# MINUTES OF THE NUCLEAR WASTE BOARD SPECIAL MEETING
November 5, 1984



EFSEC Hearings Room
Building #1 - Rowesix
4224 Sixth Avenue S.E.
Lacey, Washington 98504



Board Members Present:

Warren A Bishop, Chair
Senator Max Benitz
Senator Sam Guess
Representative Shirley Hankins
Senator Margaret Hurley
Nicholas D. Lewis
Representative Louise Miller
Donald W. Moos
Representative Dick Nelson
Representative Nancy Rust
Richard W. Watson
Senator Al Williams
Ray Lasmanis, DNR Designee
Dr. John Beare, DSHS Designee
Dr. Royston H. Filby, Water Research Center Designee

The meeting was called to order by Warren Bishop, Chair at 1:30 p.m.

Mr. Bishop announced that this Special Meeting of the Nuclear Waste Board was to be a work session on the Draft Consultation and Cooperation Agreement submitted to the Board by the State Negotiating Team. He said negotiations between the U.S. Department of Energy and the State began in July, 1983 and in December, 1983 the State Team submitted a preliminary draft of the Agreement to the Board for review. Early in 1984 the Legislature reviewed this draft and revised State procedures for considering such agreements. Under new legislation the Board has the responsibility to negotiate such agreements. In July, 1984, following additional negotiations, the State negotiating team submitted a revised Draft Agreement to the Board for its consideration. Mr. Bishop said that under state law the Board must hold at least two public hearings and tentative plans are to hold four to five hearings around the state. After the public hearings, the Board must consider the comments received and following affirmative Board action, the proposed agreement will be submitted to the Legislature for its review and approval. After Legislature action, the Board may execute the document.





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Mr. Bishop said that this work session is not being held to approve the document; it is simply one important step for the Board to take if it determines that the draft Agreement should be examined at formal public hearings.

The second and only other item to be considered at this Special Meeting, he said, was proposed funding of defense waste activities through a supplemental budget request.

Included in the Board packets was a copy of the Minutes of the last meeting. He said no action would be taken on these until the next regular meeting on December 14.

C&C Agreement

Mr. Bishop said at the last Board meeting a question was submitted to the Board relating to the application of the State Environmental Policy Act requirement to the C&C process. On behalf of the Board, Mr. Bishop requested the Senior Assistant Attorney General Charles Roe and Assistant Attorney General Chuck Lean to give the Board an opinion. The written opinion of the attorneys was distributed to the members of the Board and is attached to these minutes.

Chuck Lean gave a brief resume of the opinion, explaining this opinion was an informal opinion as it would take several months to go through the routine of obtaining a formal opinion through the Office of the Attorney General. Citing the RCW, Mr. Lean said the State Environmental Policy Act of 1971 (SEPA) requires the preparation of an Environmental Impact Statement on proposals for "major actions significantly affecting the quality of the environment...". He said some governmental activity does not have the potential to significantly affect the quality of the environment, and such activities are not "actions" within the language of SEPA, and no compliance with SEPA is required for these activities. The opinion then recited the SEPA rules defining "action" spelled out in their opinion, and stated the approval or execution of a "C&C" agreement with the Federal Department of Energy in their opinion did not come within the definition of "action" as set out in the SEPA rules. He said it would not be an approval or license of any physical activity. He said since it was not an "action" procedural compliance with SEPA was not necessary.

Mr. Lean stated that the courts have said not to blindly apply these rules to exempt something that obviously could have potential to significantly affect the environment. He said that was considered and it was felt that because of the popular misconception by signing the C&C Agreement the State is somehow committing itself or taking the first step along a road that would lead to approving a repository in the state. That is not true, he said, and in fact the Federal Act would not constrain

the Federal government if there was no C&C agreement and could continue its repository program if these negotiations did not work out.

Mr. Lean said there is no link between approving the Agreement and approving a repository.

Representative Nelson asked whether an Environmental Impact Statement is required when there is an omission of action in the form of physical activity. Mr. Lean responded that it would not. There would have to be governmental action to trigger SEPA, and that action has to be of a kind that leads toward approval of some proposal to modify the environment.

Representative Nelson then asked as an example whether there would be an impact depending on how liability is addressed in the agreement. Mr. Lean said he didn't believe so. If an accident happens, or doesn't happen, who pays for it afterwards would not be an environmental impact.

Senator Hurley asked whether transportation issues such as congestion, the possibility of accidents with inclement weather, and the possibility of radiation from stops, would be considered an impact. Mr. Lean said that those are all environmental impacts. However, those possible events would not depend on the state signing or not signing the C&C Agreement. If we ever get to the point where a repository is constructed here and the State concurs in transportation routes, perhaps at that time concurrence would require compliance with SEPA. However, by the time that point is reached there will have been environmental assessments, plus draft and final Environmental Impact Statements to guide decision makers. That will certainly influence the SEPA compliance at that point.

Representative Nelson asked whether there are any precedents in State law for a EIS on such an agreement. Mr. Lean said that he was familiar with all the State Appellate Court cases under SEPA and had dealt with the Act since it was passed. There is really nothing that exactly matches the C&C Agreement. However, he didn't think there is anything that could be considered analogous where the courts have required and EIS.

Representative Nelson asked whether the Agenda could include discussion of the question of an EIS even though we have the opinion that we are not bound legally to produce one. He indicated that the State should, as a matter of course, produce an EIS or something equivalent to it to assist the citizens of the State to understand the Agreement better, and to see the tradeoffs that the Agreement presents. Representative Nelson then moved to add to the Agenda at an appropriate time a discussion of whether there is a need for a document such as an EIS or its equivalent. After discussion as to the relevancy of the motion to the Agenda, Senator Guess moved that the motion be laid on the table. The vote was taken and the motion to table carried.

Mr. Bishop said his intent today was to take each Article of the Consultation and Cooperation Agreement and work through each one. Action, he said, will be taken on the individual articles following discussion. A summary of comments previously received was presented to each member to consider as the Board proceeded.

Mr. Lewis asked for clarification of any approval given by the Board after discussion. Mr. Bishop said Board approval will authorize the language reached upon common agreement to proceed to a public hearing. He reiterated this was in no way to be construed as a final approval of the document itself.

Mr. Stevens explained briefly the contents of the Introduction: Role of the Consultation and Cooperation Draft, which was given each member of the Board. He highlighted several points, one being the purpose of entering negotiations, which followed a specific action of the Department of Energy identifying the site at Hanford as a potentially acceptable site for a repository. The Federal Nuclear Waste Policy Act sets forth in some detail the presumption that the U.S. Department of Energy will be entering into a C&C agreement with states where there are potential sites. The Act covers specific areas to be covered by that agreement. Although Congress did not mandate there be an agreement, he said, there was an expectation that potential host states would find agreements beneficial.

He said in Section 117, one of the principal aspects of the proposed agreement, Congress indicated that USDOE would supply "timely and complete information" to the state on site selection, operation and development to the Governor and Legislature. Another objective in this Section was to set forth procedures for the Secretary of USDOE to "consult and cooperate" with the Governor and Legislature to resolve concerns of a prospective state regarding "public health and safety, environmental and economic impacts" of a proposed repository.

Mr. Stevens emphasized the C&C Agreement was the right given to the states under the Federal Act to reinforce their authority to conduct independent review and monitoring of all Federal activities relating to exploration of the site. He said the reason the State has been involved in negotiations was due to extensive pre-site characterization activities going on at Hanford. In addition, should the state be included on that list of sites for characterization (which is a formal process involving Presidential selection probably in mid-1985) the state would have this Agreement in place to cover the site characterization activities taking place the next several years.

He continued that a process for modification of the Agreement was provided as no one could foresee all issues and all facets of all issues at one point in time. He also said in framing

the draft the intent was to be as comprehensive as possible in the identification of issues of concern to the State, as well as being as specific as possible in detailing necessary procedures to allow the State to examine ongoing pre- or site characterization activities.

Mr. Stevens said should this draft Agreement go to public hearing, explanatory material would be expanded to give the public the necessary information to understand the intent and the purpose of the Agreement.

Representative Rust suggested the cover letter of informational material should include a statement to the effect that the Agreement is not complete, pointing out certain issues that have not been resolved. Mr. Stevens agreed, and said when the final informational summary was prepared it would reflect the disposition made of the Agreement at this meeting.

Recitals

Senator Guess moved approval to authorize the language in the Recitals to go for public hearing.

Senator Williams questioned the consistency of the insertion of the fourth WHEREAS, which only made a statement and did not relate to the Nuclear Waste Policy Act of 1982, as did all the others. "WHEREAS, the parties to this Agreement recognize that since 1976 the Hanford site has been under evaluation by USDOE as a potential repository site and that an informal process of communication with the State has been ongoing since 1979." He said he was somewhat puzzled as to the purpose of its being inserted. Mr. Stevens replied that the Team had raised that question to the Federal team with a suggestion to delete. The Federal team asked it be included to reflect the fact that the Department did create this informal communication device in 1979 and reiterated it in 1981 to recognize there was some information flow. The original phrase had been "Consultation and Cooperation", which inferred that somehow there was a formal process existing before the Act. The Team thought this was somewhat misleading and felt recognition of some communication would be better, which satisfied USDOE.

Mr. Lewis remarked he had no feeling about the language but did confirm the dates. He said he agreed with Senator Williams that paragraph was not germane to the Act.

Senator Williams said he thought it was added language that was of no benefit to the state. He felt this could be recognized in some other form and was not necessary in this document.

The Recital was approved with the proposed modification.

Article I - Definitions

Mr. Bishop explained Article I incorporates the suggestion by Representative Nelson to define the term "on-site" to mean all the lands inside the Hanford Reservation boundaries and the term "off-site" to mean all lands outside the Hanford Reservation boundaries. It was moved that Article I as modified be approved for purposes of going to public hearing. The motion was carried.

Article II - Scope and Duration of the Agreement

No modifications were made to this Article. Motion was made to approve the Article for purposes of public hearing. Motion carried.

Article III - Foreign Waste

No modifications were made to this Article.

Article IV - Modifications

No modifications were made to this Article.

Article V - On-site, Off-site Studies and Investigations

No modifications were made to this Article.

Motion was made to approve Articles III, IV, and V for purposes of public hearing. Motion carried.

Article VI - Consultation

Representative Nelson had suggested new language should be added to this Article to specifically comment on the State's right to comment on contractor selection. Representative Nelson asked that the USDOE response was to the language suggested in his letter of October 17: "USDOE will provide the State with information on the contractors it intends to execute contracts within 10 days prior to entering into any contracts to facilitate State review of an comment on contractor selection."

Mr. Bishop responded most of the discussions with USDOE centered around the aspect of reciprocity in terms of the ability of USDOE to inquire regarding our contractor. He said there has been no specific determination by USDOE regarding the stated modification. Mr. Stevens said at the last Board meeting there

was considerable discussion of whether the State wanted to have a time frame resulting in their equal demand. He said in the oral comments made with USDOE there was not a formalized reaction. He said from staff the impression was gained that there had to be more discussion about what the specific thrust of any altering language relative to contractor selection would be, which seemed to go beyond your letter.

Representative Nelson wondered how to proceed at this point, and Mr. Bishop said it could have been a misinterpretation but he believed there was no specific direction from the Board. Representative Nelson asked if a motion was made or a resolution passed clearly specifying which Articles were to be presented to USDOE for their approval. Mr. Bishop replied there was no specific motion, just a general understanding of consensus of those Articles discussed. (The minutes of the last meeting reflected no action on Article VI and a rehearing of the tape showed discussion ceased and the Board continued on to discussion of other articles.)

Representative Nelson moved to include language suggested in his letter of October 17, 1984, concerning Consultation in the Agreement. Discussion followed. Senator Hurley spoke in favor of the motion and Nick Lewis expressed reservation, saying he felt strongly it was in the State's interest to keep itself at arm's length from the internal affairs of USDOE. The motion was called for and was defeated.

The motion was made to approve Article VI for public hearing. Motion carried.

Article VII - Response to State Objections, Concerns and Comments

No modifications recommended.

Article VIII - Access to Information

No modification recommended

Article IX - Conflict Resolution

No modification recommended.

Motion was made to approve Articles VII, VIII, and IX for purposes of public hearing. Motion carried.

Senator Hurley inquired if there would be the opportunity for the C&C Agreement to be changed in response to public hearings.

Mr. Bishop replied in the affirmative, and Chuck Lean added the statute provides that the Agreement can be modified following public comment.

Article X - Financial Assistance

Modification was proposed in Section B, as follows: "Recognizing that the State may have committed substantial resources to participate in the activities specified in this Agreement, and to assure that financial assistance are phased out in a reasonable and orderly manner, USDOE agrees to provide funding for up to one year for closeout activities. ~~(in the event this Agreement is terminated pursuant to Article II).~~ This deletion was proposed by USDOE and agreed to by the Board.

In Section D, USDOE suggested additional language to read: "While it is recognized it shall be the responsibility of USDOE to monitor the repository site after closure, USDOE shall, subject to the availability of appropriated funds which may be used for such purposes, provide financial assistance to the State to review these monitoring activities. Senator Williams expressed some reservation about taking away the State's option to pursue funds. Mr. Stevens agreed it might be a lessening of pressure, but everything is based on funding from a dedicated fund.

Another suggested modification to Section D was proposed by DSHS to expand financial assistance for state review of USDOE monitoring to include the time before and during operations, as well as after closure. It was considered these concerns were covered in other Articles of the Agreement, including Article V. No Board action was required.

A fourth modification was suggested by the Hanford Oversight Committee, Paragraph D: "guarantee the state unfettered access to, and the financial wherewithal, in perpetuity, from USDOE for monitoring/surveillance of a repository located in this state." The Board considered the State Negotiating Team had carefully structured the Agreement to provide assurances that the State can adequately oversee the activities associated with a repository, and financial assistance, access to information, and studies and investigations are provided for in the Agreement.

It was moved to approve Article X with changes for purposes of public hearing. Motion was carried.

Article XI - Impact Assistance

Additional language was suggested by the Department of Social and Health Services to include staffing, training, and exer-

cising to the emergency response planning provisions in the Agreement. Brief discussion followed and it was moved to approve this Article, as amended, for purposes of public hearing. Motion carried.

Article XII - Public Involvement

No modifications or changes were offered for this Article. The motion was made to approve Article XII for purposes of public hearing. Motion carried.

Article XII - Utilization of Available Expertise - Joint Review and Monitoring

WashPIRG suggested there needed to be a provision of independent State monitoring of point sources of radioactive emissions at the Hanford Reservation. The Team comment was that point-source monitoring of existing facilities is a responsibility outside the waste repository program. Baseline monitoring is an appropriate activity related to a repository siting and is currently being initiated as a result of the Board's Resolution 84-21 which authorized the Department of Ecology to enter into an interagency contract with the Department of Social and Health Services for the latter agency to establish a state-approved, radiological baseline for referencing potential impacts from the proposed repository.

Senator Guess moved the Article be approved as written for the purposes of public hearing.

Discussion followed and Representative Nelson wondered if the State should limit itself to baseline monitoring. Mr. Bishop said he understood baseline monitoring is the extent of the State's authority, and Dr. Beare said that was the authority under the Act. Don Provost said the intent of the baseline monitoring was to monitor the soil, water, and the air, etc., but did not intend to cover emissions or discharges. He said there was a clear understanding between U.S. Department of Energy and the State that the State did not have that authority under the Nuclear Waste Policy Act, but there was authority to do the planned baseline monitoring. Dr. Beare added that Resolution (84-21) was needed to allow the Monitoring Committee to enter into negotiations with USDOE in terms of getting funding to establish the baseline monitoring program. He said at this point there is no definition of what the program would involve. Representative Rust said she felt the answer was not relevant to the question, and Mr. Provost replied that should the State be selected as a repository this would be covered in the EIS and the State would have an opportunity for point-source monitoring later on. He said the Agreement would then be modified accordingly.

Senator Guess asked if the $23 million dollars worth of monitoring being done now would furnish the data to arrive at the baseline conditions prior to the installation of a deep repository. Mr. Stevens said certainly the amount of data was comprehensive enough and the amount of money being spent was extensive, but the determination had to be made that in fact this information was comprehensive enough for the State purposes. He said the State would want to be in a position to assure there was baseline adequacy. Once that was established, he said, there would be a monitoring responsibility to know, through primary data or through analyzed data from other sources, if that baseline were changing and what that impact would be on a repository.

Mr. Lewis said Article XIII does not preclude point-source monitoring. He said it allows the State to include a wide variety of monitoring--whatever is necessary--and he was comfortable with the Article.

Representative Nelson added the State needed to be "braver" in asserting its authority under the Act to request, when appropriate, point-source monitoring. He thought USDOE had committed itself to honoring those requests on a request-by-request basis. Dr. Beare said in meetings with USDOE they agree to allow the State to come on site and work with them in terms of developing an additional monitoring capacity. In order to do that, he said, the funds in the grants are being requested. He added DSHS will be, as Senator Guess suggested, using largely information that has been generated by the Hanford Operation and their subcontractors. He said undoubtedly DSHS would develop some sentinel point-source additional monitoring under the proposed program for their validation of the data. He commented it would certainly not be the $23 million job that USDOE is doing.

Representative Nelson said he thought that since this was understood, it should be spoken to in the C&C Agreement. Senator Guess thought the line "...to the extent consistent with the State's right to independent review..." would take care of his concern.

Mr. Moos asked Dr. Beare if the access and opportunity to his Department were far different from a year or two ago, and Dr. Beare replied in the affirmative. Mr. Moos thought a good part of this did not come about through the C&C negotiations, but from other pressures from Ecology and DSHS put on because they both felt it necessary. Mr. Moos continued he thought Representative Nelson's point to clarify point-source monitoring was excellent, because he thought State needed to better guarantee for the State's access of monitoring, whether it is baseline

monitoring or point-source. However, he said, if there would be some things that would intervene in the next months to clarify this, the question should be kept open for a public hearing or for the examination that will be taken by the Legislature.

Senator Hurley commented that eighteen monitors for the Federal government were out of commission which was noted in testimony before the Senate. She thought the type of tightening up Representative Nelson suggested would assure the Federal government that the State was watching and they should keep their equipment working. Mr. Stevens cautioned against building the whole monitoring program on the basis of a repository. He pointed out that if the repository program at Hanford was terminated, then the State's monitoring capacity would be eliminated. He said we have to be on independent, but parallel, tracks to make sure those monitoring capabilities can be carried out on a permanent basis.

Mr. Watson asked what has USDOE acceded to in terms of point-source monitoring. Mr. Provost replied he understood there are three programs the State is looking at at Hanford:

1. environmental baseline monitoring to be supported from the Nuclear Waste Policy Act grant.

2. special request for appropriation to allow the State to monitor the point sources, or discharges, independent of nuclear waste monitoring; and

3. defense waste monitoring.

Mr. Watson asked if point-source monitoring were necessary to carry out the State's responsibility with regard to a repository. Dr. Beare replied in establishing a baseline he thought it would be. Mr. Provost added all reports from USDOE on discharges or emissions would be available to the State. He said it is a matter of verifying data or actually doing side-by-side sampling.

Representative Nelson felt some definitions needed to be clarified. He felt "baseline" was a very general term which could include background monitoring; it could include point-source monitoring; it could be health sampling. He thought all three could be a part of a baseline monitoring of the radioactivity that emanates from Hanford. Mr. Provost said to go back to the term originally used, baseline environmental monitoring, which generally has meant in the Department of Ecology and Department of Social and Health Services as being a little away from emission points and the discharges using those as indicators of problems. He said each of the three programs pointed out by Representative Nelson is a little independent and used to check

on the others. Representative Nelson said since the word "baseline" is not used in the Act, it is up to the State to define it and to write it into the Agreement to the extent the State thinks it necessary. Mr. Provost agreed with this statement.

Dr. Filby thought that unless the definitions of "baseline", "point-source monitoring" and other health surveillance monitoring are defined that the interests of the State are protected and the State has enough flexibility in the present language of Article XIII. He thought nothing further was necessary.

The question was called and the motion was carried.

Representative Nelson further commented he understood there was a letter from the U.S. Department of Energy that states the State has some rights to point-source monitoring, and he felt the basic document should reflect the State's right to go in as appropriate and either review the data and the point-source measurements they are making, or set up an independent point-source measurement. He said if USDOE has acceded to that, it seemed foolish not to put it in the Agreement.

Dr. Beare said he thought there would be opportunity based on public hearings and further input to go back and amend this section. He felt it was very well encompassed within the wording as it is stated. Should the State want to be more specific, he said, another look could be taken, but he felt it should be sent out for public review and change it if necessary later on.

Article XIV - Modifications

No comments or changes were suggested.

Article XV - On-site, Off-site Studies and Investigations

No modifications were suggested.

Motion was made to approve Articles XIV and XV as written for the purposes of public hearing. Motion carried.

Article XVI - Liability

Mr. Stevens explained Liability is one of the unresolved issues of the C&C Agreement, and no agreed-upon position has yet been achieved in spite of the fifteen months of negotiations. He reviewed the various comments received by the Board and the options to be considered. The Team had suggested the Board

receive public comments on the options. Representative Nelson had commented that USDOE must commit to a date for the completion of an economic risk analysis associated with a repository and the government should provide for full compensation without regard to fault. In response to this comment a letter was sent to USDOE asking about the status of the risk analysis.

Mr. Stevens said the Board would be obligated to have some good, clear, explanatory material to present the public in order for them to be aware of the primary issues.

Complete language on the four suggested options were given the Board, and Mr. Stevens briefly summarized them as follows:

Option 1. Original positions of the State and the response of the USDOE.

Option 2. Language discussed during negotiations.

Option 3. Discussion language which was suggested, discussed, and submitted in a slightly different form to the USDOE for their reaction. USDOE did indicate the acceptability of that language if the State would accept.

Option 4. Discussion language proposed by the State and submitted to USDOE during negotiating sessions and returned as unacceptable by USDOE.

Mr. Stevens said these alternative language proposals were submitted to USDOE last week, and they indicated that Option 3 was something that was acceptable to them, if acceptable to the State. The Board was asked to decide how they wished to present this whole issue to the public at the hearing process.

Mr. Lewis moved that the Board approve for the purposes of public hearing Option No. 3.

Senator Guess referred to Section C. of Option 3, and asked if the right of nonconcurrence under Section 116(b) of the Act means the Governor or the Legislature will exercise the right of nonconcurrence. Chuck Lean, Assistant Attorney General, replied he questioned whether a future Legislature or a future Governor could be bound right now. He said he felt the statement being made to USDOE now as the present intention of the State. Senator Guess said he thought current language is incorrect and could say that the Nuclear Waste Board will recommend to the Governor or to the Legislature the right of nonconcurrence unless USDOE has irrevocably agreed. Mr. Stevens said this was discussed by the Team with differing opinions, and the feeling was this was the strongest statement that could be made in order to accommodate a State view. He said in talking with the officials in the other primary five states, they indicated a very close approximation of the attitude as presented in

terms of the states' problems if this issue were not to be resolved satisfactorily. Senator Guess wondered if this would delay acceptance by USDOE of the C&C Agreement by making an idle threat which the State has no power to enforce. Mr. Bishop explained USDOE had already agreed to this statement.

Senator Williams said if the Board has recognized it is dealing with an issue that is not agreed to by the USDOE and the State, then the language suggested for public hearings should be what the state considers to be its best position, regardless of whether USDOE agrees to it. Therefore, Option 1 or Option 4, in his opinion, should be recommended with the alternative being Option 3. Mr. Lewis said he thought Option 3 does represent the State's best position, although it does not totally solve the problem.

Representative Nelson said he felt a stronger position was to stay with position stated under 3-B without the other qualifications. He said he thought the leverage the State has is the Agreement and the nuclear waste being considered for a repository is totally different from the intent of the Price-Anderson Act. He felt strongly that the State should not roll over on the issue of liability, and the draft Agreement should be taken to the public with the strongest position possible.

Mr. Watson said with reference to Mr. Lewis' statement that his was the best position the State could have, he asked for some elaboration. Mr. Lewis said following a year and a half of working on the Team, and discussing the issue at length with careful consideration and study of the Act, he said he came to the conclusion that only the Congress of the United States could resolve this problem. He said in his view this would not be resolved by Congress in the immediate future. He said the liability question would only be operative once an actual repository situation exists. He said the best position of the State is to serve notice to Congress that there is a problem, and that problem must be resolved. He said the leverage point is not the Agreement, but the right of the State to nonconcur. He continued he thought every other state in this position would take the same position, and there would be intense pressure on the Congress to solve the liability problem. He was emphatic in believing the C&C Agreement was vital to the State's interest and Option 3 sent a very clear message to Congress that the State is taking a very tough position.

Senator Hurley wanted to know at what point nonconcurrence would happen. Mr. Stevens said the right of nonconcurrence comes after the President selects the first repository site.

Representative Nelson brought up the subject of economic risk and asked what the USDOE response to our letter was on this issue. Mr. Bishop replied to date no response has been received. Representative Nelson said he felt it was unreasonable to take action on the important issue of liability when

the U.S. government has not advised the State what the risk is, both the probability of accident and the economic risk of that accident, nor advised when the analysis will be available to the State. He thought Option 3 only offered Price-Anderson Act with perhaps some limits.

The question was called for (the adoption of Option 3 for the purposes of public hearing). The motion was carried.

Representative Nelson proposed some language be added to the Agreement, addressing the issue of economic risk. He thought this could be addressed in a separate Article, and moved the following language be added as a separate Article:

"USDOE shall in consultation with the state of Washington, undertake an economic risk analysis of the possibility and likely harm resulting from any incident at a repository which releases radioactivity or any accident involved in the transportation of waste to or from that repository."

"This study shall be completed no later than sixty (60) days prior to the final Environmental Assessment."

Discussion followed, and it was agreed should this motion be adopted, this would be a new Article, following Article XVI on Liability, and the remaining Articles would be renumbered. Mr. Stevens asked if the Office were being asked to submit this new Article to USDOE for their reaction prior to public hearing, and it was agreed this should be done.

The motion carried.

Article XVII - Transportation

Comment No. 1 by Representative Nelson was considered. He had suggested there should be clarification of what appears to be conflicting provisions regarding the selection of routes within the state of Washington. The Board response centered on the question of whether or not the assurances provided for highway transportation needed to be provided for rail and air transport also. Mr. Lewis said the intent was to include both rail and road, but he suggested on page 20, Section 5, line 1 of the Agreement the words "rail and highway" be inserted to clarify the meaning of the Article. Motion was made to amend the Agreement accordingly. Dr. Filby added the word "vehicle" apply to rail cars. Mr. Lewis suggested inserting "rail and highway" to precede the word "vehicle" where appropriate, and in paragraph (5) insert "rail and highway" preceding the word "routes". Further modification changed the word "trucks" to "vehicles" where it appeared in the text.

It was moved to approve Article XVII with suggested modifications for purpose of public hearing.

The other comment was from WashPIRG, suggesting the Agreement should indicate that the Federal government would not try to preempt State review, comment, and concurrence on transportation plans. Staff and legal analysis was that it was the intent of the Article to provide the State with authority to concur with the designated routes within existing Federal authority. This provides for State input and joint action, thereby removing the need for any preemptive action.

Mr. Lean, Assistant Attorney General, said at the time negotiations on court cases were being heard in New York, particularly the attempt by the City of New York to prohibit transportation of hazardous materials by certain means. The court decision was negative as it was found to be the job of the U.S. Department of Transportation under the Federal Hazardous Substances Transportation Act. The USDOE used this argument to dispute the State's wish to have veto power over the transportation routes. Mr. Lean said the USDOT approached the problem by setting certain types of routes that were acceptable, the most common one being the U.S. Interstate system. The Team felt there would be several routes in the state of Washington that would qualify so the Agreement reached with the USDOE was the right to concur from among the routes approved by the USDOT.

The Chair called for a motion to approve Article XVII with modifications for purpose of public hearing. Motion carried.

Article XVIII - Emergency Response

Representative Nelson had suggested the State should have a commitment by USDOE to full funding of emergency response capabilities. He said he thought it was not addressed by the Impact Assistance language that was added earlier. He thought a better approach would be to sit down with USDOE and negotiate a plan for emergency response. He thought that would give the State a better chance of receiving more adequate funding to cover emergency response, if it were stated that whatever the negotiated plan was, it would be fully funded by USDOE.

Dr. Beare responded Representative Nelson did have a point and agreed the approved modification is permissive language. He would support, he said, the suggestion, although he did not know just where it would fit. Following further discussion, Mr. Stevens pointed out the Act states the Secretary "shall" provide financial and technical assistance to mitigate impacts on the State, so USDOE is under a direct mandate to fund those items set out in the Article. Representative Nelson said he thought the position of the State would be further strengthened if Article XVIII were cross-referenced with Article XI - Impact

Assistance. The decision was made to allow the staff to intertie the two Articles with proper wording to strengthen the Emergency Response. Mr. Bishop continued it was assumed the Plan itself would detail all expressed concerns.

Motion was made to approve with suggested modification Article XVIII for the purposes of public hearing. Motion carried.

Article XIX - Defense WAste

Representative Nelson restated his position that there needed to be reference to a separate Defense Waste Agreement in the C&C Agreement, if a Defense Waste Agreement is negotiated. A Defense Waste Agreement should be signed prior to or at the same time as a C&C Agreement. Should that not be done, he said, he felt the State would be relinquishing some leverage on this important issue. Mr. Lewis agreed with Representative Nelson and suggested adding a section to this Article, with staff working up language to cover this point. Mr. Stevens raised the thought that the USDOE seemed to think language proposed along these lines earlier was inappropriate. He suggested the fate of both agreements depends upon both Board and Legislative review, and he thought that is where the decision would lie. Mr. Lewis said he felt the addition of the proposed language would not commit the USDOE to do anything, and he felt it was essential for the public hearings to clarify the position of the defense waste question.

Senator Guess asked if the Act gave the State the right to ask for a separate Defense Waste Agreement. Mr. Stevens responded the entry point for discussion of the Defense Waste is in Section 8, which is the Commingling Study. Presumably, the President will be making that finding the first part of January, 1985. Senator Guess wondered then if the C&C Agreement would be put in jeopardy by pre-conditioning something that has not been determined by the President.

Senator Guess then moved that Article XIX be approved as written for the purpose of public hearing.

Mr. Lewis proposed a Section "C", which would specify that the execution of the C&C Agreement would depend upon the concurrent or prior execution of a satisfactory agreement on defense waste for the state of Washington. In response to Mr. Lasmanis' question as to the meaning of "satisfactory agreement", Mr. Lewis responded satisfactory to this Board.

Representative Rust moved to amend Article XIX as articulated by Mr. Lewis. Representative Nelson asked if the intent of USDOE for public review of the Defense Waste Agreement were known. He suggested both agreements be placed side-by-side for public hearing. Senator Guess was concerned about the timing.

Mr. Lewis said it would be in order for the Board to take a Defense Waste Agreement to public hearing, but he said he would not like to see that as a precondition. It was agreed the Board could make that decision.

The question was called, and the motion to amend Article XIX was carried.

Mr. Lewis then moved adoption of Article XIX, as amended, for the purpose of public hearing. Motion carried.

Senator Hurley distributed a suggested motion to ask the advice of the Attorney General to consider and evaluate the potential for litigation on the part of the State in regard to USDOE refusal to negotiate within the Consultation and Cooperation Agreement on Defense Waste. She said she felt it was important to seek this information now in case it should be needed in the future. Senator Hurley said she was not offering the motion as an amendment to the C&C Agreement, but as a motion to be made before the subject of the C&C Agreement was finished.

The question was called for and the motion carried.

Article XX - Second Repository

No comment had been offered on Article XX. It was moved to approve this Article for purposes of public hearing. Motion was carried.

Article XXI - Notification of Agreement with Other States or Indian Tribes

The Team had commented language should be included in this Article that allows the State to request and, unless USDOE objects for clear cause, automatically receive any provisions of C&C Agreement USDOE enters into with other states or tribes.

Two options were presented. Option A would be acceptable to USDOE, Chuck Lean explained, as it refers back to using the Modification provisions, if something is agreed to that the State would want in its C&C Agreement. Option B was an attempt to have USDOE precommit, and they objected to this proposal.

Option A reads: "USDOE shall promptly transmit to the State any Consultation and Cooperation Agreement executed with another state or Indian tribe. If such agreement contains any provision which the State feels would be an appropriate addition to the existing agreement, it may, at its discretion request modification of the Agreement under Article IV to incorporate such provision. Such request to USDOE shall be in writing and USDOE will enter into good faith negotiations on such matter within 30 days of receipt of the request."

Mr. Watson moved to approve Option A for the purpose of public hearing.

Representative Nelson stated he felt this language did not add anything to the Modifications Article. Mr. Watson said the only thing it accomplishes is to short circuit a couple of the preliminary steps in the modifications process to move right ahead.

The question was called for and the motion passed.

Article XXII - Signature Authority

There was no comment on this Article. Mr. Lewis moved approval of Article XXII for the purpose of public hearing. Motion carried.

Appendix A

Mr. Stevens explained Appendix "A" was written to identify key events which will trigger a State/USDOE consultation. He said it is composed of a list which was negotiated with the U.S. Department of Energy and appears as the last two pages of the Consultation and Cooperation Agreement.

Motion was made to approve for purposes of public hearings Appendix "A". Motion carried.

General Comments

Comment from WashPIRG at the last Board meeting suggested that the Agreement should echo Senate Joint Memorial 127 which said granite sites should be undertaken before Hanford can be nominated for development of a repository. The proposed resolution was this comment relates to the Federal law and major USDOE program documents and is outside the scope of the C&C Agreement.

Mr. Bishop discussed briefly the public hearing process planned. Fact sheets and information background will be prepared regarding the revisions of the Agreement. Concerning the environmental impact process, Mr. Bishop said that although the Board is not required by law to go through that process, he thought it important to incorporate as many of the ideas or approaches of others. He suggested the Office staff meet with representatives of WashPIRG to get any views or comments they may have concerning input or expansion of materials to be distributed to the public, or the conduct of the process itself.

Senator Guess suggested the Advisory Council undertake this process. Mr. Bishop said it was a possibility to involve them. He said input from the Board members would also be in order. Mr. Watson added he thought in presenting the C&C Agreement to the public every effort be made to identify key points in the Agreement and the alternatives associated with those points and their implications. He said he thought the benefit of environmental impact statements is the laying out of alternatives, their implications, and he felt this objective could be achieved without the procedural steps necessary for an environmental impact statement. Mr. Lewis referred to this idea as a Mini-EIS, and stated he would be highly supportive of this plus consulting with the Advisory Council, various interest groups and any others. Mr. Bishop agreed and said he would refer to these elements as public policy elements instead of an EIS. Mr. Lewis suggested it be done in a very readable, non-technical fashion.

Mr. Bishop requested the staff to begin to take these steps mentioned.

Senator Williams commented this was the general intention of Representative Nelson's earlier motion, and said he was pleased to see the Board and Chair take up this issue.

Discussion followed on the steps necessary to put this Agreement before the public. Mr. Bishop said a method would have to be devised to put the proposals before USDOE for approval, and perhaps footnote them if not approved.

In response to Representative Rust's question as to when the public hearings would be held, Mr. Bishop replied the attempt was to schedule them in the first week of December. It said the mechanism for the alternative papers, the explanatory material, etc. would determine. He said the time span was short to get this material ready and set up at least five hearings. The question was asked if the Board had to set the hearings schedule, and Mr. Moos agreed with Mr. Bishop that the staff could do this without Board approval. Mr. Bishop said the intent was to develop a schedule, provide the necessary notice to the media, Board, and all necessary parties to maximize participation at the hearings. He said it would be done as soon as possible. Dr. Beare suggested that once the material is distributed sufficient time be allowed for adequate public review.

Defense Waste Funding

Mr. Stevens briefly reviewed the recommendation of the Defense Waste Working Group concerning the funding of the review of the defense waste disposal programs carried on at Hanford. Because

the request to USDOE for a separate grant to funding this program was denied, the Group recommended seeking a supplemental budget request for State oversight of this nuclear disposition. A budget request was given the members which set forth a budget for the period of January 1, 1985 through June 30, 1985. Also distributed was a proposed Resolution to authorize seeking the supplemental fund in the amount of $75,000.

Senator Williams said when House Bill 1637 was debated in the Legislature there were some strong objections to this legislation because of the implication that creating a Nuclear Waste Board might cost the State money to fund it. He said he personally strongly committed not to involve appropriation from the State funds to support the Board. He said it would be difficult for him to support this Resolution, and he felt further exploration of Federal funding should be pressed. He said he thought the whole intent of the Nuclear Waste Policy Act was for the Federal government to fund the whole program, and their neglect to include some portion, such as defense waste, should not leave a void such as this.

Mr. Lewis said he agreed with Senator Williams' assessment of the situation. He said the dilemma was that some fairly intensive technical documents on this issue were expected in the next several months which would allow a very short time frame in which to respond, and the difficulty of trying to battle at the Federal level for funding would consume the time needed to review the documents the State needed to comment on.

Mr. Lasmanis asked if it were known how the State of New Mexico received their funds for defense wastes. Mr. Lewis said he suspected they had a special Congressional appropriation for the WIPP process. He said he thought this State should have it too, but the time element does enter the picture. Mr. Stevens said he thought there would be an opportunity once the commingling decision is made, but that will not be until January. He added the effort would still be made to try for funding, but there was the timing factor. Mr. Lewis said the other option that could be pursued was to go to higher levels, involving the Governor, the Congressional delegation, etc. to pursue Federal funding again, and as a fall-back position attempt to go to the Emergency Fund. Mr. Bishop continued it was indeed the intent to pursue vigorously Federal funds.

Mr. Moos said he was not inclined to start the appropriations process. He said it is the obligation of the Federal government and he would rather see the Board reserve some time, and when the President has made the decision on commingling he would be willing to support an appropriation request, but he would not like to ask for a supplemental at this time.

Mr. Lewis asked if it would be in order for the Board to recommend the Governor to send a letter to Secretary Hodel requesting he reconsider the Department's position on funding. Mr. Lewis then so moved.

Representative Rust asked if the request for funding included the monitoring program. Mr. Provost replied the defense waste request relates to the defense wastes temporarily stored in tanks at Hanford. The earlier conversation on monitoring was the baseline, which would be covered by the Nuclear Waste Policy Act. The other part including the emission and discharge monitoring will be handled by the Department of Social and Health Services in their regular budget process. Representative Rust asked if we should ask for money for that also, and Dr. Beare remarked that was a valid point. He said these issues had to be looked at separately, one the background monitoring for the BWIP project, and the other the ongoing monitoring of the defense situation at Hanford. Once the combined monitoring program is developed, he said, Federal funds should be sought from USDOE, Defense Department, or wherever, to do that part of it. He said in the DSHS budget additional funds are being requested from the State in terms of the environmental monitoring as a public health responsibility for the citizens of the State. If those funds could be replaced by the Department of Energy funds, that should be done, he said.

The motion to pursue funds through the higher channels was called for. Motion carried.

There being no further business, the meeting was adjourned.

OFFICE OF THE ATTORNEY GENERAL
Ken Eikenberry, Attorney General
Temple of Justice, Olympia, Washington 98504

# M E M O R A N D U M

October 31, 1984

TO: Warren Bishop, Chairman, Nuclear Waste Board

FROM: Charles B. Roe, Jr., Senior Assistant Attorney General CBR
Charles W. Lean, Assistant Attorney General CWL by CBR

SUBJECT: Processing a Proposed "Consultation and Cooperation" Agreement - State Environmental Policy Act Requirements

This is written in response to your request, made at the Nuclear Waste Board meeting of October 19, 1984, pertaining to the applicability of the environmental impact statement requirements of the State Environmental Policy Act to the proposed "consultation and cooperation" agreement with the federal department of energy.

## I. Background

The Nuclear Waste Policy Act, 42 U.S.C.A. § 10101 et seq. (hereafter, "the NWPA") establishes a federal program for the siting, construction, and operation of repositories, located deep underground, for disposal of "high level" radioactive wastes. This program provides for state participation in several ways, including the "consultation and cooperation" (C&C) element of section 117 of the NWPA. Subsection 117(b) sets forth a "C&C" agreement negotiation process involving the Department of Ecology and a state which is being considered for a repository by the federal agency. The content of such a proposed "C&C" agreement is provided in section 117(b), in pertinent part, as follows:

> Such written agreement shall specify procedures:
>
> (1) by which such State or governing body of an affected Indian tribe, as the case may be, may study, determine, comment on, and make recommendations with regard to the possible public health and safety, environmental, social, and economic impacts of any such repository;

(2) by which the Secretary shall consider and respond to comments and recommendations made by such State or governing body of an affected Indian tribe, including the period in which the Secretary shall so respond;

(3) by which the Secretary and such State or governing body of an affected Indian tribe may review or modify the agreement periodically;

(4) by which such State or governing body of an affected Indian tribe is to submit an impact report and request for impact assistance under section 10136(c) of this title or section 10138(b) of this title, as the case may be;

(5) by which the Secretary shall assist such State, and the units of general local government in the vicinity of the repository site, in resolving the offsite concerns of such State and units of general local government, including, but not limited to, questions of State liability arising from accidents, necessary road upgrading and access to the site, ongoing emergency preparedness and emergency response, monitoring of transportation of high-level radioactive waste and spent nuclear fuel through such State, conduct of baseline health studies of inhabitants in neighboring communities near the repository site and reasonable periodic monitoring thereafter, and monitoring of the repository site upon any decommissioning and decontamination;

(6) by which the Secretary shall consult and cooperate with such State on a regular, ongoing basis and provide for an orderly process and timely schedule for State review and evaluation, including identification in the agreement of key events, milestones, and decision points in the activities of the Secretary at the potential repository site;

(7) by which the Secretary shall notify such State prior to the transportation of any high-level radioactive waste and spent nuclear fuel into such State for disposal at the repository site;

(8) by which such State may conduct reasonable independent monitoring and testing of activities on the repository site,

> except that such monitoring and testing shall not unreasonably interfere with or delay onsite activities;
>
> (9) for sharing, in accordance with applicable law, of all technical and licensing information, the utilization of available expertise, the facilitating of permit procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws;
>
> (10) for public notification of the procedures specified under the preceding paragraphs; and
>
> (11) for resolving objections of a State and affected Indian tribes at any stage of the planning, siting, development, construction, operation, or closure of such a facility within such State through negotiation, arbitration, or other appropriate mechanisms.

In 1984, the Legislature enacted a program for state participation in the deep geologic repository program of NWPA. Chapter 43.200 RCW. The Nuclear Waste Board, created by said chapter, is the lead implementation agency for the state program. RCW 43.200.025; RCW 43.200.100. The Board is authorized to initiate negotiations leading to the execution of a C&C agreement. The processes for "C&C" agreement negotiations are provided in RCW 43.200.100 and .110. The major steps, in sequence, include (1) the board's development of a proposed "C&C" agreement, followed by (2) the Board's conduct of public hearings on the proposal, and thereafter (3) its submittal to the Legislature for its approval.

## II. Inquiry

Your request relates to the application, if any, of the environmental impact statement preparation requirements of the State Environmental Policy Act to "C&C" process. More particularly, you inquire as to whether an environmental impact statement is required to be prepared by the Board prior to the Board's initiation of public hearings as noted in step 2, noted above.

## III. Response

SEPA (the State Environmental Policy Act of 1971; chapter 43.21C RCW) requires the preparation of an environmental impact statement on proposals for "major actions significantly affecting the quality of the environment. . . ." RCW 43.21C-.030(2)(c). Some governmental activity does not have the

potential to significantly affect the quality of the environment. Such activities are not "actions" within the language of SEPA, and no compliance with SEPA is required for these activities. See, e.g., Harris v. Hornbaker, 98 Wn.2d 650, 664, 658 P.2d 1219 (1983).

In early 1984, acting pursuant to the authority contained in RCW 43.21C.110 and closely following the recommendations of the Environmental Policy Commission, the Department of Ecology adopted comprehensive rules governing SEPA compliance contained in chapter 197-11 WAC. Those rules are entitled to substantial deference. RCW 43.21C.095. The SEPA rules define "action" in WAC 197-11-704 as follows:

> WAC 197-11-704 Action. (1) "Actions" include, as further specified below:
> (a) New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies;
> (b) New or revised agency rules, regulations, plans, policies, or procedures; and
> (c) Legislative proposals.
> (2) Actions fall within one of two categories:
> (a) Project actions. A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:
> (i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
> (ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.
> (b) Nonproject actions. Nonproject actions involve decisions on policies, plans, or programs.
> (i) The adoption or amendment of legislation, ordinances rules, or regulations that contain standards controlling use or modification of the environment;
> (ii) The adoption or amendment of comprehensive land use plans or zoning ordinances;

(iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (197-11-060), but not including any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation;

(iv) Creation of a district or annexations to any city, town or district;

(v) Capital budgets; and

(vi) Road, street, and highway plans.

(3) "Actions" do not include the activities listed above when an agency is not involved. Actions do not include bringing judicial or administrative civil or criminal enforcement actions (certain categorical exemptions in Part Nine identify in more detail governmental activities that would not have any environmental impacts and for which SEPA review is not required).

The rules also require compliance with SEPA's procedural requirements only for those activities which are "actions." See WAC 197-11-070 and -310(1).

The approval or execution of this "C&C" agreement with the federal department of energy pursuant to RCW 43.200.100 and .110, in our opinion, does not come within the definition of "action" quoted above. It is not a "project" action. The agreement does not approve, fund, or commit the state to undertake any activity which will modify the physical environment. (In this regard, it is important to note that the federal department of energy can take any authorized step under the NWPA, including building a high level nuclear waste repository, without a C&C agreement. The NWPA only requires that the Secretary of Energy attempt to negotiate such an agreement with the state.)

Likewise, the adoption of a "C&C" agreement does not appear a "nonproject" action under the SEPA rules. The only portion of the definition which even arguably covers a "C&C" agreement is WAC 197-11-704(2)(b)(iii); but since federal approval of this agreement is required for it to be effective, this subsection does not apply. We thus conclude that this agreement is not covered by the definition of "action: in WAC 197-11-704.

Our courts have warned us not to slavishly apply provisions of the SEPA rules to exempt activities which have potentially significant environmental effects. See Downtown Traffic

Planning Comm. v. Royer, 26 Wn. App. 156, 612 P.2d 430 (1980), cited with approval in Noel v. Cole, 98 Wn.2d 375, 380-81, fn. 2, 655 P.2d 245 (1982). But even if we give this proposal the "second look" which those cases contemplate, there still does not appear any potential environmental impact which will directly result from the agreement.

As noted above, a nuclear waste repository could be built in this state without the agreement. Conversely, the agreement in no way commits the state to approve or acquiesce in the construction of a repository or anything else. The main features of the agreement are procedures for the exchange of information. There are some provisions of the agreement which require state approval or concurrence for federal activities, but these approvals are not given by the agreement nor are standards beyond those in the NWPA contained in the agreement which would govern these future approvals.

For the reasons stated above, we conclude that the approval or execution of the currently proposed "C&C" agreement is not an "action" requiring procedural compliance with SEPA, and thus no environmental impact statement is required. We close by noting the above are the opinions of the writers and do not constitute a formal opinion of the Attorney General's office. We trust they are of assistance.