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October 21, 1986

Ms. Alma Hale
Policy and Program Control Branch
Division of Waste Management
Nuclear Regulatory Commission
Mail Stop 623-SS
Washington, D.C. 20555

Dear Alma:

Enclosed is the State of Washington's Litigation Status Report.
The report is without attachments.

I have also enclosed a copy of Referendum 40. Washington State
citizens will be voting on the referendum during the November
4, 1986, general election. The Washington State Nuclear Waste
Board and Advisory Council are currently conducting informa-
tional meetings about the referendum.

I hope the enclosures prove helpful. Please let me know if I
can assist you further. Greetings to Nancy and Joe.

Sincerely,

HOVIS, COCKRILL, WEAVER & BJUR

Nancy

Nancy E. Hovis

NEH:ls

Enclosures

WM Record File

101.4

WM Project

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Docket No.

PDR ☒

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Distribution:

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REFERENDUM BILL 40

CHAPTER 1, LAWS of 1986, 1st EX. SESS.

Note: The ballot title and explanatory statement were written by the Attorney General as required by law. The complete text of Referendum Bill 40 begins on page 16.

Vote cast by the 1986 Legislature on final passage:
HOUSE: Yeas, 91; Nays, 3; Absent or not voting, 4.
SENATE: Yeas, 44; Nays, 3; Absent or not voting, 2.

Statement for

CHALLENGE THE "FEDS" ON THE HANFORD NUCLEAR WASTE SITE

Shall the state of Washington continue its challenge to the U.S. Department of Energy's (USDOE) search for a site for long-term storage of high-level nuclear waste? Vote yes to support our state's efforts and to give our congressional delegation the public backing they need to challenge USDOE's process of selecting Hanford.

USDOE ignored the federal law mandating a careful, scientific selection process. Internal USDOE memos show the department bowed to political pressure in its race to find a place to dump high-level nuclear waste.

USDOE DEFIED FEDERAL LAW BY POSTPONING SELECTION OF A SECOND SITE

Our Congress directed USDOE to search for two nuclear waste sites. The department indefinitely postponed its search for a second site without congressional approval, directly violating federal law.

Unless we act immediately, the Hanford site near the Columbia River could, by default, become the *only high-level nuclear waste site in the country.*

YOUR "YES" VOTE IS A VOTE FOR OUR STATE'S FUTURE

Your yes vote supports our state's demand that site selection be based on sound scientific principles that take public safety into account. Your yes vote insists that USDOE give greater consideration to sites closer to where the waste is produced. Your yes vote supports our state's efforts to pursue alliances with Western states affected by the storage and transportation of high-level nuclear wastes.

Official Ballot Title:

Shall state officials continue challenge to the federal selection process for high-level nuclear waste repositories and shall a means be provided for voter disapproval of any Washington site?

The law as it now exists:

Federal law directs the United States Department of Energy to undertake a process for the selection of sites for

USDOE's actions have destroyed the credibility of the site selection process. Let's send a clear message to the federal government and the nuclear waste-producing East Coast that we are *not willing to become the nation's nuclear waste site for the sake of political convenience.*

THIS DECISION WILL AFFECT OUR STATE FOR THOUSANDS OF YEARS

Vote for fairness. Vote yes — Referendum 40!

Rebuttal of Statement against

Public safety is not a waste of taxpayer's dollars! State government has an obligation to fight for the long-term safety of Washington residents.

Public safety protections have already been violated The federal Department of Energy's own reports indicate that political considerations caused Hanford to be selected as a nuclear waste finalist—even though it did not qualify based on the evidence.

If we do not fight this flawed process now, later will be too late!

For additional information, call (206) 223-1964.

Voters Pamphlet Statement Prepared by:

MIKE TODD, State Representative; AL WILLIAMS, State Senator; CLIFF BAILEY, State Senator.

Advisory Committee: RAY HILL, Master, Washington State Grange; LAWRENCE KENNEY, President, Washington State Labor Council, AFL-CIO; DAVID BRICKLIN, President, Washington Environmental Council; GERALD POLLET, Executive Director, Washington Public Interest Research Group (WashPIRG).

the safe, permanent disposal of high-level nuclear waste. Ultimately, the repository sites are to be selected by the President. A state selected as a site by the President is authorized by federal law to indicate disapproval of the selected site by its Governor or Legislature. Such disapproval by a state can be overridden by Congress.

The effect of Referendum Bill 40, if approved into law:

This measure would not change the existing provisions of federal law. It does, however, direct state officials to use all legal means to suspend the preliminary site selection process under which Hanford, Washington is now one of three candidate sites until the United States Department of Energy complies fully with federal law. Further, if a Washington site is ultimately selected by the President, the Governor is directed to call a special statewide election wherein voters would be asked if they favor a notice of disapproval

of a site in Washington State. If the Governor or the Legislature submits a notice of disapproval to Congress within twenty-one days of the President's recommendation, the Governor would be authorized to cancel the special election.

Statement against

VOTE NO! DO NOT WASTE TAX DOLLARS!

A *no* vote is recommended. A *yes* vote will not stop site characterization. A *no* vote will stop your state officials from spending your tax dollars in meaningless court challenges of federal law. Federal law does not provide for voter disapproval of site characterization.

PROCEDURES HAVE BEEN ESTABLISHED AND FOLLOWED

The President of the United States has decided to proceed with full-scale, extensive, in-depth testing and characterization of three sites in three different states, for possible use as a nuclear waste repository, in accordance with the Nuclear Waste Policy Act of 1982. This decision represented the culmination of extensive evaluations of these and other potential sites during the past three years. Work included the compilation of thorough environmental assessments and widespread public comment. Over 20,000 public comments were received and incorporated into the decision.

PUBLIC HEALTH AND SAFETY WILL BE ADDRESSED

Site characterization will cost approximately \$1 billion at each site and take 4 to 5 years to complete. Federal law requires that the impact of a repository on the health and safety of people and the environment must be determined in accordance with Environmental Protection Agency standards and regulations. A final environmental impact statement is required. All steps must be completed before the President may recommend a site to Congress for construction of a repository. The repository is subject to independent licensing by the Nuclear Regulatory Commission.

WASHINGTON STATE IS ALREADY EMPOWERED TO DISAPPROVE A SITE

Federal law provides for disapproval by the Governor or the state Legislature for substantial reasons, subject to override by majority vote of both Houses of Congress, only after the President has recommended a site.

Rebuttal of Statement for

The proponents statement is based on false allegations. The allegations that the sites were not selected on a scientific basis and that USDOE violated federal law by postponing the selection of a second site are false. The scientific evaluation and selection of the three sites took over three years as already discussed. A law that does not apply for at least three more years could not have been violated!

No law at present relates to repository site location; hence, your vote has no effect.

For additional information, call (206) 786-7614 or (509) 946-5562.

Voters Pamphlet Statement Prepared by:

RAYMOND E. ISAACSON, State Representative; MAX E. BENITZ, State Senator; SAM C. GUESS, State Senator.



OFFICE OF THE ATTORNEY GENERAL

October 8, 1986

TO: Warren A. Bishop, Chairman
Nuclear Waste Board

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

SUBJECT: Litigation Status Report

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

I. Pending Litigation

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

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

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

OFFICE OF THE ATTORNEY GENERAL

Warren A. Bishop
October 8, 1986
Page 2

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

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

2. Preliminary Determination of Suitability (PDS) Litigation.

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

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

3. Second-Round Repository Suspension Litigation.

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

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

OFFICE OF THE ATTORNEY GENERAL

Warren A. Bishop
October 8, 1986
Page 3

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

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

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

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

B. Siting Guidelines Litigation

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

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

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

OFFICE OF THE ATTORNEY GENERAL

Warren A. Bishop
October 8, 1986
Page 4

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

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

C. "Monitored Retrievable Storage" (MRS)

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

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

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

OFFICE OF THE ATTORNEY GENERAL

Warren A. Bishop
October 8, 1986
Page 5

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

D. EPA Standards Litigation

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

E. Litigation Funding Litigation

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

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

OFFICE OF THE ATTORNEY GENERAL

Warren A. Bishop
October 8, 1986
Page 6

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

CBR:gb

Attachment

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