect existing federal, state or local laws on high level radioactive waste transportation. USDOE interpreted this to mean that no agreements could be made with the state without the involvement of the Department of Transportation. However, involvement of USDOT in discussions was resisted by USDOE because of no express authority to enter into three-party agreements. This approach once again prevented a major substantive area of concern to the state from being addressed in a substantive way.

Assertion of authority by USDOE to address these and other concerns of the state in a substantive fashion in an effort to resolve those concerns as required by the Act would facilitate greatly the agreements process.

### CONCLUSION

The agreements process under the Nuclear Waste Policy Act could provide an opportunity for a state to become educated on the issues surrounding repository siting and to have substantive concerns addressed in a binding written agreement. A state, however, must carefully balance the political disincentives to an agreement process against the possible gains. The response to questions of whether to participate in an agreements process, who to involve in negotiations, and when to begin

negotiations will be primarily influenced by a state's perception of the good faith efforts by USDOE to address substantive concerns of the state in the agreements process. The experience in Washington State suggests the commitments from USDOE on involvement of top-level decision makers, timely responses to state positions, and authority to respond to substantive concerns should be conditions of any involvement by a state in an agreements process.