

OCT 27 1986

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FROM: Alma Hale, Project Manager
State/Tribal Participation
SUBJECT: BWIP-RELATED INFORMATION

WM Record File 101.3

WM Project 10
Docket No. _____

PDR
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The attached information is provided FYI.

Thanks,

Alma

Alma

Attachment
As stated

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OFFICE OF THE ATTORNEY GENERAL

October 8, 1986

TO: Warren A. Bishop, Chairman
Nuclear Waste Board

FROM: Charles B. Roe, Jr. *C.B.R.*
Senior Assistant Attorney General

SUBJECT: Litigation Status Report

This memorandum sets forth the general status of various litigation or potential litigation areas pertaining to the Nuclear Waste Policy Act (NWPA).

I. Pending Litigation

A. Litigation Initiated Pertaining to Decisions of May 28, 1986 Taken by Officials of the United States.

1. (a) Nominations, (b) Recommendations, (c) Environmental Assessments (EAs), (d) Presidential Approvals, (e) Preliminary Determinations of Suitability (PDS), and (f) Second-Round Repository Suspension - the "comprehensive" case.

Eikenberry v. Herrington, No. 86-7325 (9th Cir.), filed on June 4, 1986, embodies a challenge by the State of Washington and the Nuclear Waste Board to all of the subject actions ((a) through (f)) of the federal officials of May 28, 1986 as set forth above. Texas has initiated litigation involving federal official actions (a) through (d) in Texas v. USDOE, No. 86-1310 (D.C. Cir.). Nevada has also initiated a similar action, involving (a) through (c) and (f) in Nevada v. Herrington, Nos. 86-7307, 7309 and 7310 (9th Cir.). In addition, as reported earlier, several private organizations have initiated similar litigation. See Sierra Club v. Herrington, No. 86-7338 (9th Cir.); Nuclear Waste Task Force, Inc. v. Herrington, No. 86-7372 (9th Cir.); and National Parks and Conservation Association v. Herrington, No. 86-7373 (9th Cir.). The latest

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to file such litigation (except for PDS) are Oregon and Idaho. Both filed last month.

The major action taken during the reporting period is that USDOE filed an eight hundred page "Index to Record" setting forth that agency's view of the record relation to the disposition of the issues in this case.

2. Preliminary Determination of Suitability (PDS) Litigation.

Nuclear Waste Board v. United States Department of Energy, No. 86-7326 (9th Cir.), filed June 4, 1986, embodies a challenge by the State of Washington and its Nuclear Waste Board to USDOE's PDS determination. The federal court of appeals in San Francisco has not, as yet, begun active processing of this case.

The latest activity of note in the PDS area since the last report date is a challenge to the USDOE's PDS decision in Nuclear Waste Task Force v. Herrington, No. _____ (5th Cir.).

3. Second-Round Repository Suspension Litigation.

State of Washington v. United States Department of Energy, No. 86-7327 (9th Cir.), embodies a challenge by the State of Washington and its Nuclear Waste Board to USDOE's determination to indefinitely suspend a site-specific search for a "second-round" repository. Since that action, Idaho and Oregon have initiated similar litigation. See subsection I.A. of this memo. See also National Parks and Conservation Association, et al. v. Herrington, et al., No. 86-7373 (9th Cir.) transferred from the District of Columbia Court of Appeals, Docket No. 86-1341. Likewise, the Coalition for Safe Power, an Oregon group, has initiated a similar proceeding. Coalition For Safe Power v. Herrington, No. 86-7416 (9th Cir.). In addition, the following states have moved to intervene in State of Washington v. United States Department of Energy, *supra*, and National Parks and Conservation Association, supra:

- a) New Hampshire
- b) Maine
- c) Virginia

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- d) North Carolina
- e) Wisconsin, and
- f) Minnesota

In addition, approximately twenty nuclear power utility organizations (lead by Arkansas Power and Light Company) have also moved to intervene in this case (as well as the other two cases we initiated on June 4, 1986).

Since our last written report, this office filed, in No. 86-7327, a motion in the nature of a summary judgment, which was discussed in detail at the last Nuclear Waste Board meeting. Idaho and Senator Slade Gorton have filed briefs amicus curiae with the Court of Appeals in support of our motion. The United States has filed a response in opposition to our motion.

Finally, Texas has recently filed a "second-round" case. Texas v. Herrington, No. _____, (5th Cir.) Texas, immediately upon the filing thereof, requested the case be transferred to the United States Court of Appeals for the Ninth Circuit.

B. Siting Guidelines Litigation

Environmental Policy Institute v. Herrington, Consolidated Cases Nos. 84-7854, etc., including State of Washington, Nuclear Waste Board v. United States Department of Energy, Nos. 85-7128 and 86-7253 (9th Cir.).

The United States Department of Energy (USDOE) moved, in 1985, to dismiss the Nuclear Waste Board's case on the grounds that the guidelines are not "ripe" for review. All briefing on the motion by the parties was completed in the summer of 1985. On April 24, 1986, the court issued an Order stating "the motion is hereby referred to the merits panel." This action means that the three-judge panel will consider the United States' motion to dismiss at the same time the hearing on the merits of the litigation takes place.

The Ninth Circuit Court of Appeals, in June, issued an order consolidating all of the siting guidelines cases initiated by the various states and private groups. The latest state to be granted party "intervenor" status in this litigation is Oregon which was

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authorized to participate last month. Idaho has also petitioned to intervene.

On July 2, 1986, the federal court conducted a telephone status conference related to the further processing of the case. The court thereafter entered an order that established a briefing schedule relating to various motions pending in the court, including a motion filed by the United States requesting the court to transfer the consolidated "siting guidelines" cases to the U.S. Court of Appeals for the District of Columbia. We filed our response in opposition to the motion, a copy of which was provided to you earlier. (Of note, the Court has not set a schedule for the filing of briefs pertaining to the merits of challenges to the siting guidelines' validity.)

C. "Monitored Retrievable Storage" (MRS)

Tennessee v. Herrington, No. 385-0959, D. Ct. Tenn., relates to section 141 of the NWPA. That section directs USDOE to report to Congress its recommendations relating to the establishment of a monitored retrievable storage (MRS) facility for the disposal of high-level nuclear waste. In July 1985, USDOE recommended the location of such a facility in Tennessee. On August 20, 1986, Tennessee challenged USDOE's processing of the MRS provisions of the NWPA contending that USDOE's actions were in conflict with "cooperation and consultation" requirements of the NWPA, and that the NWPA, itself, conflicts with the United States Constitution, Article I, Sec. 7.

The United States moved to dismiss the case on jurisdictional grounds. That motion was denied by the district court on November 26, 1985, and on December 5, 1985, USDOE appealed the district court's action to the Sixth Circuit Court of Appeals. On February 5, 1986, the United States District Court also ruled that USDOE failed to "consult and cooperate" with the State of Tennessee as required by the NWPA in relation to USDOE's MRS siting activity. In light thereof, the court has enjoined USDOE from presenting a MRS recommendation to Congress containing studies prepared in violation of the NWPA.

The latest chapter in this litigation is that USDOE has appealed the district court injunction decision to the United States Court of Appeals for the Sixth Circuit. Oral argument was presented in the federal court of appeals in Cincinnati on July 24, 1986. The

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issues to be decided are (1) the district court's jurisdiction, and (2) the validity of the district court's injunctive ruling. EPI, et al., filed an amicus curiae brief in support of Tennessee while Baltimore Gas and Electric, et al., filed an amicus curiae brief in support of USDOE.

D. EPA Standards Litigation

The Natural Resources Defense Council (NRDC) and several other environmental groups, along with the states of Minnesota, Maine, Texas, and Vermont, on December 2, 1985, filed petitions to review the standards adopted by the United States Environmental Protection Agency relating to radioactive releases from high-level nuclear waste repositories. Natural Resources Defense Council v. EPA, No. _____ (1st Cir., filed November 1985). The challenges were based on "invalidity" contentions pertaining primarily to ground water standards and procedures used in adopting the standards. The cases were filed in various circuits of the United States Courts of Appeals, namely, the First (NRDC, Maine, and Vermont), Fifth (Texas), and Eighth (Minnesota) circuits. The briefing phase of the case is now complete. Oral argument was heard on September 10, 1986 in Boston.

E. Litigation Funding Litigation

On May 28, 1986, Nevada initiated litigation in the Ninth Circuit Court of Appeals challenging USDOE's refusal to provide Nevada with monies from the Nuclear Waste Fund of NWPAs to finance litigation challenging the validity of USDOE's implementation of the NWPAs repository siting program. Nevada v. Herrington, No. 86-7311 (9th Cir.). See discussion on page 1 of this memo.

Thereafter, on July 28, 1986, this office filed similar litigation in the same court. The case, Department of Ecology of the State of Washington, et al. v. United States Department of Energy, et al., No. 86-7456 (9th Cir.), centers on the United States Department of Energy's denial on June 17, 1986 of a Department of Ecology request for funds to finance litigation. Active processing of this case has begun in combination with a related case, Nevada v. Herrington, No. 86-7311 (9th Cir.). This office filed a brief on the merits due on October 6, 1986. A copy is attached.

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I trust this will assist you in the conduct of your Board's meeting.

CBR:gb

Attachment

cc: Terry Husseman (w/o attachment)
Jeff Goltz (w/o attachment)
Narda Pierce (w/o attachment)