

**Summary of the Interviews Conducted to Assess the  
Feasibility of Conducting a Negotiated  
Rulemaking or Other Consultative Process**

with respect to

**High-Level Radioactive Waste Disposal Standards**

**40 CFR 191**

**Prepared by**

**RESOLVE**

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## **A. Summary**

RESOLVE<sup>1</sup> was asked by the U.S. Environmental Protection Agency, Office of Radiation Programs (EPA, ORP) to assess the feasibility of revising 40 CFR 191, which provides standards for the safe management and disposal of high-level and transuranic radioactive wastes, through a regulatory negotiation process. If RESOLVE determined that a regulatory negotiation process was not feasible an assessment would be provided on the feasibility of convening policy dialogues, workshops or another consultative process to address specific issues that have been raised in connection with the re-promulgation of 40 CFR 191. The investigators are Howard S. Bellman, Senior Fellow and Abby Arnold, Senior Convener.

In response to EPA's request the workplan provided that this undertaking be conducted in one and possibly two phases. Phase I included consultation with EPA personnel, study of certain existing documents and materials, and interviews with representatives of Washington, D.C.-based potential parties. The interviews were to explain the regulatory negotiations and other processes, as well as inquire as to the parties' interests and concerns regarding the feasibility of developing such processes. After completing the Washington D.C. interviews RESOLVE was to report informally to ORP. Prior to initiating Phase II, ORP staff were to determine whether to go forward with Phase II interviews of other potential parties outside of Washington D.C. to complete the convening assessment.

RESOLVE's informal oral report advised that on the basis of the Washington D.C. interviews, and its own analysis of the matter, it was the judgment of RESOLVE that further interviews of potential parties outside of Washington, D.C. were not warranted. RESOLVE advised that the interviews of the Washington, D.C.-based parties revealed such serious obstacles and impediments to a successful negotiated rulemaking, or other process for developing consensus respecting the germane issues, that proceeding further represents an inappropriate expenditure of resources.

On the basis of that advice, ORP requested that RESOLVE prepare a final report summarizing the results of the meetings conducted. At this time RESOLVE does not recommend any particular further measures to collect the views of the

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<sup>1</sup> Note: RESOLVE is an independent program of the World Wildlife Fund and The Conservation Foundation. RESOLVE provides dispute resolution services through mediation, facilitation, outreach, training and research.

remaining, non-Washington, D.C. parties regarding the feasibility of using regulatory negotiation or some other form of consultation process to develop the high-level radioactive waste standard.

## B. Introduction

This report describes the findings, analysis and conclusions of RESOLVE's assessment of the feasibility of revising 40 CFR 191, standards for the safe management and disposal of high-level radioactive waste, through negotiated rulemaking or another consultative process. This assessment is based upon consultation with US EPA personnel, including representatives of ORP, a review of certain existing materials and documents, and interviews with Washington, D.C.-based parties who are affected by the promulgation of 40 CFR 191.

## C. Assessment Criteria

In order to assess the feasibility of using a regulatory negotiation process in this case, RESOLVE referred to EPA's authority to initiate a regulatory negotiation process provided in Section 583 of the Negotiated Rulemaking Act of 1990. Under this act the agency must determine that establishing a rulemaking committee is in the public interest and is "feasible and appropriate." Particularly relevant to this case is the requirement in Section 583 (3) that requires EPA to consider whether there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who (a) adequately represent the interests in the issue and (b) are willing to negotiate in good faith to reach a consensus on the proposed rule.

EPA has developed additional criteria for screening rulemakings for the use of regulatory negotiation procedures. The criteria pertinent in this case relate to selection of participants. That is:

"The parties should have some common goals and should be willing, in good faith, to participate in negotiations. They should feel themselves as likely, if not more likely, to achieve their overall goals using negotiation as they would through traditional rulemaking."

RESOLVE analyzed the responses of the parties who were interviewed in light of these criteria in order to develop its report to EPA.

#### **D. Parties Interviewed**

RESOLVE interviewed the following representatives from the Department of Energy, Nuclear Regulatory Commission, Natural Resources Defense Council, Environmental Protection Agency Office of Radiation Programs, and Edison Electric Institute-Waste/Electric Power Research Institute, in order to determine whether the conditions outlined above could be met.

##### **1. Environmental Protection Agency**

Rich Guimond, Former Director  
Office of Radiation Programs

Margo Oge, Acting Director,  
Office of Radiation Programs

Bill Gunter, Director,  
Criteria and Standards Division

Floyd Galpin, Chief  
Waste Management Standards Branch

Ray Clark, Project Leader  
Waste Management Standards Branch

Caroline Petti, Assistant Project Leader  
Waste Management Standards Branch

##### **2. Department of Energy**

Dr. Paul Ziemer, Assistant Secretary  
Office of Environment, Safety and Health

Ms. Lynn Fairbent, Technical Assistant to the  
Assistant Secretary, Office of Environment,  
Safety and Health

Mr. Edward Regnier, Chief Waste Management Unit  
Air, Water, Radiation Division

Mr. Andrew Wallo, III., Director  
Air, Water, Radiation Division

##### **3. Nuclear Regulatory Commission**

Mr. Robert Bernero, Director  
Office of Nuclear Materials Safety and Safeguards

Mr. Joseph Youngblood, Director  
Division of High-Level Waste Management

Mr. John Linehan, Deputy Director  
Division of High-Level Waste Management

Mr. Martin Malsch, Deputy General Counsel  
Licensing and Regulation

4. Electric Power Research Institute/Edison Electric  
Institute/UWaste

Mr. Mike Bauser, Legal Counsel  
Newman and Holtzinger, P.C.

Mr. Chris Henkel, Program Manager  
Utility Nuclear Waste and Transportation Program  
EEI/UWaste

Mr. R.F. (Bob) Williams, Senior Technical Advisor  
Materials and Systems Development Department  
EPRI

5. Natural Resources Defense Council

Mr. Dan Reicher, Senior Attorney  
Mr. Tom Cochran, Senior Scientist

E. Interview Questions

The following questions were asked at each interview. The responses to these questions served as the basis for RESOLVE's recommendations to EPA's ORP about proceeding with interviews with parties based outside of the Washington D.C. area.

- who are the principal parties that might be affected by the rule;
- do the parties perceive it in their interest to participate in a regulatory negotiation to develop this rule;
- is there some other discussion forum or process that would be preferable to a regulatory negotiation;
- what are the key issues;
- what potential problems might arise if regulatory negotiation is used;

- what thoughts and concerns do the parties have about regulatory negotiation that could affect the design of the ground rules or the issues considered in the negotiations;
- what resource limitations or other constraints might affect their ability to participate in such an effort.

#### F. Findings

Two consultations were held with staff at EPA ORP. Two meetings were necessary because of a change of ORP directorship during the time of this assessment.

None of the EPA ORP staff interviewed expressed optimism regarding the likelihood that a regulatory negotiation process could result in complete agreement, as is usually the objective of a negotiated rulemaking. However, there was willingness to attempt a regulatory negotiation process particularly if it could be completed within an appropriate time frame. It was believed that, whether negotiated rulemaking or another procedure was initiated, all the parties would benefit.

The perception expressed by all the parties interviewed is that in this issue's 15 year history meetings and hearings have been conducted where representatives from agencies and interest groups have stated their positions. However, none of the parties referred to a facilitated process where all parties present moved beyond stating positions to identify underlying interests, explore common ground and clarify reasons for points of disagreement. If other parties were willing, EPA believed a consultation process of this type may have been beneficial to move the issue to closure.

The Department of Energy, (DOE) expressed opposition to a negotiated rulemaking procedure in particular and to other consensus based procedures in general. It was believed that communication between DOE and EPA on the relevant subjects is excellent already; that DOE would not benefit from discussions respecting its positions and preferences with other parties; that consensus among such parties is unlikely in the extreme; that the issues in dispute are not appropriately decided by consensus; that consensus might require unsound treatments of technical matters; that such processes would provide an unwarranted burden upon DOE resources; and that any process other than an ordinary rule-making would probably result in delay of the ultimate issuance of the rule. In short, DOE believes that the conventional rulemaking process, including whatever political and legal conflicts it might include, is preferable to negotiated rulemaking or any consultative process. It was stated, however,

that DOE would participate in any procedure to which it was invited.

The Nuclear Regulatory Commission, (NRC) also expressed opposition to initiating a negotiated rulemaking. This view was grounded upon the opinion that there are many issues in dispute that are "too technical" for negotiation methods. The NRC stated that the technical nature of the issues are such that the respective interested parties do not all have the same technical resources and therefore a "round-table" discussion would be "asymmetric," placing some parties at a disadvantage.

On the other hand, a less formal but focused procedure, directed at raising technical questions and testing the efficacy of various suggested alternatives to the standards was believed by NRC to be beneficial because the parties would be better informed. Such a process would be an opportunity for in depth discussion on the technical issues. Ideally, the product would be technical conclusions that could be used to further discuss 40 CFR 191. For example, it was suggested that the parties analyze respective models being used to test performance standards. The result would be improved understanding of the utility of the respective models. This was carefully distinguished from efforts to identify areas of agreement regarding what should or should not be included in the standard.

The Natural Resources Defense Council, (NRDC) indicated that its participation in a negotiated rulemaking procedure would be conditioned upon the nature of participation of the Office of Management and Budget, which it views as requisite to any true closure respecting the substantive provisions of the rule. Given OMB's authority, NRDC does not find it in its interest to participate in a regulatory negotiation without OMB at the table. NRDC questioned whether the NRC, given its ultimate regulatory role, should be a party to such a procedure.

Another condition for NRDC participation was securing funding to support the retention of experts to engage with the experts of all other parties. Other concerns expressed by NRDC were over the time commitment required to conduct a regulatory negotiation and the cost to the organization should the process not conclude in agreement.

NRDC would consider participating in a less formal and rigorous procedure, although in any case financial support for retention of appropriate expertise would be required. The preferred purpose for such a session, or series of sessions, would be to test the basis of various proposals and thereby bring to light the underlying assumptions or sources of the various parties' positions.

Edison Electric Institute, (EEI/UWaste) and Electric Power Research Institute, (EPRI) who were interviewed jointly expressed the belief that a negotiated rulemaking procedure in particular, and possibly any of the contemplated alternative procedures, is far more likely to contribute unnecessary delay than any benefits to the ultimate rulemaking.

EPRI advised that it was well along in a project that would, by providing conferences for experts and other interested parties, help illuminate some of the conflicts within the rulemaking.

Before providing their final view on the convening by EPA of a procedure other than negotiated rulemaking, EPRI & EEI/UWaste requested time to confer "internally." Subsequently they advised that in their judgment "such a gathering is neither necessary nor desirable," but might, "frontload the EPA process so as to result in delaying issuance of the proposed Agency rule for comment." They also offered the following suggestion:

"EPA might, for policy or other reasons, find it desirable to hold a public meeting after notice of the proposed rule as part of the comment process. EEI/UWASTE and EPRI would not object to such a meeting, but--as indicated above--do oppose an agency conclave which would precede issuance of the Standards for Comment."

#### G. Analysis

At this time, RESOLVE recommends against continuing with inquiry into the feasibility of regulatory negotiations or other consultative process. Our analysis below is based on the responses to the questions listed on pages five and six, herein.

- o Among the five potential parties interviewed, only EPA unconditionally favored regulatory negotiations in this matter, and EPA was quite guarded in its forecast of consensus. NRDC seemed favorable on a conditional basis. DOE, EEI and NRC opposed initiating a negotiated rulemaking. Therefore, the 5 parties interviewed do not meet EPA's own participant-related criteria suggesting that the parties should have common goals and believe that they are more likely to achieve their overall goals with a regulatory negotiation.
  
- o Respecting the initiation of a policy dialogue, workshops, or other consultative procedures, EEI and DOE again expressed strong opposition, whereas EPA, NRC and NRDC saw potential merit. However, NRC and NRDC

envisioned quite distinctly different agendas for such an approach. Divergent agendas would likely require correspondingly distinct processes which themselves might engender objections.

Indeed, it is especially noteworthy that although NRC and NRDC specifically prefer different agendas, the conflict of basic perspectives which this indicates is not limited to those two organizations. In general, the potential parties interviewed seem to make diverse baseline assumptions, disagree as to what data and models are appropriately applied, and do not share a view as to which conflicts among them must be resolved to form a basis for a standard to which all of them may agree.

- o Because of the admittedly incomplete assessment process upon which this report is based, as well as the type of responses made to both negotiated rulemaking and other processes, key substantive issues can not be catalogued on the basis of this investigation. It seems quite clear, however, that all of the potential parties that were interviewed are strongly confident that those issues are very well known among such parties. An important factor noted by most interviewees is that this rulemaking has been underway and subject to their close scrutiny, and indeed to their political and legal activities, for approximately 15 years. This has been in the main, a history of conflicts among public policy advocates, scientists, government agencies and private sector interests. Many people we spoke with stated that by now there is probably little fundamental dispute over what the major policy and technical issues are.
  
- o A regulatory negotiation has not been recommended because of the attitudes and beliefs described in the findings of this report. Suffice it to say that should the EPA determine to proceed in this mode it apparently would find some principal potential parties unwilling to participate and others participating very unenthusiastically. It is our judgment that negotiated rulemaking, and indeed most negotiation modes, depend for success upon the motivations of the participants. Moreover, RESOLVE holds that negotiated rulemakings as well as other negotiation processes must include representation of all significant interests in order to be effective, as well as to claim integrity as decision-making or advisory processes.

- o As to resource limitations, as indicated above, two potential parties, DOE and NRDC explicitly indicated that negotiated rulemaking would strain their available resources.

## H. Conclusions

This inquiry among Washington, D.C.-based potential parties to a negotiated rulemaking in connection with the re-promulgation of 40 CFR 191 found that only ORP favored such a process unconditionally, although ORP does not predict ultimate consensus in that mode. One other potential party favors the process conditionally, but its conditions are rigorous. All the other potential parties we spoke with oppose negotiated rulemaking in this matter.

Respecting policy dialogues, workshops and other such methods of addressing issues, two potential parties oppose such initiatives on various grounds, including unproductive delay. Two others would consider such processes but have distinctly divergent views of appropriate agendas. Again, only the EPA appears basically open to such process possibilities.

On these grounds, it is recommended that a successful process, negotiated rulemaking or otherwise, cannot be developed in connection with the re-promulgation of 40 CFR 191, and that it would not be useful or a wise allocation of resources to continue this assessment among non-Washington, D.C. potential parties.