

NUCLEAR WASTE CONSENT AND NON-CONSENT:
A BRIEF HISTORICAL PERSPECTIVE

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Presentation at the Stanford University Reset of U.S. Nuclear Waste Management Strategy and Policy. March 9, 2016.¹ Citations and details added.

1. Being involved in the Department of Energy (DOE) nuclear waste programs for more than 40 years, I think we need to look back in order to look forward. As I'll discuss in more detail, the historic reality of Non-Consent is an important element of any consent-based process. But DOE seems to want to ignore that reality. Further, the agency is currently repeating past mistakes and therefore is likely to get the same results in the future.

2. Some key elements of "consent" include that it is:

Free and Voluntary; Prior, which is before decisions are made; Informed, including adequate and broad-based dissemination and understanding of the information; and there is Consent agreement.²

And Non-Consent must be respected, so hearing "No" should end any further consideration of a state or site.

While DOE sometimes includes "informed" when discussing consent, the other elements, and non-consent are notably absent.

3. The United States system of government, and historic practice, shows that the consent process will involve, at a minimum – many elements and processes, including Electoral, Legislative, Judicial actions at Federal, State, and Local government levels.

4. There are likely different dates that could be given for when the U.S. historic process starts, but 1970 seems a very important date. When it comes to nuclear waste, Idaho has been the trend-setter!

Beginning in 1952, the central location for manufacturing the plutonium pits cores of nuclear weapons was the Rocky Flats Plant (RFP), north of Denver, Colorado. Fires in the 1950s and 1960s resulted in the Atomic Energy Commission (AEC) needing to allay public fears about radiation releases. So the AEC began shipping wastes to Idaho in the 1950s, to what is today the Idaho National Laboratory (INL). On June 9, 1970, then AEC Chairman Glenn Seaborg wrote then Idaho Sen. Frank Church promising that wastes would be moving out of Idaho within 10 years.³

From this initial history, at least three important threads/trends resulted:

1. AEC, and DOE since, did not keep major promises regarding nuclear waste.

2. Violations of the promise led directly to future reactions – Idaho litigation and 1995 Settlement Agreement – that have long-term consequences. Those reactions also expanded the wastes covered. RFP waste is what we now call low-level waste (LLW) and transuranic (TRU) waste, but not high-level waste (HLW) or spent nuclear fuel (SNF). Nonetheless, Idaho required that the Settlement Agreement be expanded to include SNF, including navy fuel. That agreement included that TRU waste would begin leaving Idaho by April 30, 1999 and that all TRU

¹ <http://sric.org/nuclear/docs/DH030916.pdf>

² https://drive.google.com/folderview?id=0B4IudW22FyDIOVFUbtTbzNfMUE&usp=drive_web&tid=0B4IudW22FyDla0g5c2t1NVBpdGc

³ [http://energy.gov/sites/prod/files/2013/04/f0/Gosling%20and%20Fehner%20-%20Closing%20the%20Circle%20\(complete\).pdf](http://energy.gov/sites/prod/files/2013/04/f0/Gosling%20and%20Fehner%20-%20Closing%20the%20Circle%20(complete).pdf). Pages 15-16.

waste, estimated at 65,000 cubic meters, would be out of Idaho by December 31, 2018. All SNF would be out of Idaho by January 1, 2035, and that was expanded to include research SNF in the 2011 MOA.⁴

3. The promise did result in the AEC/DOE taking significant actions.

5. AEC initially moved expeditiously to fulfill the promise. In 1971, the agency selected a salt mine near Lyons, Kansas and set a very aggressive schedule for it to be operating by 1975.⁵ Of course, it didn't meet that schedule. There were significant state objections, including the technical problems with the site.

Hearing about the Kansas controversy, some local people in Carlsbad invited AEC to come.⁶

The "non-consent" from Idaho and Kansas grew out of those AEC actions, as did the "invitation" from some Carlsbad folks. It clearly was not a structured or legislated process. As the 1970s progressed, there was more discussion about nuclear waste, and it became an important issue during the Carter administration.

6. One of President Carter's actions was to establish an interagency nuclear waste review group (IRG) of 14 federal agencies. The IRG had public meetings and received more than 3,300 comments. One of its major areas was "Institutional Issues." One option was a State veto that could be used at one moment to approve or disapprove a site. Consultation and Concurrence (C&C) meant ongoing dialogue and "cooperative relationship," which IRG supported.⁷

7. Congress's first response was the initial WIPP authority, which reduced the state role to "consultation and cooperation." Public Law 96-164, Section 213(b):⁸

"[DOE] shall consult and cooperate....[and] shall seek to enter into a written agreement with the appropriate officials of the State of New Mexico... not later than September 30, 1980."

DOE Secretary James Schlesinger had promised "state veto" for New Mexico.⁹ DOE did not meet the schedule, in part because on February 12, 1980 when President Carter announced his nuclear waste policy in response to IRG, he stated that he was cancelling WIPP, because it would be an unlicensed site.¹⁰

The DOE WIPP Final Environmental Impact Statement in October 1980 also called for canceling WIPP and putting TRU waste in the first HLW repository.¹¹

⁴ <https://www.deq.idaho.gov/inl-oversight/oversight-agreements/1995-settlement-agreement/>

⁵ Atomic Energy Commission, 1971. *Environmental Statement Radioactive Waste Repository, Lyons, Kansas*, WASH-1503, June 1971.

⁶ McCutcheon, Chuck. *Nuclear Reactions: The Politics of opening a radioactive waste disposal site*. Albuquerque: University of New Mexico Press, 2002. Introduction and Chapter 1.

⁷ DOE, 1979. *Report to the President by the Interagency Review Group on Nuclear Waste Management*, March 1979, TID-29442. See page 95 for the C&C recommendation.

⁸ <https://www.govtrack.us/congress/bills/96/s673/text>

⁹ McCutcheon, pages 62-66.

¹⁰ Office of the White House Press Secretary, 1980. Fact Sheet – The President's Program on Radioactive Waste Management, p. 2.

¹¹ DOE, 1980. *Final Environmental Impact Statement Waste Isolation Pilot Plant*. October 1980.

Among the first actions of the Reagan administration in January 1981 was to proceed with WIPP for TRU waste and HLW experiments, based on the 1979 law. The Record of Decision stated that WIPP would begin operating in 1987 and by 1990 the waste at INL would be removed to WIPP.¹²

The State of New Mexico and others objected and filed suit. A settlement was signed on July 1, 1981 that included the C&C Agreement. Importantly, that agreement included that no HLW could be disposed at WIPP: "All radioactive material used in high level waste experiments shall be removed from the WIPP site."¹³

8. Construction at WIPP proceeded throughout the 1980s and controversy also continued. To address a variety of issues, Congress began considering the WIPP Land Withdrawal Act (LWA) in 1987. In October 1991, tired of waiting for Congress to act, then DOE Secretary Watkins announced that WIPP would open in a week. The State of New Mexico filed suit (to be joined by citizen groups and the State of Texas, an example of consent not necessarily being limited to the host state). The District Court Judge in Washington, DC found in favor of the plaintiffs and enjoined WIPP's operations.¹⁴ The injunction was upheld by DC Circuit Court of Appeals in 1992.¹⁵

9. Congress then passed the WIPP LWA (Public Law 102-579).¹⁶ The law bans all HLW and SNF. Section 12 – "**BAN ON HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL.** The Secretary shall not transport high-level radioactive waste or spent nuclear fuel to WIPP or emplace or dispose of such waste or fuel at WIPP."

10. There were several years of activity to comply with the LWA and get WIPP open, more controversy and litigation. On March 22, 1999, the DC District Court failed to enjoin shipments,¹⁷ so WIPP's first shipment arrived less than four days thereafter from Los Alamos National Lab.

11. Shifting back to the HLW/SNF thread in the Reagan Administration, Congress passed the Nuclear Waste Policy Act (NWPA) of 1982.¹⁸ The law had a variety of dates related to repositories and MRS (consolidated storage), including:

- 1/1/1985 – DOE nominates 5 repository sites; recommend 3 sites for characterization
- 6/1/1985 – DOE has MRS proposal; at least 3 sites
- 3/31/1987 – President recommends first repository site
- 7/1/1989 – DOE nominates five second repository sites; 3 "additional" sites not in 1st round
- 3/31/1990 – President recommends second repository site
- 1/31/1998 – First repository operating

12. In sections 116-118, the NWPA also dealt with state veto and C&C – the consent issues. Provisions related to State/Tribal Notification; State/Tribal Participation; Financial Assistance to States/Tribes;

¹² Federal Register, Vol. 46, No. 18, pp. 9182-9184 (January 28, 1981).

¹³ http://www.wipp.energy.gov/library/Information_Repository_A/Supplemental_Information/Consultation%20and%20Cooperation%20Agreement.pdf. Article VI.B.

¹⁴ *State of New Mexico v. Watkins*, 783 F.Supp. 628 (D.D.C. 1991); *State of New Mexico v. Watkins*, 783 F.Supp. 633 (D.D.C. 1992).

¹⁵ *State of New Mexico v. Watkins*, 969 F.2d 1122 (D.C.Cir. 1992).

¹⁶ <http://www.wipp.energy.gov/library/cra/baselinetool/documents/regulatory%20tools/10%20wipplwa1996.pdf>

¹⁷ *New Mexico v. Richardson*, 39 F.Supp.2d, 48 (D.D.C. 1999).

¹⁸ Public Law 97-425, 96 STAT 2201.

Notice of Disapproval from State Governor or Legislature; and Notice of Disapproval from Tribal governing body.

13. DOE's implementation of the law engendered a lot of opposition and controversy, which, among many other things, resulted in the dates being missed. In 1984, DOE released draft environmental assessments for the nine first round sites in six states: 4 bedded salt sites in Texas (2) and Utah (2); 3 salt domes in Mississippi (2) and Louisiana; a basalt site at Hanford, Washington; and volcanic tuff at Yucca Mountain, Nevada.¹⁹ There was strong opposition in the states and some of the local communities, demonstrations, protests, hearings, lobbying, and litigation. On May 28, 1986, President Reagan announced that the three sites chosen for characterization were Deaf Smith County, Texas; Hanford; and Yucca Mountain.

14. DOE notified states in 1983 that they had sites under consideration for the second repository site, and by January 1986, draft Area Recommendation Reports were issued for 12 sites in seven states (Georgia, Maine, Minnesota, New Hampshire, North Carolina, Virginia, and Wisconsin).²⁰

On May 28, 2016, the same day of the announcement of the three first round sites for characterization, DOE also announced that the second round was indefinitely postponed.²¹

15. DOE also took action to establish Monitored Retrievable Storage (MRS), which was the NWPAs version of consolidated interim storage. In 1985, DOE identified three potential MRS sites in Tennessee. There was opposition, lobbying, and litigation, which resulted in a District Court judge prohibiting DOE from submitting its MRS report to Congress that would select a site. DOE did select an Oak Ridge, Tennessee site.

Thus, by 1986, DOE was proceeding with implanting the NWPAs, but it was not working. Citizen opposition demanded a halt to the program, which resulted in Congress cutting funding from \$769 million to \$420 million and prohibiting underground work at the three sites or proceeding with the MRS.

16. In 1987, Congress passed the NWPAs Amendments Act to designate Yucca Mountain as the repository site, stop the second round siting; annul and revoke MRS siting.²²

Also, Congress proposed financial incentives for Nevada. The new law also proposed a "volunteer" process through the Nuclear Waste Negotiator, who could negotiate with a Governor or Indian tribe for an MRS or repository site, Consult with affected states, tribes, local governments. Any negotiated Agreement must be enacted into federal law.

17. The first Negotiator was not nominated and confirmed until 1990. Two Idahoans held the Negotiator position until it was terminated in 1995. They carried out an extensive program of trying to get states and tribes to volunteer for repository or MRS. They provided grants to states and tribes for studies, all of which were for MRS-type sites.

¹⁹ Federal Register, Vol. 49, pp. 49540-49541 (December 20, 1984).

²⁰ Federal Register, Vol. 51, pp. 1275-1276 (January 10, 1986).

²¹ Federal Register, Vol. 51, pp. 19783-84 (June 2, 1986).

²² Public Law 100-202. Signed on December 22, 1987.

18. In 1991-92, there were 21 applications for 16 tribes, four counties, and one corporation – but no state volunteered for either a repository or MRS. The heavy bias toward tribes raised environmental justice issues.

MRS APPLICATIONS (as of September 8, 1992)	
Mescalero Apache Tribe, NM	Awarded 10/17/91 Phase II-A award 4/21/92
Grant County, ND	Awarded 11/25/91 Terminated March 1992
Chickasaw Nation, OK	Awarded 2/14/92 Withdrew 3/31/92
Fremont County, WY	Awarded 1/23/92 Governor vetoed 8/21/92
Sac and Fox Nation, OK	Awarded 2/19/92 Withdrew 3/4/92
Prairie Island Nation, MN	Awarded 3/18/92
Yakima Indian Nation, WA	Awarded 1/23/92 Grant expired 7/23/92
Fifield Development Corp., WI	Rejected by DOE as ineligible
Apache County, AZ	Governor objected 4/3/92
Skull Valley Goshute Tribe, UT	Awarded 4/17/92
Alabama Quassarte Tribe, OK	Under review by DOE
Eastern Shawnee Tribe, OK	Under review by DOE
Tetlin Village, AK	Rejected by DOE 6/26/92
Lower Brule Sioux, SD	Under review by DOE
Akhiok-Kaguyak, AK	Rejected by DOE 6/26/92
Apache Development Authority, OK	Under review by DOE
Absentee Shawnee Tribe, OK	Withdrew 6/9/92
San Juan County, UT	Awarded 5/4/92
Ponca Tribe, OK	Awarded 9/4/92
Caddo Tribe, OK	Withdrew 7/16/92
Ft. McDermitt Paiute Shoshone, NV	Awarded 7/15/92
Sources: U.S. DOE; U.S. Office of Nuclear Waste Negotiator	

In light of DOE's 2016 attempt to site a borehole research project in Pierce County, North Dakota, one has to wonder about whether DOE remembered that history. The second application approved was Grant County, North Dakota. That application created a huge controversy that resulted in the County

Commissioners being recalled, and the new commissioners terminated the application. Given that history, the controversy and rejection of this year's proposal was expected.

19. Two of the tribes that responded to the Negotiator did continue with MRS sites. On December 20, 1994. The Mescalero Apache Tribe and approximately 23 utilities signed a Letter of Intent to develop a Private SNF Storage on tribal land. The next year there were two tribal referenda – the first one rejected the proposal and the second one supported it. There was extensive public and New Mexico government official opposition. In April 1996, negotiations between the Tribe and utilities ended.

Some of the utilities then went to Skull Valley Goshutes in Utah. There was internal tribal opposition and strong state and citizen opposition. A license application was submitted to the Nuclear Regulatory Commission in 1997 and the license was issued in 2006.²³ In the same year, the Bureau of Land Management denied Right-of-Way into the site and the Bureau of Indian Affairs refused to approve the lease.²⁴ Thus, the site has never operated.

20. Some conclusions about DOE

- DOE has only sited one HLW/SNF repository; it will not operate because of non-consent from Nevada state government
- DOE's "successful" consent for WIPP also prohibits HLW/SNF
- DOE has proposed an MRS, but it did not operate because of non-consent from Tennesseans
- DOE does not have long-term consent for much HLW/SNF storage in ID, SC, WA, NY
- For 45 years DOE has achieved non-consent and has no operating HLW/SNF consolidated storage or repository sites

21. More conclusions about DOE

- DOE has not been a reliable party regarding complying with the requirements of the NWPA.
- DOE has not been a reliable party regarding complying the agreements or statutory requirements for WIPP. It has continued to promote WIPP for missions that are prohibited by the WIPP Land Withdrawal Act.
- Given DOE's lack of reliability, it will be difficult to have confidence that "consent" agreements would be honored.

DOE also has a bad record of mis-handling nuclear waste at its sites. The agency "erred in dealing with nuclear waste [by leaving] behind a terrible legacy—the massive residue of contaminated wastes at Hanford and other nuclear materials production sites."²⁵

22. Some more conclusions

- Utilities also have achieved non-consent for consolidated storage
- Utilities have not consented to consolidated storage at closed or open power plant sites
- If SNF storage is safe at reactor sites; consolidated storage seems unnecessary at non-reactor sites
- It is highly unlikely that consent will be given for consolidated storage site(s) away from reactors

²³ NRC License No. SNM-2513, issued on February 26, 2006.

²⁴ Federal Register, Vol. 71, pp. 58629-58630, (October 4, 2006)-BIA. Federal Register, Vol. 71, pp. 57005-57006, (September 28, 2006)-BLM.

²⁵ J. Samuel Walker, *The Road to Yucca Mountain*, Berkeley: University of California Press, 2009, p. 50 (quoting Glenn Seaborg's book (with Eric Seaborg, *Adventures in the Atomic Age: From Watts to Washington* (New York: Farrar, Straus and Giroux, 2001), p. 233.

23. 20 years ago, here was one artist's idea about the situation. Not much has changed.

