19.0038.08000

FISCAL NOTE

Requested by Legislative Council
04/15/2019

Amendment to: Reengrossed SB 2037

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			$19,692		$19,692	
Appropriations			$19,692		$19,692	

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This measure relates to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons. This measure also establishes a high-level radioactive waste fund and a high-level radioactive waste advisory council.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 3 of this measure provides disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons to be overseen by the Industrial Commission acting through the state geologist, and provides jurisdiction in regulatory, permitting, and reporting requirements.

Section 3 also establishes a high-level radioactive waste fund as a continuing appropriation and a high-level radioactive waste advisory council. The bill requires appointed council members to meet at least annually, but it is estimated the council will meet three times per year (every four months) in response to the number of issues that arose this session during testimony on this bill. The bill requires all travel and other expenses incurred by appointed council members be reimbursed. The travel reimbursement costs are estimated at $19,692 per biennium.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

With no exploration happening at this time, no permits are expected to be filed. Therefore, no revenue is anticipated at this time.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Expenditures are for travel reimbursement for the advisory council. There would be a maximum of seven people from outside of Bismarck. The expenses are estimated as follows:

Mileage: $0.58/mile @ 560 miles x 7 people = $2,274
Lodging: $84.60 + $6.77 (tax) x 7 people = $640
Per diem: $35.00 + $17.50 x 7 people = $368
Estimated total cost per meeting: $3,282
Cost per biennium (6 meetings): $19,692

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

The Geological Survey expenditures for the increased costs in travel expenses mentioned in 3B total $19,692. Until the high-level radioactive waste fund has revenue, the travel costs will be general fund expenses.

Name: Robyn Loumer
Agency: Industrial Commission
Telephone: 701-328-8011
Date Prepared: 03/20/2018

19.0038.07000

FISCAL NOTE

Requested by Legislative Council
03/19/2019

Amendment to: Reengrossed SB 2037

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			$19,692		$19,692	
Appropriations			$19,692		$19,692	

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This measure relates to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons. This measure also establishes a high-level radioactive waste fund and a high-level radioactive waste advisory council.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 3 of this measure provides disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons to be overseen by the Industrial Commission acting through the state geologist, and provides jurisdiction in regulatory, permitting, and reporting requirements.

Section 3 also establishes a high-level radioactive waste fund and a high-level radioactive waste advisory council. The bill requires appointed council members to meet at least annually, but it is estimated the council will meet three times per year (every four months) in response to the number of issues that arose this session during testimony on this bill. The bill requires all travel and other expenses incurred by appointed council members be reimbursed. The travel reimbursement costs are estimated at $19,692 per biennium.

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A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

With no exploration happening at this time, no permits are expected to be filed. Therefore, no revenue is anticipated at this time.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Expenditures are for travel reimbursement for the advisory council. There would be a maximum of seven people from outside of Bismarck. The expenses are estimated as follows:

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Estimated total cost per meeting: $3,282
Cost per biennium (6 meetings): $19,692

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

The Geological Survey expenditures for the increased costs in travel expenses mentioned in 3B total $19,692. Until the high-level radioactive waste fund has revenue, the travel costs will be general fund expenses, which are not included in the appropriation budget.

Name: Robyn Loumer
Agency: Industrial Commission
Telephone: 701-328-8011
Date Prepared: 03/20/2018

19.0038.06000

FISCAL NOTE

Requested by Legislative Council
12/21/2018

Amendment to: SB 2037

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			$2,812		$2,812	
Appropriations			$2,812		$2,812	

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This measure relates to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons. This measure also establishes a high-level radioactive waste fund and a high-level radioactive waste advisory council.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 3 establishes a high-level radioactive waste advisory council, which will meet annually. The appointed council members meet annually, and must be reimbursed for travel and other expenses incurred. The appointed council members travel reimbursement costs are estimated at $2,812 per biennium.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

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Expenditures are for travel reimbursement for the advisory council. There would be a maximum of three people from outside of Bismarck. The expenses are estimated as follows:

Mileage: $0.58/mile @ 560 miles x 3 people = $974.40
Lodging: $84.60 + $6.77(tax) x 3 people = $274.11
Per diem: $35.00 + $17.50 x 3 people = $157.50
Total annual meeting cost: $1,406.01
Cost per biennium: $2,812.00

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

The Geological Survey expenditures for the increased costs in travel expenses mentioned in 3B total $2,812. Until the high-level radioactive waste fund has revenue, the travel costs will be general fund expenses, which are not included in the appropriation budget.

Name: Robyn Loumer
Agency: Industrial Commission
Telephone: 701-328-8011
Date Prepared: 12/27/2018

19.0038.05000

FISCAL NOTE

Requested by Legislative Council
12/21/2018

Amendment to: SB 2037

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			$2,812		$2,812	
Appropriations			$2,812		$2,812	

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

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C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

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Name: Robyn Loumer
Agency: Industrial Commission
Telephone: 701-328-8011
Date Prepared: 12/27/2018

19.0038.04000

FISCAL NOTE

Requested by Legislative Council
12/21/2018

Bill/Resolution No.: SB 2037

1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			$2,812		$2,812	
Appropriations			$2,812		$2,812	

1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

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B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

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A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

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The Geological Survey expenditures for the increased costs in travel expenses mentioned in 3B total $2,812. Until the high-level radioactive waste fund has revenue, the travel costs will be general fund expenses, which are not included in the appropriation budget.

Name: Robyn Loumer
Agency: Industrial Commission
Telephone: 701-328-8011
Date Prepared: 12/27/2018

2019 SENATE ENERGY AND NATURAL RESOURCES

SB 2037

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2037
1/4/2019
30411

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; definition of illegal transportation of unusable products; the disposal of nuclear waste material; and to provide penalty.

Minutes: 2 attachments

Chair Unruh opened the public hearing, attendance was taken, all members were present. Introductions were made, a brief training on electronic testimony submission and retrieval ensued.

Kyle Forester, ITD (3:05-11:20) Training for electronic testimony and LAWS application.
Senator Larry Luick (12:00-16:50) Introduced the bill, please see attachment #1.
Chair Unruh: The last bullet point on first page authorizes the Industrial Commission to issue a notice of disapproval when the Legislative Assembly is not in session, why not have that authority stay with the Industrial Commission even when we are in session?
Senator Luick: We wanted the authority if we deemed it necessary to make a decision during legislative session. I understand the concern there and it is questionable, it wouldn't be a bad idea to pursue it.
Ed Murphy, State Geologist, Department of Material Resources (18:00-32:25) Agency testimony, please see attachment #2.
Representative Jon Nelson: (33:00-44:45**)** in favor with amendments. This bill is a piece of legislation that was forwarded last session, because of a situation that occurred in Pierce County. There was a proposal to drill a bore hole in southern Pierce County, one can argue the merits of exploration, whether that was good for the county or not, the community was concerned that high level nuclear waste was the only option because they learned about it in the newspaper. It got off to a rocky start. It was ultimately denied by the zoning authority using a moratorium strategy. It raised a lot of awareness in the region. That bill occurred to allow local community some voice in the process, which is a reasonable request when we are talking about high level nuclear waste storage. This could happen anywhere in North Dakota. I appreciate Mr. Murphy's work; we've had conversation with him about some proposed amendments. An organization was formed in Pierce County to track progress. In most cases I support a business friendly environment, this is an exception to this rule. I think

our goal is to create as many roadblocks as we can to dissuade high level nuclear waste storage in North Dakota, to make those industries look somewhere else. Some changes that would do that and also provide assurance that local voices are heard. I would start on page 11, line 14: there is a 2-mile notice provided in this legislation for landowners. We think that is too low, in rural areas, there may not be a dweller that has a household within that radius; if there is, the owner may not live in North Dakota. That should be expanded, in our consultation we used 30 miles. That's large, it makes it difficult for an industry to provide notice by certified mail; somewhere between 2 and 30 miles is where we feel comfortable. That way we would prevent another occurrence like what happened in Pierce County. We feel that a bond of at least $1 million needs to be included in permit fee. Mr. Murphy mentioned the 60-day approval notice that the Federal Government has in this process, we would like to see a 6-month notice, that has to mesh with national rules, and I suggest that we make that time delay as long as possible to give people the opportunity to wade through the consequences. Whatever that number is, we need to lengthen it, we should err on the higher side. The biggest proposed change is on page 12, line 19; the process for when the legislature is in session and when we're not. We're very uncomfortable, not individually, but because of the role of the policy branch of government, most likely the legislature wouldn't be in session when a proposal comes forward. We think this is an important enough issue for a special session. We'd like to see that added to reflect the opportunity for the citizens of North Dakota to have a voice in this action. This is a huge decision, the last time that a special session was called was to address the fructose plant in Wahpeton, that was a business venture that deemed necessary for a special session to provide incentives for that business to come into the state. This has consequences to end of time, we think the legislature should a have role in that decision making. We feel the state may have more control in the area of exploration than nuclear storage. There is a federal issue that does take away a lot of the state control. We feel that if we can beef up the exploratory beginning of this where counties have a say in zoning size and scope to reinforce the local control from the exploration state; that would give the states and local communities about as much influence as could happen. We would like some strength in that area. That is stated on page 14, line 5. We would add the exploration stage to the high level waste facility; that would go through the whole process. Page 15, line 5, we would like to see permanent signage rules. People traveling or living near need to know what is taking place; if these considerations are added, we would support the bill. Without those changes it would be hard for the people I represent to support this legislation.

Rebecca Leier, North Dakota Community Alliance(NDCA) (45:30-55:30): In favor, with amendments. NDCA came together in 2016 after the issue of a bore hole being brought to Pierce County, and all of us learning about it in the newspaper. We would support this bill, with amendments. I will go over why we feel these are important. Senate Bill 2037 says high level radioactive waste disposal. I want everyone to understand that is a multigenerational decision. I live on a three generation ranch, it doesn't just affect us, but many generations to come. High level radioactive waste has yet to be successfully stored. My husband and I returned to North Dakota in the 1990s right in the mix of the Yucca Mountain debacle in southern Nevada. We have relatives working with radioactive waste in Nevada, Colorado, and New Mexico. In our community, in 2016, we began to educate ourselves to keep an eye on what was going on. We formed a group of prominent members of our community and have been live broadcasting the US Nuclear Race technical review board meetings to try to figure out a timeline for removing nuclear waste in our country, the last meeting on October

24th also technology that's coming down the line for transportation of that nuclear waste. Right now it looks like it's moving to New Mexico, but it's not going away. The fact that it came so quickly to Pierce County blindsided us. There was no notification until it was right there. We felt like we needed to make clear to the Natural Resources Committee that discussion with local people is very important. In September of 2017 the Natural Resources Committee decided to do this study. One of the suggested study approaches was to contact the Pierce County Commissioners who were very instrumental in the moratorium that Rep. Nelson spoke of in stopping that bore hole. No one, as of December 10, from this Legislative Body has contacted the Pierce County Commission. That is a concern that we have; not being in loop. The way the bill is drafted without amendments, we are left in the dark. We would like to see the retaining of legislative oversite; the legislative assembly is our voice; you are the shepherds of my grandchildren; high level nuclear waste is a hazard for thousands of years. It's never been stored successfully; it's leaked within decades. We'd like that to be in the forefront of your decision making. We have no issues with the State Industrial Commission, but we are better represented by the people who are elected to represent us. We ask for a longer public notification, we suggested certified mail to everyone within a larger radius, currently it's a 2-mile radius, I live 2.5 miles away from the last proposed bore site on Highway 3 in Pierce County. Within the current radius, there are only two residences; one is an elderly couple who live there part-time, their son lives in another city. That is a very small radius. Rep. Nelson suggested 30 miles, which included communities, schools, and hospitals. Those were the population centers that should have been notified. Additionally, we would like an amendment specifying permanent, universally understandable signage, funded for the duration of storage. If you imagine Stonehenge or the pyramids, it would be terrible if future archaeologists unearthed the site and caused a leak. Bonding: if a private company were to be permitted to store how low would the bond be in place? Page 14 discusses local input, we would like it to include size, scope, location, and exploration at the local level of the county. In Washington state, the exploration site was taken by the federal government using eminent domain. If the proposed bore hole had shown viability, the federal government would have taken the site. In conclusion, we would like amendments to include county input on size, scope, location, and exploration; and to include permanent universally understood signage for the duration of storage. We are available for questions through North Dakota Community Alliance.

Jack McDonald, North Dakota Newspaper Association/North Dakota Broadcaster Association (56:00-58:50) Testified in favor. We would like to address the notice provision in this bill. We believe there should be some type of public notice instead of certified letter that goes to the landowners. As it stands, only the surface owners know about it. The general public would not know, many people rent, residents of nearby towns would not be informed. I would volunteer some amendments for public notice, rather than just certified letters to owners. When it talks about the advisory council on page 13, line 8 the High Level Waste Council, their meeting should be publically posted. I will submit proposed amendments for that.

Chair Unruh: Does current law require these public notices?

Mr. McDonald: The current law has no provision for public notice except for certified letter to surface owners. If a public body was created presumably they would be required to post notice for their meetings, but from our standpoint it is always better if specifically stated. I think there should be something for that council.

Chair Unruh: Was this issue brought up in interim committee?

Mr. McDonald: No, it wasn't.
Senator Cook: I have a question for Mr. Murphy. On the definition of high level radioactive waste. Was that definition created in committee or is it copied from Wyoming or from the federal government?
Mr. Murphy: That definition came right out of the Nuclear Waste Policy Act of 1982. We amended that last session so it was the same, we had been using a difference definition, we wanted to be consistent with the federal government.
Chair Unruh: Does this chapter only apply to high level radioactive waste?
Mr. Murphy: Yes. This is why we used the federal definition. As you know we have low level radioactive waste, and it is treated differently.
Senator Piepkorn: Why are some of these decision not made in the Health Department? That seems to be a natural place for a lot of things.
Mr. Murphy: What's interesting, Chapter 23-20.2 is under the Health Department. Chapter 38 is the Industrial Commission. We have regulated through the Industrial Commission since 1979 even though it was placed into the Health Department Century Code chapters. The way we're setting it up now, DEQ (Department of Environmental Quality) would have strong input on this. You could argue either way, but you need geologists, hydrologists as well as environmental chemists. We've worked as a team on this.

No opposing testimony.
Public Hearing was closed.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2037
1/11/2019
Job Number 30700

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; definition of illegal transportation of unusable products; the disposal of nuclear waste material; and to provide penalty.

Minutes: 1 Attachment

Senator Roers: I've met with Rep. Nelson, the only thing we've been able to do at this time is to start to work through some amendments, (see attachment 1). They are contemplating reducing some of those restrictions from 30 miles to 10 miles, advertising period from 180 days to 90 days, relatively small tweaks right now. The second page is an amendment suggested by the lobbyists from waste management; they want to make sure we understand that the low level radioactive materials coming out of the oil fields are not high level and not of concern for this bill. We are working through anything that we could put in to better control what might happen in the event that the federal government comes in and says you will be required to take high level nuclear waste; we'd like to have something in statute that would say If we're forced to do that; here's our minimum criteria. We're trying to get that put together right now, and that's where we're at. We're looking at some industry experts to help us create some structure.

Senator Piepkorn: I was surprised that the people who were concerned about the high level nuclear active waste in their area were not opposed to the bill, but rather interested in amending it. I was surprised at the fact there was no opposition.

Chair Unruh: Part of that is that this was passed last session.

Senator Cook: If they're opposed to the bill, that means they want us to kill it. Then they have no protection. If we amend it, they have some protection.

Chair Unruh: We'll keep working on it.

Senator Cook: I don't think it matters what the bill says, if the federal government decides to dump waste on us, they're going to do it.

Senator Piepkorn: I think we learned that in the interim, that the federal law is the highest authority in that.

Senator Roers: What we've been discussing, if you have something in place you have more strength than if you have nothing in place. We're trying to find, is there a process where we could say, I understand that you're going to bring high-level radioactive material, but you need to protect the state to this point, or you're going to need to bring it down to this level. Then there's got to be a plan for the event that something does go wrong. Maybe we can flesh some of that out in a bill today, that would be leveraged another day. I hope that you're wrong on the iron hand coming down on us.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2037
2/8/2019
Job Number 32472

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; definition of illegal transportation of unusable products; the disposal of nuclear waste material; and to provide penalty.

Minutes: 4 Attachments

Chair Unruh: Opened committee work. All members were present.
This is the bill that relates to the disposal and storage of high level radioactive waste. Senator Roers has been working on some amendments to address the concerns we had with the bill when we first heard it.

Senator Roers: Please see attachment #1. We've had an opportunity to visit with the Health Department and Governor's Office, and a number of other people, including some of the people from Pierce County. We have some people who want to speak to this bill. The amendments are agreed upon by everybody, and we would like to bring this forward to be approved, and taken to the floor to discuss.

Chair Unruh: We'll have Senator Roers introduce this amendment, and then we'll allow some testimony.

Senator Roers: The amendments are small in nature, it talks about providing and maintaining a permanent marker forever for these sites. Monitoring these sites, and making sure they aren't leaking; that they are safe for the public. Providing notice through the local paper that these things are happening and will be potentially coming to the state. One of the issues that came up was the fact that the county needed to approve this particular site, I think. The other thing was that the legislature would have to approve any of these sites, which frankly are unconstitutional and cannot be done that way. It has been taken back to the point where the Industrial Commission would have to be approving or negotiating this potential site. I think that covers the majority of these other than small things, like the raised fee to $1 million.

Senator Cook: I have no problem with the amendment, but seems something is missing. I'm looking at the change 'within 2 miles of the location to 30 miles' but I don't see where the 2

miles is coming out. As I read them, I don't see them deleting anything or replacing anything. Maybe I'm reading these wrong.

Chair Unruh: I see what's happening; 'the applicant for a permit needs to provide notice to the surface owner and residents in a permanently occupied dwelling within 2 miles, and the county commissioners and mayor of any municipality within 30 miles, and publish a notice in the official county newspaper and any newspaper within 30 miles. Its three contingencies.

Ed Murphy, State Geologist, Department of Mineral Resources: I think I can help Senator Roers, we worked on these. You're right, that's what happened. The North Dakota Community Alliance (NDCA) group asked that we go out 30-miles with notice. This was a compromise. We stayed with the 2 miles, and then went out with the 30 miles with the county newspaper. If there's any others, I could quickly go through these. I can give a little history; the very first one is page 8, line 20, that came from industry that was concerned that TENORM (Technically Enhanced Naturally Occurring Radioactive Materials) was going to get pulled into this. In North Dakota, that's the filter socks coming off of injection wells, they wanted to make sure that didn't get caught up in this chapter. That's why we added to that consistent with the existing law and rules, TENORM is handled in the DEQ rules. Moving to page 10, line 10, again the NDCA was concerned about signage over a long period of time, so we added a permanent marker is to be erected and maintained over the disposal sites. And then specifically that could be handled in the rules, what that would be, I think more than a sign, for long term, we're talking about sites with half-lives of millions of years with uranium 238, plutonium, 24,000 years. You're looking at long term; you would want to warn someone away from developing right on top of that. Rather than signage, there is ways of constructing things that would prohibit people from developing over that. SB 2037 sets up an advisory council, these are things that they can deal with. Things that we got partway to resolving, the council could take those things further. Page 10, line 14, again, the NDCA asked, when would the Commission not require a bond to be furnished, that language comes from Chapter 38-08, we couldn't think of one, in all instances we would want a bond in this situation. We agree with them; the best thing would be to strike that language. Page 10, line 20, changes dealing with the fees, for the most part clarifications, the NDCA really wanted that fee pushed up, but we've looked at a lawsuit in the state of Utah where they set a $5 million application fee and $2 billion bond for a repository like this, depending the facility, the cost to reclaim all this, $2 billion maybe is not out of the question. A tribe in Utah sued the state, saying that those were too high and would prohibit development. The tribe was looking at having one of these. We did go from $800,000 to $1 million. Dave Glatt and I spent a minute running through some costs, of 4 FTEs, of training of EMTs, community training, monitoring, we both came up with $800,00 pretty quickly, we said there's probably things we haven't thought of, let's go to a million dollars. If that money doesn't get used, if goes into that fund and can be used for other things directly related to it. Page 11, line 11, NDCA was looking at ways that the locals could have more input into this process, they suggested that as part of the permit application they would have to have a letter of support. We talked to the attorneys, they said we couldn't do that, because in essence if they didn't get one they would not be able to have a complete application. We softened it, that's where the language 'the notice of opportunity for a position paper' in other words, they would have to include in their permit application that they did reach out to locals and try to get their support. Obviously, if they didn't get a letter, they didn't have the community's support. Somewhat along the lines of what the feds were trying to do with consent based siting. Page 11, line14, Rep. Nelson discussed this when he introduced

the bill, they thought that there should be a return receipt on the notice, our attorneys said if you don't get that, you don't know if they actually received it, they said to cite the North Dakota civil procedure rule 3, page 11, lines 15-16, that was staying with the 2 mile, and getting out to 30 miles with the newspapers that way. Page 11, line 18, we had 45-day notice for a hearing, they requested 180 days. We reached out to legislative council, 60 days is the longest for anything in North Dakota. Page 13, line 2, we should strike, we don't want to be limited to just receiving federal funds, since there could be private funds if this were to go to some type of waste disposal. Page 13, line 27, NDCA wanted to make sure that they legislature or the Industrial Commission got a report from this advisory council, we took out the language 'if requested by' I'm sure the legislature would want that report, if it goes to a notice of disapproval you have to have statement of reasons accompany that. That could be pulled out of that report. Finally, page 14, line 5, this was our attempt to give the locals some input into this process early on. Originally, they could regulate the size, scope, and location of the facility, that is in the bill, we also moved that up to cover exploration. The NDCA would like the legislature back in the process. In SB 2156 from last session, that was one of the things we were supposed to find. How can we make a concurrent resolution work? Where the legislature says yes or no right up front for both exploration and a facility, our attorneys were not able to do it, they couldn't find a way where we wouldn't run into a legislative veto. They also discussed whether there was a way to bring the legislature in to approve or deny a permit issued by the Industrial Commission, again, our attorneys didn't see how they could do that constitutionally. Lastly, they're correct that the Department of Energy is trying to change some of these definitions. Potentially to get more of this in the hands of private contractors. They are very concerned about that, it's a moving target. The comment period just closed on January 9th regarding that. We've got two states, Washington and Oregon who are looking to sue over this issue. I don't think we can get this resolved during this session, one of the things, even if the feds change their definition of radioactive waste, we still have our definition in this bill. I'll point out that it says 'high level radioactive waste contains fission products in sufficient concentrations to require permanent isolation'. The other being that highly radioactive material that the Industrial Commission determines requires permanent isolation. So if the feds change, and they're focusing on transuranic waste or class A, B, C; anything not low-level or TENORM, and it needs permanent isolation would then fall under the definition of high-level radioactive waste in this bill. I think we would be covered; the advisory council could look at that over the next 2 years if this bill passes. I do have a flow chart **(please see attachment # 2)**, an update from January 4th. You've seen this, it's a little different format. The area in blue is for exploration, the area in grey is covered by notice of disapproval, the area in yellow is for a facility. I want to point out that under existing law, the concurrent resolution by legislative assembly, even back in 1987, legislative council questioned the constitutionality of doing that. Our attorneys tried to find a way to bring that into SB 2017 without creating a legislative veto. We were not able to do that. We're sitting with an existing law that legislative council says does not meet constitutionality.

Senator Piepkorn: The middle chart, the proposed legislation, who makes up the high-level radioactive waste advisory council?

Ed Murphy: That's in the bill. Its 7 state officials and 3 that are appointed, it includes a State Engineer the director of DEQ, a health officer, Director of Transportation, Game and Fish, and Commerce.

Rebecca Leier, NDCA (20:26- 32:45) please see attachment #3. I've handed out 6 points that we ask your committee to consider. These are points we've been working with Ed Murphy, Rep. Nelson, and policy advisor Reice Haase. (25:30) The federal government shipped high grade plutonium from South Carolina to the state of Nevada, despite litigation in their process, because the federal administration dropped the classification of that waste.

Charles Volk, Pierce County Citizen, member NDCA (33:00) I wanted to talk of the history, and why we wanted SB 2156 originally, and the need for additional representation for the citizens of North Dakota. When the prototype hole was proposed in Pierce County, it was but a few citizens who expressed concern over the potential outcome of the project. It was a few county commissioners who had the courage to say no and set forth the moratorium, to put a hold on the project. We felt it was necessary to move forward and gain a voice in legislature that was moral best so that many of the state legislative body had a say in determining the future of the state. I do have faith our current leadership to do the right thing for North Dakota. I have listened to the dedicated work that Ed, Dave and many others have put into this bill, but leaders change. Now this bill revises the power of many, when not in session and reverts back to the power of a few to determine the future. Even as much as giving authority to the State Geologist, a non-elected official to enter into agreements pertaining to the future of the many. The conditional support of the original bill, SB 2156, is what got us here today. When SB 2156 was passed, it was passed with the desire to have intercommittee review by congressional work after session. I think that we are working with the same requirement here, action to figure out how to call the legislature back into session to ensure that the voice of North Dakota can be fairly represented. Legislative law is not what I am trained in. But logic is a lifetime aptitude that says if South Dakota can require the governor and legislative approval, on proposals as big as this, why can't we? I would encourage the committee to have a conditional Do Pass of these amendments, just as we support the amendments that Rebecca outlined. I know work is difficult, but I think part of the conditional pass would be for this committee to create an interim committee again to continue to work to maintain legislative authority when not in session. (**Please see attachment # 4 for additional test.)**

Chair Unruh: We'll have Senator Roers evaluate the material presented today. For those here for this, we will continue to work on amendments over the next week, we are required to get the bill out next week, we will do the best that we can. The process is not over, if we can pass the bill through the Senate, it will have another hearing in the House, they'll have a chance to look at it there. We'll try to make it as good a form as we can before we send it over there.

Chair Unruh: Closed committee work.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2037
2/14/2019
Job Number 32734

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; definition of illegal transportation of unusable products; the disposal of nuclear waste material; and to provide penalty.

Minutes: 1 Attachment

Chair Unruh: Opened the meeting. All members were present.

Senator Roers: I've passed out the second amendment (**please see attachment #1**), at the last meeting when we talked about this, Ed Murphy went through all the items on this, there is just one change on the back page, we added to the board two appointees by the governor page 13, line 17, we added a Senator appointed by the Majority Leader of the Senate and a Representative appointed by the Majority Leader of the House. That is the only thing that has changed since the last time you saw this.

Chair Unruh: We had quite a list of requested changes, most were already included in the proposed amendments.

Senator Roers: Correct, there were 9 additional requests, the majority were already in the old amendment, there were 3 or 4 that were of questionable legality, those were not in the document already. Everything has been addressed that can be.

Senator Roers: I move to adopt the amendment ending in .04002.
Senator Cook: I second.

A voice vote was taken.
Motion passes.

Senator Roers: Moved a Do Pass As Amended.
Vice-Chair Kreun: I second.

Senator Piepkorn: If the feds decide that North Dakota will be a repository for high level nuclear waste, we are forced to accept it, the people who are here against it, are here to provide guidelines for warnings and signage etc.?

Chair Unruh: I believe so.

Senator Roers: I don't have a more specific answer, but yes, that's what the bill will do, create some structure. If the federal government decides to bring nuclear waste to North Dakota, there's a process they have to adhere to, that's what this bill does.

Senator Piepkorn: When legislature is not in session to help make decisions, then the Industrial Commission, the remaining 20 months of the biennium, would have the authority to make decisions that otherwise would be in the hands of the legislature. Has that been addressed?

Senator Roers: It has been addressed, it's referred to as a 'notice of disapproval' in the bill, exactly the way you described it, the legislature in session has the authority to make that notice, in the absence of the legislature, it would revert to the Industrial Commission.

Senator Piepkorn: There was a letter to the Forum that stirred up emotion, the question was; how does this benefit North Dakotans?

Chair Unruh: This sets up a structure, if this is something that does happen here it provides protection for North Dakotans. We have a public comment, a public notification period, there are lots of steps in the decision making process, local folks are involved, elected officials are involved, so people can be held accountable if there is something that happens. I think Senator Roers has done a fabulous job ensuring that everyone's voice is heard, and we still have the structure we need if something like this were to come here.

Senator Roers: There is a century code that has been created as a result of this bill, Chapter 38-23, that really creates structure in the code for that to happen. You asked, what is the benefit, I don't know that there is; it's a matter of controlling the waste product that needs to be disposed of some place. I would hate to venture to any benefit that would be created.

Senator Piepkorn: It was mentioned in the interim that Europe is competing for the right to these sites, when I suggested that North Dakota throw their name in the hat to be the national repository, that wasn't received well.

Chair Unruh: I read the letter to the Editor of the Forum that you mentioned, the legislature was accused of trying to push this through, for the record, it was a bill that came out of the interim committee, those are scheduled by legislative council before we even arrived here. This was one of the few bills that was filed. That's why we reheard things last week, we took the entire first half of the session to work on changes here in committee, so everyone can be heard in the process, I hope that everybody feels like they had input. This is not the end, there will be more on the House side.

A roll call vote was taken.
Motion passes 6-0-0.

Senator Roers will carry.
Chair Unruh: Closed the meeting.

SK
1-02

19.0038.04002
Title.05000

Prepared by the Legislative Council staff for
Representative J. Nelson
February 13, 2019

PROPOSED AMENDMENTS TO SENATE BILL NO. 2037

Page 8, line 20, after "commission" insert ", consistent with existing law and rules,"

Page 10, line 11, after the underscored period insert "A permanent marker is to be erected and maintained over the disposal site."

Page 10, line 14, remove "If the commission requires a bond to be"

Page 10, line 15, replace "furnished, the" with "The"

Page 10, line 22, after "application" insert "; monitoring and inspection of the exploration site; monitoring and inspection of the facility; and environmental and monetary impact of the facility"

Page 10, line 23, after "rendered" insert "and impact to the state and local area"

Page 10, line 23, after "the" insert "annual operating"

Page 10, line 24, remove "permit to operate a"

Page 10, line 24, after "facility" insert "permit"

Page 10, line 25, replace "eight hundred thousand" with "one million"

Page 11, line 13, after the underscored period insert:

"2. A notice of opportunity for a position paper from the commissioners of the county must be attached to the permit application.

3."

Page 11, line 14, after the underscored period insert "Notice must be provided in accordance with Rule 3 of the North Dakota Rules of Civil Procedure.

4."

Page 11, line 16, after "location" insert ", the county commissioners and mayor of any municipality within thirty miles [48.28 kilometers], and publish a notice in the official county newspaper and any county newspaper within thirty miles [48.28 kilometers] of the proposed location"

Page 11, line 16, after the underscored period insert:

"5."

Page 11, line 18, replace "forty-five" with "sixty"

Page 11, line 20, replace "2." with "6."

Page 12, line 5, replace "3." with "7."

Page 12, line 10, replace "4." with "8."

Page 12, line 13, replace "5." with "9."

2002

Page 12, line 16, replace "6." with "10."

Page 13, line 2, remove "from the"

Page 13, line 3, remove "federal government"

Page 13, line 12, remove ", and three members"

Page 13, line 13, remove "appointed by the governor"

Page 13, line 14, replace "The" with "Additional"

Page 13, line 14, replace "appointed by the governor must be" with "on the council are"

Page 13, line 15, after "government" insert ", appointed by the governor"

Page 13, line 16, after "government" insert ", appointed by the governor"

Page 13, line 16, remove "and"

Page 13, line 17, after "community" insert ", appointed by the governor;

d. One senator, appointed by the majority leader of the senate of the legislative assembly; and

e. One representative, appointed by the majority leader of the house of representatives of the legislative assembly"

Page 13, line 28, replace ", if requested by" with "to"

Page 14, line 5, after "prohibit" insert "a high-level radioactive waste disposal exploratory drilling permit or"

Renumber accordingly

Date: 2/14
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. _____

Senate Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 19.0038.04002

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Roers Seconded By Sen. Cook

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh			Senator Merrill Piepkorn		
Senator Curt Kreun					
Senator Donald Schaible					
Senator Dwight Cook					
Senator Jim Roers					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Voice Vote
Motion Carries

Date: 2/14
Roll Call Vote #: 2

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2037

Senate Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 19.0038.04002

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Roers Seconded By Sen. Kreun

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh	X		Senator Merrill Piepkorn	X	
Senator Curt Kreun	X				
Senator Donald Schaible	X				
Senator Dwight Cook	X				
Senator Jim Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Roers

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2037: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2037 was placed on the Sixth order on the calendar.

Page 8, line 20, after "commission" insert ", consistent with existing law and rules,"

Page 10, line 11, after the underscored period insert "A permanent marker is to be erected and maintained over the disposal site."

Page 10, line 14, remove "If the commission requires a bond to be"

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Renumber accordingly

2019 HOUSE ENERGY AND NATURAL RESOURCES

SB 2037

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau A Room, State Capitol

SB 2037
3/7/2019
33383

☐ Subcommittee
☐ Conference Committee

Committee Clerk, Kathleen Davis by Donna Whetham

Explanation or reason for introduction of bill/resolution:

Relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; relating to the definition of illegal transportation or disposal of radioactive waste material or hazardous waste and disposition of unusable products; relating to the disposal of nuclear waste material and provide a penalty.

Minutes: Attachment 1,2,3,4,5,6,7,8,9

Chairman Porter: Opened the hearing on SB 2037.

Christopher Joseph, Legislative Council to provide overview information on what the interim committee presented as the bill. presented (**Attachment 1)**.

6:24

Rep. Lefor: This does not allow for a county to accept or decline to have that in their county. County approval first and then the state.

Chairman Porter: Further testimony in support of SB 2037.

Sen. John Nelson, District. 14: I have been working with the Community Alliance in Pierce County on this bill . The Century Code needs to be updated in this regard, it has been too long. We need to tighten up some issues about local control. We truly need to have a partnership as to how do we work in this arena. It's a valid concern if a nuclear waste disposal site comes into your community. We want to distinguish between high level nuclear waste and the T norm waste that is developed through drilling. That is taken care of in the amendment of the bill. The main amendments were to add protections for the citizens are in the area of the permit fee. Not only did he permit fee go from $800,000 to $1million annually. A bond is required in the amendment. There's an additional provision that the county of origin where that site is located is publicized. In Pierce county several years ago the local residents heard about this in the newspaper. That doesn't get a project off to a very good start. Now if you live within 2 miles of a proposed you're notified by certified, mail . The mayor and the county commission is notified within a 30 mile radius and in the county newspaper. The legislature is the peoples voice. The bill was silent on

that. In the senate amendment they added a member from the house and senate to the advisory committee. That committee is made up of agency heads, as it came out of the committee 1 member in the agricultural committee,1 from the city, and 1 from county appointed by the governor. There was three community members and added two legislators to that list. We also allow the county to submit a position paper if an applicant does come forward and we are asking that it be made public after it is accepted by the industrial commission. We are asking in a separate amendment to allow the advisory committee to publish a report, must meet once a year, made public to Industrial Commission and Legislature. I am offering an amendment today to add an additional member from the house and senate to this advisory committee. So the peoples voice has an opportunity to be heard. Those positions would be appointed by the majority leader in each chamber. This is the only ability for the legislature to weigh in in this proposal. It's important we have a bill and support to pass this. I think this is a good first step to go forward. Possibly another amendment that is coming with the issue of definition. With the changing pace of what is considered to be high nuclear waste there are some definitions in Federal code that we would like to see added. With these amendments and potential additions, I would support this bill.

Rep Heinert: You talked about the counties position paper to be a part of the application process but you also talked about a 30 mile radius of the site and the mayors and the commission chairs being notified. Is the commission opinion paper just for the county where it is to be sited or if the 30 miles cross the county lines does each of the additional counties get to weigh in on it? What about those local mayors?

Sen. Nelson: The way the bill sits today it is the county where the project is located is the home county and they would have the notice. Any city within 30 miles would be provided notice that an application has come forward for exploration or disposal. This is in both areas, the county of origin is the one that would have the opportunity to write the position paper. I did neglect to say there was a 45 day window that was extended in the Senate to 60 days. The peoples opportunity to weigh in is still available but this would be an official county of origin ability to write that position paper.

Rep Heinert: The local mayors if they are within the county would go to their county commission versus writing their own position paper?

18:45

Sen. Nelson: There is no ability for the local mayors to be part of that official paper but they could do that on their own or in conjunction with the county. They wouldn't have to be in the same county. When we're talking disposal of high level waste want people to be aware of this.

Rep. Keiser: Relative to the penalty, it says a civil penalty of no more than $12,500, what if it costs us $50,000 to correct the problem and we have said the civil liability is $12,500?

Sen. Nelson: That wasn't changed in the amendments that I have seen.

Rep. Keiser: We would need new language on Page 6. This is really a significant issue. They should be held accountable for a violation and they should be held accountable for what it costs plus.

Sen. Nelson: The $1million dollar application fee goes into a separate fund that would pay for the administration and the watch dogging from the Industrial commission of this. We did not discuss this aspect of the bill.

Rep. Keiser: I don' mind the million fee to get in but if they violate it I want them to pay.

Sen. Nelson: I don't disagree with you. There is a need for protections, as many as we can offer. There is a need in this country for disposal and they're looking at areas to do this and they have identified North Dakota as one option.

22:50

Ed Murphy, North Dakota State Geologist: In support of SB 2037. Bringing in local control on this issue is very important, the advisory council is important also with legislators on it. Presented (**Attachment 2).**

32:02

Chairman Porter: If we passed this bill and the federal government says we have supremacy over this issue and then there's nothing we can do with it.

Ed Murphy: That is correct to a degree, with Yucca Mountain in Nevada the governor of Nevada did issue a notice of disapproval and that was overridden by congress in 2010. So at least there is a procedure to follow. If I gets to that point where the president has agreed that the site should be nominated then you really come down to getting both houses of congress to not override the notice of disapproval.

Chairman Porter: with the permit fees and the penalty and even the felony, those are really against the federal government. Are they even enforceable?

Ed Murphy: Although there is a component now that there's some things happening. They alerted us to this and the Department of Energy is trying to change some definition such as High level radioactive waste. I don' know if they're going to be successful. I think they're going to look at private companies to do this. I don't see that as a problem with the federal facility because they would have to pay for that and they have a special fund. If this passes in this format the advisory council will be very busy the next four years sorting a lot of issues out and bringing it back next session.

35:00

Rebecca Leier, North Dakota Community Alliance: In support of SB 2037 with amendments that she explained. Presented (**Attachment 3).**

51:36

Rep. Roers Jones: Are the changes you're requesting the same changes or in addition to the amendments suggested from Sen. Nelson?

Rebecca Leier: I will say in addition to because they are the same as he did reference them but not clearly where they are in the bill and why they are important. I would say you would have to note in addition to Sen. Nelson's amendments. Continued presenting **(Attachment 3).**

57:38

Nelson Amendments .06001, .06002, .06003 as (**Attachment 4)** were passed out.

58:00

David Glatt, North Dakota Department of Health, Environment Health Section: In support of SB 2037. This is an important issue and the state needs to get their input into this and we only have a certain amount of time. To answer Rep. Keiser's question on the penalties, $12,500 per day is only one element. That is per day per violation. If there is more than one so that goes per violation. There is also a bonding requirement and there is the ability to do injunctions that you require them to clean it up. On the definitions, do you want to put a lot of specific definitions in the law and if the federal government changes theirs we would have to go back and change the law. I personally think if you have a broad definition in the law and specific ones in the rules. Rules are able to be changed easier. The Nuclear regulatory commission when you look at other state laws you have to look at whether or not they are legal or not. We do need to look at other state laws but are they legal. This bill is not perfect in every way but it is a step in the right direction. This is important enough that it should be an ongoing discussion.

Chairman Porter: Inside of the penalty component, this could become a privatized situation. Are you comfortable with the way the penalty component is if it becomes private?

1:01:00

David Glatt: I would be comfortable if there is an adequate bonding requirement. Then we can use the bond to make the site right if the person walked away. I do not feel comfortable if we just have the penalty alone and injunction ability.

Chairman Porter: As far as the current definition, are there changes you will supply the committee that you think would fit better under the definition of high level radioactive waste means?

Mr. Glatt: I'd like to have a further conversation with North Dakota Community Alliance on that. At this point I'm not ready to give a definition.

Rep. Keiser: I don't know how you work the penalty but $12,500 per day per violation sounds big, but compared to the risk it may not be big at all. The bond is a catch 22, it is too great, no one can do it so maybe that is the solution. We could put the bond

requirement at a level they can't meet. If an issue arose, it could get into the hundreds of millions of dollars potentially. Can we require them to cover any uncovered problems?

Mr. Glatt: Under existing statute and how we deal with things today, we make the bonds commensurate with what your activity is and what it would take to clean it up. Those are evaluated on a periodic basis so your bond may change. You're looking at high stakes high dollar issues here. I would suggest that your bond would reflect what it takes to clean it up and remove it. If it is too high they can go someplace else. We would be fair about it.

Chairman Porter: 1:05:13 You are comfortable on page 10 with "the good and sufficient surety conditioned on the full compliance with this chapter" covers the DEQ's authority to set that bonding level upon permitting.

Mr. Glatt: Yes, I'm comfortable with that language and looking at other agencies.

Rep. Keiser: What other communities in the United States have had one of these approved and put into operation?

Mr. Glatt: I'm not aware of any but I am aware of some communities that would like to have one.

Rep. Keiser: Let them have it then. My point is we can't know the risk because it hasn't been done and none has gone into default.

Mr. Glatt: I agree with that to a certain extent. There are some installations such as Washington state that require very high dollar bonds. We currently deal with some low level things that require bonding and we quantify how much it would cost to clean it up.

1:08:00

Stephanie Steinke, Member of the Community Alliance, In support of SB 2037. I passed out a summary from 5 different states and what they have done, in there you will find wording about high level radioactive waste. presented (**Attachment 5).**

1:14:22

Dallas Hager, North Dakota Alliance: In support**.** presented (**Attachment 6).**

1:16:03

Liz Anderson, Dakota Resource Council: In support of SB 2037. presented **Attachment 7**

1:19:30

Rep Heinert: In your testimony on line 7 page one it is not strong enough to protect local communities from these facilities? What is your real point to that, do you not want these facilities at all?

Ms. Anderson: The DRC wants the local communities to have as much voice as possible. So it they want it then that good. We just want to make sure the local communities have the say.

Rep Heinert: So the amendment that talks about the county commission having the authority to write a paper on it that becoming public then that would suffice?

Ms. Anderson: Yes sir and also the council that we had to ask for legislators to be on there would help in that area.

Rep. Keiser: As a representative of Dakota Resource Council you are involved in lots of legislation. I support your adding legislators to the council but they have no impact on the legislature. I feel that is a misrepresentation that it will have a lot more impact on the work product of the council. They may add a lot to the discussion but they cannot represent the full legislature in any decision. I don't think it brings the additional value that has been suggested here today.

Ms. Anderson: I think that's clear to me they do not speak for the whole legislature. What adds the value is the information they may present.

1:22:00

Wayde Schafer, Conservation Organizer for The Dacotah Chapter of Sierra Club: We definitely support getting rules and regulations in place, but there is one portion of this that we oppose is the lack of local control. presented (**Attachment 8)**.

1:29:30

Chairman Porter: Questions? Further support? Opposition?

Larry Heilman, biochemist from Fargo: In opposition to SB2037. Encouraged a Do not pass recommendation. presented (**Attachment 9)**.

Chairman Porter: Any other testimony? Seeing none. Closed the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau A Room, State Capitol

SB 2037
3/14/2019
33692

☒ Subcommittee
☐ Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; relating to the definition of illegal transportation or disposal of radioactive waste material or hazardous waste and disposition of unusable products; relating to the disposal of nuclear waste material and provide a penalty.

Minutes: Attachment 1,2

Chairman Lefor:

Blaine Schmaltz, ND Community Alliance: presented Attachment 1 and 2

Rep. Nelson:

- Concerns come from a community feeling they were violated, not informed
- Question of ND being a permissive state where other states are more prohibitive, that we are a weaker legislative state in the Union
- If we could add, a legislative intent language, ND does not want high level nuclear waste
- I will support this bill with or without that language because it's better language than we have now.

Ed Murphy, State Geologist, Dept of Mineral Resources

- DEQ and DER attorneys have probably put in 400 hours, I have about 1000 hours on this, the Community Alliance brought forth 2 dozen amendments and we've accepted 10 of those. What is before us is a better bill.
- Utah law on high level waste was reviewed
- The number of representatives on this committee going from 2-4 would be good, potential bill sponsors for the next legislative session
- County position paper must be made public at the time it is submitted.

David Glatt: Section Chief of the Dept of Health, soon to be Dept. Environmental Quality

- Maybe with an opening state, a general prohibition to high level radioactive waste
- We also understand the Feds have some control over this

- that general prohibition may require the Feds to challenge and shoot that down, and then we have to deal with that process
- If that question comes up, be ready to address it
- the advisory board
- Maggie Olson, DEQ and Nicki Meyer, Mineral Resources, attorney's will work on language/wording for a general prohibition
- Striking "person", I think would not be legal. We can't prohibit things like that. It becomes interstate commerce and the feds have control.

Chairman Lefor

- Have attorneys look at a general intent statement
- Recommend to the full committee we want that general intent statement added to the legislation and Rep. Nelson's 3 amendments
- Legislative management vs study, Rep. had no issues with that

The subcommittee hearing adjourned.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau A Room, State Capitol

SB 2037
3/15/2019
33811
☐ Subcommittee
☐ Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; relating to the definition of illegal transportation or disposal of radioactive waste material or hazardous waste and disposition of unusable products; relating to the disposal of nuclear waste material and provide a penalty.

Minutes: Attachment 1

Chairman Porter: opened the hearing on SB 2037.

Rep. Lefor: the subcommittee met and heard testimony from Ed Murphy, Dave Glatt, Chris Joseph. We came to a consensus on everything.

- On Attachment 1, I passed out, an update Christopher Joseph, LC, made me aware that under general prohibition it should be 38-23-01, so replace 32 with 23. On page 1 after line 11, insert the word exploration, after the comma on treatment. This was agreed by all parties. Some of the reasons we didn't go beyond was to allow the Commission to be able to promulgate rules and be more flexible in case where Federal law might change or situations may change.

- On 06001 Page 13, line 29, replace "1 senator" with "2 senators"; Page 14, Line 1 replace "1 representative" with "2 representatives."

- Then on 06002, by Rep. Nelson, Page 14 after Line 19, add "d" Report its findings biennially to the commission and to the legislative management.

- Under proposed 06003, Page 11, line 18, after the underscored period insert "A county position paper must be made public at the time the permit application is submitted."

I think everybody knows this will probably be back in 2 years with updates to this as they continue to learn more and more. The committee last session recall looking at least exploring having nuclear waste near Rugby where the citizens were not made aware of it at all. This is trying to be proactive for the future. It sets some basic framework for this issue.

Rep. Zubke: Adding the word "exploration"; at one time there were several uranium mines in ND and how do you explore for high level radioactive waste.

Rep. Lefor: The additional thing they're trying to do is virtually stop any attempt at this storage of high level nuclear waste including storage, exploration of, disposal of. I will tell you that if there is opposition to that word it won't be met with very stiff resistance. In quoting Mr. Glatt this morning, he did not have a problem with it but at the same time I feel a little bit of fatigue at the requests these individuals are making.

Rep. Zubke: Do you think having that word in there would prevent uranium mining?

Rep. Lefor: I couldn't answer that question.

Chairman Porter: Instead of using the blanket word, exploration, would it be better to put after the word disposal, including exploration for disposal?

Rep. Lefor: yes it would

Chairman Porter: and then take out of consideration, restricting somebody's mineral interest because if we aren't clear, we are potentially restricting somebody else's personal property inside of a mineral estate where uranium does fall in to.

Rep. Lefor: I think that's fine. I also think it's fine to take the word exploration out and leave the amendment the way it was.

Chairman Porter: From my standpoint, we'll rely on your expertise inside of the work of the subcommittee.

Rep. Lefor: I would say remove the word "exploration". On the proposed amendment, the only thing different is the number in the code from 32 to 23.

Rep. Lefor: I move the amendments as have been described.

Rep. Ruby: second.

Chairman Porter: I have a motion and a second for the amendments as presented, with the removal of "exploration" as printed, and the replacement of the number of "32" with "23". Discussion? Voice vote, motion carries.

Rep. Lefor: I move a Do Pass as Amended.

Rep. Eidson: second.

Chairman Porter: I have a motion and a second for a Do Pass as Amended to SB 2037. Discussion? Roll call vote. 10 yes, 0 no, 4 absent. Rep. Lefor is carrier.

DP 3/16/19

19.0038.06004
Title.07000

Adopted by the House Energy and Natural Resources Committee
March 15, 2019

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2037

Page 8, line 12, after "**38-23-01.**" insert "**General prohibition.**

The placement, including storage, treatment, or disposal, of high-level radioactive waste within the exterior boundaries of North Dakota is prohibited. If this provision is superseded by federal law, the remaining provisions of this chapter continue to apply. This section does not limit the authority of the legislative assembly or the commission to issue a notice of disapproval under this chapter.

38-23-02."

Page 8, line 29, replace "**38-23-02**" with "**38-23-03**"

Page 11, line 13, replace "**38-23-03**" with "**38-23-04**"

Page 11, line 18, after the underscored period insert "A county position paper must be made public at the time the permit application is submitted."

Page 13, line 1, replace "**38-23-04**" with "**38-23-05**"

Page 13, line 9, replace "**38-23-05**" with "**38-23-06**"

Page 13, line 12, replace "**38-23-06**" with "**38-23-07**"

Page 13, line 17, replace "**38-23-07**" with "**38-23-08**"

Page 13, line 29, replace "One senator" with "Two senators"

Page 14, line 1, replace "One representative" with "Two representatives"

Page 14, after line 19, insert:

"d. Report its findings biennially to the commission and to the legislative management."

Page 14, line 20, replace "**38-23-08**" with "**38-23-09**"

Renumber accordingly

Date: 3-15-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2037

House Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: proposed amendment, 19.0038.06001, 19.0038.06002 and 19.0038.06003

Recommendation: ☒ Adopt Amendments
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Lefor Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep Bosch			Rep. Ruby		
Rep. Devlin			Rep. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment Voice vote. Motion Carried

If the vote is on an amendment, briefly indicate intent:

Date: 3-15-19
Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2037

House Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 19.0038.06004

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Lefor Seconded By Eidson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	A		Rep. Marschall	✓	
Rep. Anderson	✓		Rep. Roers Jones	✓	
Rep Bosch	A		Rep. Ruby	✓	
Rep. Devlin	✓		Rep. Zubke	✓	
Rep. Heinert	✓				
Rep. Keiser	AB		Rep. Mitskog	AB	
			Rep. Eidson	✓	

Total (Yes) 10 No 0

Absent 4

Floor Assignment Rep. Lefor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2037, as reengrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 0 NAYS, 4 ABSENT AND NOT VOTING). Reengrossed SB 2037 was placed on the Sixth order on the calendar.

Page 8, line 12, after "**38-23-01.**" insert "**General prohibition.**

The placement, including storage, treatment, or disposal, of high-level radioactive waste within the exterior boundaries of North Dakota is prohibited. If this provision is superseded by federal law, the remaining provisions of this chapter continue to apply. This section does not limit the authority of the legislative assembly or the commission to issue a notice of disapproval under this chapter.

38-23-02."

Page 8, line 29, replace "**38-23-02**" with "**38-23-03**"

Page 11, line 13, replace "**38-23-03**" with "**38-23-04**"

Page 11, line 18, after the underscored period insert "A county position paper must be made public at the time the permit application is submitted."

Page 13, line 1, replace "**38-23-04**" with "**38-23-05**"

Page 13, line 9, replace "**38-23-05**" with "**38-23-06**"

Page 13, line 12, replace "**38-23-06**" with "**38-23-07**"

Page 13, line 17, replace "**38-23-07**" with "**38-23-08**"

Page 13, line 29, replace "One senator" with "Two senators"

Page 14, line 1, replace "One representative" with "Two representatives"

Page 14, after line 19, insert:

"d. Report its findings biennially to the commission and to the legislative management."

Page 14, line 20, replace "**38-23-08**" with "**38-23-09**"

Renumber accordingly

2019 CONFERENCE COMMITTEE

SB 2037

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2037
4/11/2019
Job Number 34697

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the disposal and storage of high-level radioactive waste and subsurface storage and retrieval of nonhydrocarbons; relating to the definition of illegal transportation or disposal of radioactive waste material or hazardous waste and disposition of unusable products; and relating to the disposal of nuclear waste material; and to provide a penalty.

Minutes: 2 Attachments

Chairman Roers: Opened the conference committee.

Representative Lefor: I've handed out an amendment, **please see attachment #1**, and Ed Murphy is passing out some amendments, **please see attachment #2**. From the amendment I've given you, they've taken out the word 'including' so that the other words would not be defined under the placement, the staff attorneys felt uncomfortable about the other words being defined under placement. Another request they had is in green at the bottom, the waste fund will 'be maintained as a special fund and all moneys transferred into the fund are hereby appropriated and must be used and disbursed solely for the purposes in this chapter.' Which makes sense to me, it is a special fund. But it clarifies it, our original objection to the words exploration and testing was due to a conversation in the committee that had some concerns that if you added the word exploration, you are then hurting other areas, such as uranium mines. We have been told that's not a concern. If you look at the amendment here from Mr. Murphy for 38-23-01, and 38-23-07, those two, and then Representative Nelson also had some updates, which update numbers and page 11, line 18, insert 'a county position paper must be made public at time of the permit application is submitted.' Then on page 13, line 29, one senator to two senators, and one representative to two representatives to add more legislative involvement, that was all right with everybody involved, and then report its findings biannually to the commission and to legislative management, There's difference forms we could take, we could take Representative Nelson's amendment, and take out 'including,' and the comma after disposal, and go with the rest of that, and we'd be okay with that, and then adding Mr. Murphy's request about special funds and the definition thereof.

Ed Murphy, State Geologist Department: Representative Lefor covered everything very well. He mentioned our attorneys, in looking at this, the language that was proposed, we're concerned that if we didn't strike 'including,' it could be interpreted that exploration and testing

would then be prohibited only when it was tied to placement. I think that is a better solution. I discussed this with legislative council, they suggested that we strike 'including.'
For the high level radioactive waste fund; if this looked like it was not going to be going back to the House, I thought we might hold this until next session, it sounds like it will, then I'd like to add this language, that this fund must be maintained as special fund, all moneys transferred in are appropriated and must be used and dispersed solely for the purposes in this chapter. We realized that we got caught with the fiscal note, which originally was $2,820 we submitted it back in December, because of the amendments, instead of paying the travel and expenses for three appointed officials, now we were paying for seven, and also we originally planned for two meetings for the biennium; it became clear that we need to meet probably every four months. I calculated for six meetings next biennium. We have an awful lot to do for that advisory council. We're going to be generating rules, that council will need to have input into that.

Senator Piepkorn: On page 8, line 12, if including was not eliminated, then storage, treatment, exploration, testing or disposal, those would all be considered in the placement category, now they are separate?

Mr. Murphy: That's correct. It doesn't change the intent, it clarifies.

Representative Lefor: I move that House recede from its amendments and amend as follows, using amendment draft ending in .06006, changing on page 8, line 12, removing 'including' and taking the comma after disposal and leaving the rest of the amendment intact. Additionally, under 38-23-07, high level radioactive waste fund, add the words, 'this fund must be maintained as a special fund and all moneys transferred into the fund are hereby appropriated and must be used and disbursed solely for the purposes in this chapter.'
Representative Roers Jones: I second.

A roll call vote was taken.
Motion passes 6-0-0.

Chairman Roers and Representative Lefor will carry.

Chairman Roers: Closed the conference committee.

19.0038.06007
Title.08000

Adopted by the Conference Committee

April 11, 2019

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2037

That the House recede from its amendments as printed on pages 1025 and 1026 of the Senate Journal and pages 1219 and 1220 of the House Journal and that Reengrossed Senate Bill No. 2037 be amended as follows:

Page 1, line 7, remove "and"

Page 1, line 7, after "penalty" insert "; and to provide a continuing appropriation"

Page 8, line 12, after the boldfaced period insert "**General prohibition.**

The placement, storage, exploration, testing, or disposal of high-level radioactive waste within the exterior boundaries of North Dakota is prohibited. If this provision is superseded by federal law, the remaining provisions of this chapter continue to apply. This section does not limit the authority of the legislative assembly or the commission to issue a notice of disapproval under this chapter.

38-23-02."

Page 8, line 29, replace "**38-23-02**" with "**38-23-03**"

Page 11, line 13, replace "**38-23-03**" with "**38-23-04**"

Page 11, line 18, after the underscored period insert "A county position paper must be made public at the time the permit application is submitted."

Page 13, line 1, replace "**38-23-04**" with "**38-23-05**"

Page 13, line 9, replace "**38-23-05**" with "**38-23-06**"

Page 13, line 12, replace "**38-23-06**" with "**38-23-07**"

Page 13, after "**fund**" insert "**- Continuing appropriation**"

Page 13, line 16, after the underscored period insert "This fund must be maintained as a special fund and all moneys transferred into the fund are hereby appropriated and must be used and disbursed solely for the purposes of this chapter."

Page 13, line 17, replace "**38-23-07**" with "**38-23-08**"

Page 13, line 29, replace "One senator" with "Two senators"

Page 14, line 1, replace "One representative" with "Two representatives"

Page 14, after line 19, insert:

"d. Report its findings biennially to the commission and to the legislative management."

Page 14, line 20, replace "**38-23-08**" with "**38-23-09**"

Renumber accordingly

Date: 4/11
Roll Call Vote #: 1

2019 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2037 as (re) engrossed

Senate Energy and Natural Resources Committee

Action Taken
- ☐ **SENATE accede to House Amendments**
- ☐ **SENATE accede to House Amendments and further amend**
- ☐ **HOUSE recede from House amendments**
- ☒ **HOUSE recede from House amendments and amend as follows**

- ☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Rep. Lefor Seconded by: Rep. Roers Jones

Senators	4/11			Yes	No	Representatives	4/11			Yes	No
Senator Roers	X			X		Representative Lefor	X			X	
Senator Kreun	X			X		Representative Roers Jones	X			X	
Senator Piepkorn	X			X		Representative Marschall	X			X	
Total Senate Vote				3		Total Rep. Vote				3	

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier Sen. Roers House Carrier Rep. Lefor

LC Number 19.0038.06007 of amendment

LC Number 19.0038.08000 of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Insert LC: 19.0038.06007
Senate Carrier: J. Roers
House Carrier: Lefor

REPORT OF CONFERENCE COMMITTEE

SB 2037, as reengrossed: Your conference committee (Sens. J. Roers, Kreun, Piepkorn and Reps. Lefor, Roers Jones, Marschall) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 1025-1026, adopt amendments as follows, and place SB 2037 on the Seventh order:

That the House recede from its amendments as printed on pages 1025 and 1026 of the Senate Journal and pages 1219 and 1220 of the House Journal and that Reengrossed Senate Bill No. 2037 be amended as follows:

Page 1, line 7, remove "and"

Page 1, line 7, after "penalty" insert "; and to provide a continuing appropriation"

Page 8, line 12, after the boldfaced period insert "**General prohibition.**

The placement, storage, exploration, testing, or disposal of high-level radioactive waste within the exterior boundaries of North Dakota is prohibited. If this provision is superseded by federal law, the remaining provisions of this chapter continue to apply. This section does not limit the authority of the legislative assembly or the commission to issue a notice of disapproval under this chapter.

38-23-02."

Page 8, line 29, replace "**38-23-02**" with "**38-23-03**"

Page 11, line 13, replace "**38-23-03**" with "**38-23-04**"

Page 11, line 18, after the underscored period insert "A county position paper must be made public at the time the permit application is submitted."

Page 13, line 1, replace "**38-23-04**" with "**38-23-05**"

Page 13, line 9, replace "**38-23-05**" with "**38-23-06**"

Page 13, line 12, replace "**38-23-06**" with "**38-23-07**"

Page 13, after "**fund**" insert "**- Continuing appropriation**"

Page 13, line 16, after the underscored period insert "This fund must be maintained as a special fund and all moneys transferred into the fund are hereby appropriated and must be used and disbursed solely for the purposes of this chapter."

Page 13, line 17, replace "**38-23-07**" with "**38-23-08**"

Page 13, line 29, replace "One senator" with "Two senators"

Page 14, line 1, replace "One representative" with "Two representatives"

Page 14, after line 19, insert:

"d. Report its findings biennially to the commission and to the legislative management."

Page 14, line 20, replace "**38-23-08**" with "**38-23-09**"

Renumber accordingly

Reengrossed SB 2037 was placed on the Seventh order of business on the calendar.

2019 TESTIMONY

SB 2037

Senate Bill No. 2037 (2019)
January 4, 2019 at 9:15 a.m.

Senate Bill No. 2156 (2017) required the Legislative Management to study, in consultation with the Geological Division of the Department of Mineral Resources and the Environmental Health Section of the State Department of Health, whether:

- State and local level regulation of high-level radioactive waste disposal is consistent with applicable federal regulations;
- How to ensure the state has proper input into the federal location selection process for high-level radioactive waste material deposits;
- Special laws, local laws, and existing code regarding the potential existence of a legislative veto over executive branch authority to determine the size, scope, and location of high-level radioactive waste material deposits in the state and any existing conflicts with the Commerce Clause; and
- The feasibility and desirability of developing new statutes and regulations for subsurface disposal of waste and the storage and retrieval of material.

The study was assigned to the Natural Resources Committee.

Testimony and presentations were received from:

- Residents of Pierce county;
- State Geologist, Department of Mineral Resources;
- Section Chief, Environmental Health Section, State Department of Health;
- Principal Geologist, Geosciences Group Lead, Energy and Environmental Research Center; and
- North Dakota Association of Counties.

As a result of the testimony regarding the disposal of high-level nuclear waste in the state, the committee recommends Senate Bill No. 2037 (2019) to regulate the disposal and storage of high-level radioactive waste, permit the Industrial Commission to issue a notice of disapproval in regard to high-level radioactive waste disposal when the Legislative Assembly is not in session, and regulate subsurface storage and retrieval of nonhydrocarbons.

Senate Bill 2037 (2019):

- Repeals Chapter 23-20.2 (Disposal of Nuclear and Other Waste Material);
- Creates two new chapters of Century Code, one for high-level radioactive waste disposal and one for subsurface storage and retrieval of nonhydrocarbons;
- Designates the Industrial Commission as the point of contact with the Department of Energy and other federal agencies;
- Authorizes the Industrial Commission to issue a notice of disapproval if the Legislative Assembly is not in session;

- To cover the costs of permit review, sets the permit fee for a facility at not less than $800,000;
- Establishes guidelines for reporting requirements, preventing pollution, reclamation, and bonds;
- Authorizes the Industrial Commission to regulate drilling, excavating, construction, operation, and onsite inspections;
- Requires an exploration permit from the Industrial Commission before exploring for a high-level radioactive waste facility and require a facility permit before operating a high-level radioactive waste facility;
- Authorizes the Industrial Commission to deny an application if the activity poses a threat to human health or the environment or economic impacts;
- Establishes a high-level radioactive waste fund into which funds from the federal government and permit fees and civil penalties are deposited;
- Creates a high-level radioactive waste advisory council to advise the Industrial Commission and the Legislative Assembly; and
- Authorizes counties to regulate the size, scope, and the location of a facility, but not to prohibit a facility permitted by the Industrial Commission.

Mr. Ed Murphy, State Geologist, Department of Mineral Resources, will provide a more detailed explanation that covers the technical specifications of Senate Bill No. 2037.

No negative votes were cast by the Natural Resources Committee.

SB 2037
1.4.19
att#1
#2

NORTH DAKOTA
D M R
Department of Mineral Resources

Senate Bill 2037

Senate Energy and Natural Resources Committee
January 4, 2019

Comments of Edward C. Murphy, State Geologist

Timeline

1979 NDCC 23-20.2 (Disposal of Nuclear and Other Waste Material) was created giving regulatory authority to the Industrial Commission over the following:

1) Storage and retrieval of material in the subsurface.
2) Subsurface disposal of municipal, industrial, and domestic waste.
3) Subsurface disposal of high-level radioactive waste.

1982 Nuclear Waste Policy Act of 1982

1986 North Dakota Constitution is amended prohibiting special laws or local laws.

1987 "Concurrent resolution" language added to NDCC 23-20.2 to avoid special law or local law designation -- doing so creates a potential legislative veto between legislative and executive branches.

2002 Nevada's Notice of Disapproval overridden by Congress and Yucca Mountain declared a nuclear waste repository. (2008 DOE applied for license to construct, 2010 DOE filed motion to withdraw application…….).

2016 U.S. Department of Energy proposes to fund the drilling of a deep exploration hole in Pierce County.

2017 65th Legislative Assembly: The original version of SB 2156 (referred to Senate Political Subdivisions Committee) added language to NDCC 23-20.2 requiring prior approval from the county and water resource district in that county before testing or exploration for a radioactive waste storage or disposal facility could occur and before any radioactive waste could be brought into the state and deposited.

SB 2156 was amended in the house so that no testing or exploration for a storage or disposal facility could be done unless the legislature had granted prior approval through concurrent resolution. A county's zoning approval could not preclude disposal if approved by the legislature, but could regulate the size, scope, and location.

The House also added study language to SB 2156 for legislative management, in consultation with the Geological Survey and Environmental Health Section (Health Dept.), to determine:

1) if state and local level regulations of high level radioactive waste disposal is consistent with applicable federal regulations;
2) ensure state has input into the federal location selection process for high level radioactive waste;
3) the mechanisms for calling a special session to approve the depositing of high level radioactive waste in the state and the notice of disapproval requirements under federal law;
4) special laws, local laws, and existing code regarding the potential existence of a legislative veto over executive branch authority to determine the size, scope, and location of high level radioactive waste deposits in the
state and any existing conflicts with the commerce clause; and
5) the feasibility and desirability of developing new statutes and regulations for subsurface disposal of waste and the storage and retrieval of material.

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#2

2017-2018

65th Interim Legislative Study – results of the study were presented to the Interim Natural Resources Committee: Studied the nuclear waste disposal laws of 13 states. Committee requested we model North Dakota law after Wyoming's law.

The Nuclear Waste Policy Act of 1982 (Subtitle A)
This federal laws establishes the following process for repository siting approval:

1) Prior to nominating a site the Secretary of Energy shall evaluate available geophysical, geologic, geochemical and hydrologic information and will not bore or excavate at a site unless existing data will not be adequate to evaluate the site.

2) The Secretary of Energy will notify the Governor and legislature of the State of the location and basis for nomination before nominating a repository site.

3) Before nominating a site the Energy Secretary shall hold public hearings in the vicinity of site.

4) The Secretary of Energy notifies the President of a nominated site accompanied by an environmental assessment (to include: site characterization suitability; suitability for development; effects of site characterization on public health, safety, and the environment; comparative evaluation of site with other potential sites; description of the decision process; and assessment of the local and regional impacts this site will have on the area.)

5) The President will approve or disapprove of a candidate site within 60 days (if the President does not act within the 60 day limit the site is considered to be approved). If the President submits to Congress within the 60 day limit a notice of delay, the President may take up to six months to approve or disapprove of a site (if the President does not make a decision within the six month time period, the site is considered approved).

6) Once the President recommends a repository site to Congress, the Governor or legislature of that state has up to 60 days to disapprove the site designation and submit to Congress (Speaker of the House and the President pro tempore of the Senate) a notice of disapproval. The notice of disapproval to be accompanied by a statement of reasons explaining why the State disapproved of the recommended repository site.

7) After Congress receives a notice of disapproval, it must take up a vote on the recommended repository site during the first 90 calendar days of continuous session.

8) If both houses of Congress vote to approve a resolution of repository siting, the resolution becomes law.

The U.S. Nuclear Regulatory Commission (NRC) regulates the production of radioactive source materials, nuclear reactors, nuclear materials, and radioactive waste. The NRC would license a high-level radioactive waste repository. The U.S. Department of Energy is responsible for designing, constructing, operating, and decommissioning a permanent disposal facility for high-level radioactive waste. The U.S. Environmental Protection Agency developed standards for the protection of the general environment from offsite releases of radioactive material in repositories.

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1.4.19
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SUMMARY OF SENATE BILL 2037

NDCC 38-23

The North Dakota Industrial Commission would issue an exploration or testing permit.

1) Permit fee based on anticipated actual cost of services rendered.
2) Reclamation bond based on the cost to properly plug the test hole and reclaim the site.
3) Permit applicant to provide notice to surface owner and resident of a permanently occupied dwelling located within two miles.
4) Commission to give written notice of a permit application to county at least 45 days before hearing.
5) Permit may be denied if the exploration poses a threat to human health or the environment or concerns related to economic impact.

The North Dakota Industrial Commission would issue a disposal facility permit (federal facility).

1) Permit fee based on the size and scope of the facility, but not less than $800,000.
2) Reclamation bond based on the cost to reclaim the facility and return land to a condition consistent with prior land use and productive capacity.
3) Permit applicant to provide notice to surface owner and resident of a permanently occupied dwelling located within two miles.
4) Commission to give written notice of a permit application to county at least 45 days before hearing.
5) Facility permit application to include economic impact.
6) Permit may not exceed five years.
7) Permit may be denied if the operation poses a threat to human health or the environment or concerns related to economic impact.
8) County Zoning Authority cannot prohibit a high-level radioactive waste facility permitted by the Commission, but may regulate the size, scope, and location of the facility.

Notice of Disapproval

1) The ND Industrial Commission has the authority to issue a Notice of Disapproval when the legislature not in session.
2) The ND Legislative Assembly has the authority to issue a Notice of Disapproval when in session.

High-Level Radioactive Waste Advisory Council

State Engineer	State Health Officer	DOT Director	Director of Game & Fish
DEQ Director	Commerce Commissioner	State Geologist	County Gov. Rep.
City Government Rep.	Agricultural Community Rep.		

1) Hold at least one meeting per year (appointed members serve a four year term).
2) Review administrative rules and standards.
3) Review site suitability and issue a report for a proposed facility.

High-Level Radioactive Waste Fund

1) Permit fees, civil penalties, and federal government funds to be deposited in this fund.
2) Fund to be administered by the Industrial Commission to pay for the cost of the program.

NDCC 38-24

Commission would issue exploration and operating permits for subsurface storage and retrieval of nonhydrocarbons.

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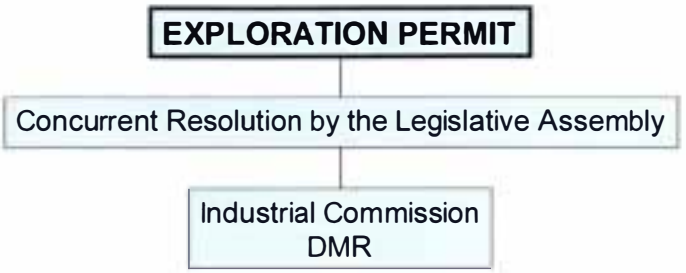
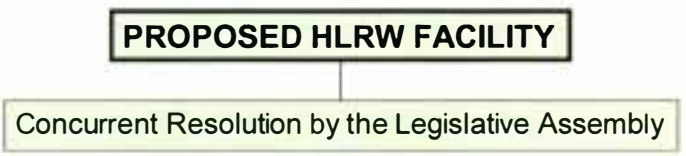
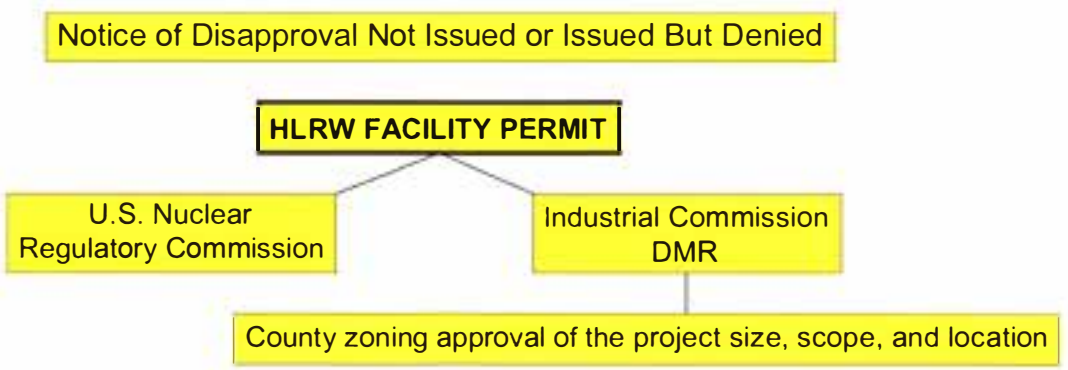
1.4.19
#2

NDCC 23-20.2 (current law)





Notice of Disapproval not addressed



SB 2037
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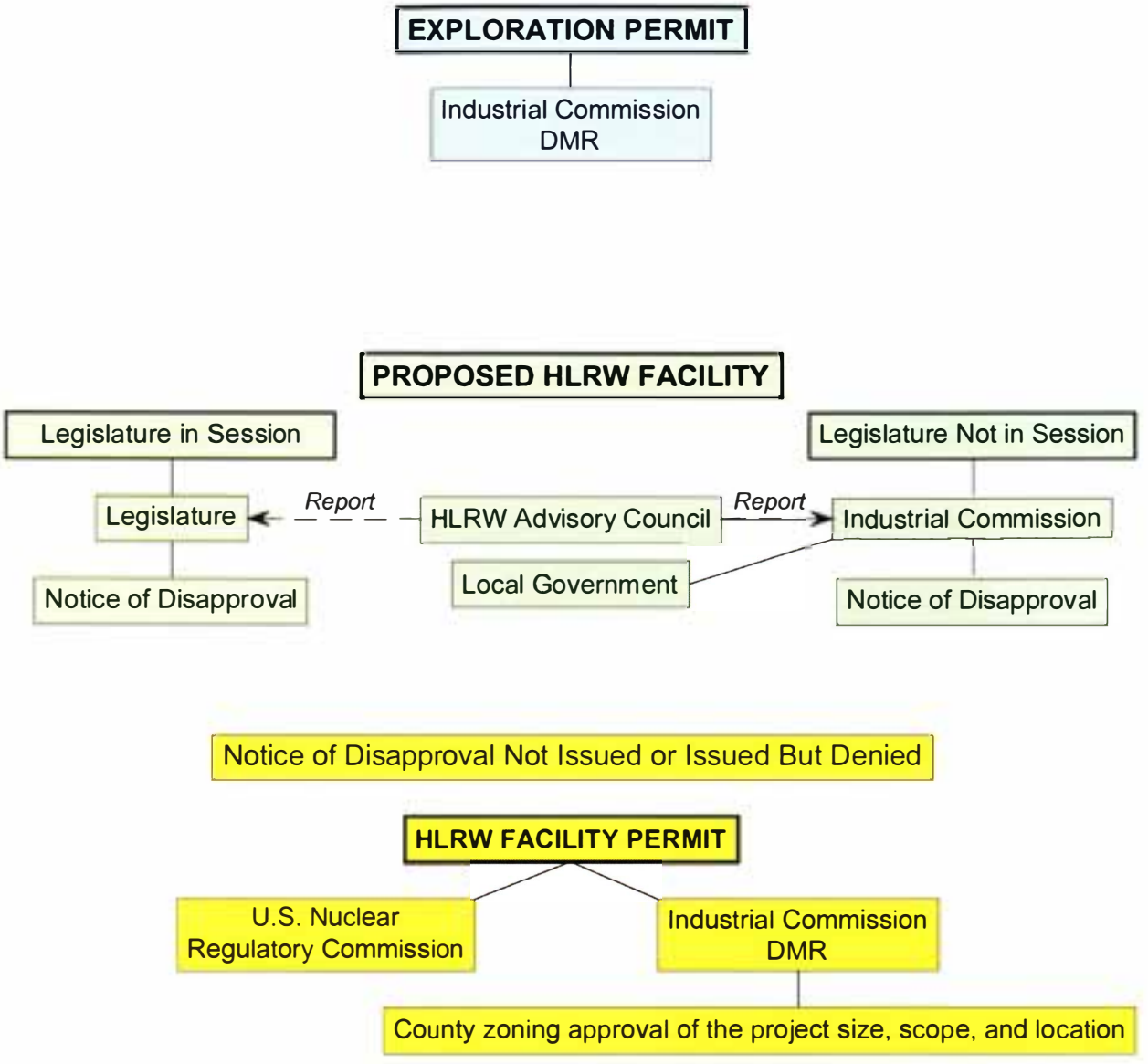
#2

Senate Bill 2037 (NDCC 38-23 as proposed)



SB 2037
1.11.19
#1
Pg. 1

PROPOSED AMENDMENT TO S.B. 2037

Page 11, line 14, after "fee" insert "of at least one million dollars"

Page11, line 14, after "notice" insert "by certified mail"

Page 11, line 15-16, remove "two miles [3.22 kilometers]" and replace with "thirty miles [48.28 kilometers]" 10 miles

Page 11, line 18, replace "forty-five" with "one-hundred and eighty" 90 days

Page 12, after line 19, insert:

"7. Upon the commission's approval of a high-level radioactive waste disposal permit, the Governor shall call a legislative special session within 30 days of the issuance of the permit. The legislature shall review the decision and affirm or reject the commission's decision within four days of being called into session. If the legislature rejects the commissioner's decision the legislature shall issue specific findings.

Page 14, line 5, after "facility" insert "or exploratory drilling for high-level radioactive waste disposal"

Page 15, after line 21, insert:

"5. Adopt and enforce rules for permanent signage warning of the hazardous waste conditions located at the approved site"

SB 2037
1.11.19
#1
Pg. 2

Nelson, Jon O.

From: Todd <Kranda@kelschlaw.com>
Sent: Tuesday, January 8, 2019 8:48 AM
To: Roers, Jim
Cc: Cook, Dwight C.; Haase, Reice J.; Unruh, Jessica K.; Nelson, Jon O.
Subject: SB 2037 amendment

CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Senator Roers –

With regard to the amendments you are working on for your Senate Energy and Natural Resources Committee with Rep Jon Nelson for SB 2037, I have a client, Waste Management, that is supportive of a clarification as to the type of radioactive waste, namely High Level Radioactive Waste, that is being addressed, such that it is not oil and gas waste, norm or low level tenorm. As a result, I am working with Riece Haase of the Governor's office as well to promote the inclusion of the following language as part of the amendment to be located on page 8, after line 21:

> "c. High-level radioactive waste does not include Naturally Occurring Radioactive Material (NORM) or Technologically Enhanced Naturally Occurring Radioactive Material (TENORM), as defined by North Dakota Administrative Code 33-10-23-03."

Please let me know if you have any questions about this proposed addition to the amendments being drafted for SB 2037.

Sincerely,

Todd D. Kranda
Lobbyist for Waste Management

PS – I previously expressed a concern before the hearing on SB 2037 to Chairman Unruh and Senator Cook, who I have copied below so they are aware of the effort to address that concern.

SB 2037
2.8.19
#1

19.0038.04001
Title.

Prepared by the Legislative Council staff for
Representative J. Nelson
February 7, 2019

PROPOSED AMENDMENTS TO SENATE BILL NO. 2037

Page 8, line 20, after "commission" insert ", consistent with existing law and rules,"

Page 10, line 11, after the underscored period insert "A permanent marker is to be erected and maintained over the disposal site."

Page 10, line 14, remove "If the commission requires a bond to be"

Page 10, line 15, replace "furnished, the" with "The"

Page 10, line 21, remove "and"

Page 10, line 22, after "application" insert ", monitoring and inspection of the exploration site, the monitoring and inspection of the facility, and the environmental and monetary impact of the facility"

Page 10, line 23, after "rendered" insert "and impact to the state and local area"

Page 10, line 23, after "the" insert "annual operating"

Page 10, line 24, remove "permit to operate a"

Page 10, line 24, after "facility" insert "permit"

Page 10, line 25, replace "eight hundred thousand" with "one million"

Page 11, after the underscored period insert:

"2. A notice of opportunity for a position paper from the commissioners of the county must be attached to the permit application.

3."

Page 11, line 14, after the underscored period insert "Notice must be provided in accordance with Rule 3 of the North Dakota Rules of Civil Procedure.

4."

Page 11, line 16, after "location" insert ", the county commissioners and mayor of any municipality within thirty miles [48.28 kilometers], and publish a notice in the official county newspaper and any county newspaper within thirty miles [48.28 kilometers] of the proposed location"

Page 11, after the underscored period insert:

"5."

Page 11, line 18, replace "forty-five" with "sixty"

Page 11, line 20, replace "2." with "6."

Page 12, line 5, replace "3." with "7."

Page 12, line 10, replace "4." with "8."

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#1

Page 12, line 13, replace "5." with "9."

Page 12, line 16, replace "6." with "10."

Page 13, line 2, remove "from the"

Page 13, line 3, remove "federal government"

Page 13, line 28, replace ", if requested by" with "to"

Page 14, line 5, after "prohibit" insert "a high-level radioactive waste disposal exploratory drilling permit or"

Renumber accordingly

SB 2037
2-8-19
#2

Senate Bill 2037

Senate Energy and Natural Resources Committee

February 8, 2019

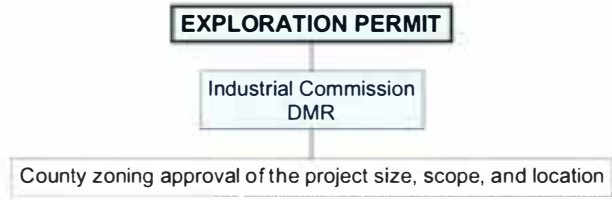
Ed Murphy, State Geologist

Existing Law

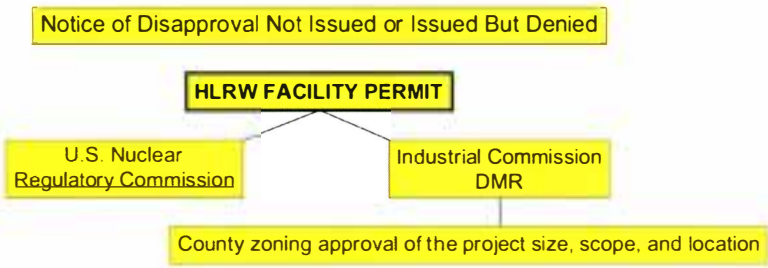
NDCC 23-20.2

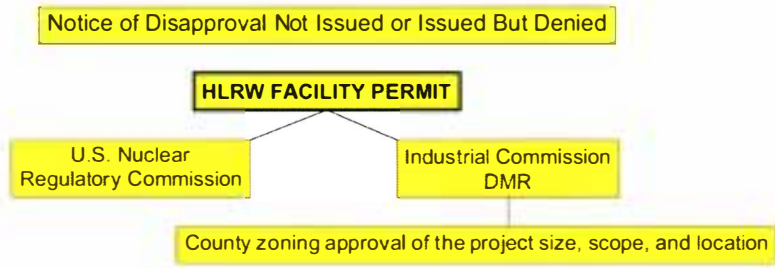
Proposed

NDCC 38-23



Notice of Disapproval (60 Day Window)





SB 2037
2.8.19
#3

North Dakota Community Alliance
ndcommunityalliance@gmail.com
www.facebook.com/NDcommunityalliance/
Rugby, ND 58368

1. For the North Dakota Community Alliance, it is of primary importance that the North Dakota Legislative body retains oversight in the process of permitting High Level Radioactive Waste exploration, transportation, disposal and storage in the state of North Dakota. We have requested a mechanism be written into SB #2037, that would address creating Legislative oversight throughout the permitting process, while in session and during the Legislative interim. As currently drafted, SB#2037, removes the voice of North Dakota citizens by removing their elected representatives during major portions of the process. Furthermore, as drafted, SB#2037 gives sweeping powers to the State Geologist, acting on behalf of the State Industrial Commission as covered on **page 9 – items 2,4**. These powers include, entering into agreements and litigation and other far reaching decision making on behalf of the state of North Dakota in regards to High-Level Radioactive Waste. Conversely the State Legislature, the elected voice of the people, has the power to issue a "Notice of Disapproval" and only during a legislative session. **Page 9. Item 3**

   At this time our discussions on the issue of Legislative oversight have come to a impasee. We still stand on the principal that SB#2037 is in error by giving unelected individuals sweeping powers that circumvent the voices of North Dakota citizens by excluding elected representation. Because of this the North Dakota Community Alliance requests the following amendment to 38-23-07, High Level Radioactive Waste Advisory Council; **page 13 item 1.** Add:
   d) Request: four (4) additional members be added to this council and that they are comprised of equal representation from the elected members of the House and Senate of the North Dakota State Legislature.

2. SB #2037 should include titles for High Level Radioactive waste that reflect measurable classifications & re-classifications of radioactive waste. The bill must recognize the current Federal government proposed classification changes of radioactive waste.
   www.newsweek.com/trump-reclassify-radioactive-waste-nuclear-weapons-low-level-disposal-cheaper-1253063
   We are concerned that SB#2037 is not strong enough in this area due to the rapid movement we have seen in regards to private corporations moving into the High Level Radioactive/Nuclear waste industry. Although we appreciate the reference to Health Dept NDAC 33-10-4.2 as the measureable resource to use with this bill, we feel it is not adequate in the area of Classifying High-Level Radio Active waste in the current national climate. https://www.reviewjournal.com/post/1585731

   We are requesting amendments to 38-23-01 Definitions; **page 8 line 20**.
   b) Request: new verbiage to replace "highly radioactive material that the commission determines requires permanent isolation. " We request definitions based on a more proactive and protective approach, such as we have seen used to classify High-Level Radioactive waste in other western states.

SB 2037
2.8.19
#3

North Dakota Community Alliance
ndcommunityalliance@gmail.com
www.facebook.com/NDcommunityalliance/
Rugby, ND 58368

3).**3823-08 County Zoning Authority. Page 14 line 4**
As currently drafted SB#2037 restricts a county's right to zoning regulations in regards to prohibiting a High Level Radio Active Waste facility when such site has been approved by the Industrial Commission, but may regulate the size scope and location of a facility. North Dakota Community Alliance strongly refutes this section of the code and believes Counties should have the right to determine their own county economy, health, and well-being by regulating land usage with zoning.

We recognize that it was the ability of Pierce County Commissioners to enact zoning in 2016, creating a moratorium on deep bore-hole exploration that reversed a "scientific data collecting bore-hole experiment in that county. We believe that given the current state of the aggressive, fast moving Nuclear Waste Industry, a successful scientific bore hole for "Exploration" in Pierce County would have resulted in "eminent domain" of the site by the Federal Government, circumventing all other State regulations or permitting.

Because of this we respectfully request the following:
1) That section 38-23-08 does not respect County Rights. We ask that it be struck from the bill or be amended to state: **page 14, line 5**

"A county has rights to zoning regulations in regards to prohibiting a High Level Radioactive Waste facility and exploration for such sites and may regulate the size scope and location of a facility or exploration, if such site has been approved by the Industrial commission through the permitting process,"

2) We also support the proposed amendment respecting County rights in SB#2037, adding a "Notice of Opportunity for a Position Paper" from the County Commissioners in any county where a permit is being considered for exploration or storage of High Level Radioactive Waste. **Page 11, line 11.**

4. **38-23-03 Permit required**: SB#2037, is currently drafted with inadequate notification processes and prohibitive restrictions for notifications to county residents and county governments.

2) The North Dakota Community Alliance supports the proposed amendments to page **11, line 14:** A Permit may be issued only after notice pursuant to North Dakota Rules for Civil Procedure, Rule 3, hearing and payment of fee.

3) North Dakota Community Alliance is also in support of proposed amendments to **Page 11 Line 15-16**: An applicant for a permit shall provide notice to a surface owner and any resident of a permanently occupied dwelling located within two miles (3.22 kilometers) of the proposed location, the county commissioners and mayors of any municipalities with in thirty miles (48.28 kilometers), and publish a notice in the official county paper with in thirty miles (48.28 kilometers) of the

SB 2037
2-8-19
#3

North Dakota Community Alliance
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Rugby, ND 58368

proposed location.

3) North Dakota Community Alliance also supports amendments to **Page 11, line 18.** The commission shall give written notice of an application for exploration or facility permit to the county in which exploration is sought or a facility is proposed at least 60 days before the hearing. The commission shall adopt rules establishing deadlines for the issuance of permits.

5. In SB#2037, the North Dakota Community Alliance requests permitting fees for High Level Radio Active Waste exploration or facilities, to be significantly increased .We feel the required permit and bond amounts should reflect the highest known parameters from other states. Increased permitting and bond fees should create reserve funds, kept in Trust, that can be used to maintain permanent signage, reclaimed surface areas, train local Emergency Responders, educate local communities regarding safety and create a significant hurdle to permitting High Level Radioactive Waste exploration and facilities in North Dakota.

In light of this position the North Dakota Community Alliance supports the following amendment:

1) **Page 13, line 2** There is established a high-level radioactive waste fund into which funds received under an agreement entered under this chapter, permit fees, and civil penalties must be deposited.

6. As currently drafted, a High Level Radioactive Advisory Council will be created in SB#2037. The North Dakota Community Alliance supports this initiative and requests that the duties of the council include, among other things; the *required* submission and acceptance of a report approving site suitability, local support and permanent signage rules & requirements before permitting is approved. The North Dakota Community Alliance understands that all decisions made in regards to High Level Radioactive Waste disposal, in our state, must consider the vast amount of time that such waste is a hazard to our citizens, our communities and to our future citizens and future communities. For this reason we support the following amendments.

1) Page 13, line 27 In regards to the Advisory Council**:** Review site suitability and issue a report for a proposed high-level radioactive waste facility to the legislative assembly or commission.

2) page 10, line 10 adding *a permanent marker is to be erected and maintained over the disposal site*(s). We would also include that that marker must be continually maintained, funded, universally understandable, visible and readable for the duration of storage or until half-life is reached for the material stored at the site.

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2.8.19
#4
Pg.1

Good Morning members of the committee, my name is Dallas Hager and I speak to with you today in good faith and the utmost confidence that we North Dakotans can work together for the common good. I am a 4th generation farmer in Pierce County. It has been my life dream to farm and provide my kids with an agricultural background. I feel privileged to grow the safest and most reliable food known to mankind. As an agriculturalist, it is my devotion to pass along my farm in better shape than in which I received it. We have seen the plow come and go. It was a good tool at the time, the only tool, however history has proven that our natural progression to minimum till and no-till are far superior practices. Given the serious nature of radioactive waste, I am confident that we cannot naturally progress from soil storage to some other long term method. Certainly our inability to get this right above ground proves such a practice will be detrimental. I ask that you take the necessary progression to ensure North Dakota provides safe and reliable food for generations to come.

As elected members of your community, it is your responsibility to ensure that citizen's rights are not infringed upon. This is your devotion as an elected member of your community. Matters such as radioactive waste shall not be taken lightly and therefore we have every right as a community to ensure a safe and reliable future for ourselves and our children.

I ask that you ensure SB 2037 gives due process to the citizens who elected you as part of their community.

Dallas Hager

Pierce County Resident

SB 2037
2/14/19
#1

19.0038.04002
Title.

Prepared by the Legislative Council staff for
Representative J. Nelson
February 13, 2019

PROPOSED AMENDMENTS TO SENATE BILL NO. 2037

Page 8, line 20, after "commission" insert ", consistent with existing law and rules,"

Page 10, line 11, after the underscored period insert "A permanent marker is to be erected and maintained over the disposal site."

Page 10, line 14, remove "If the commission requires a bond to be"

Page 10, line 15, replace "furnished, the" with "The"

Page 10, line 21, remove "and"

Page 10, line 22, after "application" insert ", monitoring and inspection of the exploration site, the monitoring and inspection of the facility, and the environmental and monetary impact of the facility"

Page 10, line 23, after "rendered" insert "and impact to the state and local area"

Page 10, line 23, after "the" insert "annual operating"

Page 10, line 24, remove "permit to operate a"

Page 10, line 24, after "facility" insert "permit"

Page 10, line 25, replace "eight hundred thousand" with "one million"

Page 11, line 13, after the underscored period insert:

"2. A notice of opportunity for a position paper from the commissioners of the county must be attached to the permit application.

3."

Page 11, line 14, after the underscored period insert "Notice must be provided in accordance with Rule 3 of the North Dakota Rules of Civil Procedure.

4."

Page 11, line 16, after "location" insert ", the county commissioners and mayor of any municipality within thirty miles [48.28 kilometers], and publish a notice in the official county newspaper and any county newspaper within thirty miles [48.28 kilometers] of the proposed location"

Page 11, line 16, after the underscored period insert:

"5."

Page 11, line 18, replace "forty-five" with "sixty"

Page 11, line 20, replace "2." with "6."

Page 12, line 5, replace "3." with "7."

Page 12, line 10, replace "4." with "8."

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Page 12, line 13, replace "5." with "9."

Page 12, line 16, replace "6." with "10."

Page 13, line 2, remove "from the"

Page 13, line 3, remove "federal government"

Page 13, line 12, remove ", and three members"

Page 13, line 13, remove "appointed by the governor"

Page 13, line 14, replace "The" with "Additional"

Page 13, line 14, replace "appointed by the governor must be" with "on the council are"

Page 13, line 15, after "government" insert "appointed by the governor"

Page 13, line 16, after "government" insert "appointed by the governor"

Page 13, line 16, remove "and"

Page 13, line 17, after "community" insert "appointed by the governor;

d. One senator appointed by the majority leader of the senate of the legislative assembly; and

e. One representative appointed by the majority leader of the house of representatives of the legislative assembly"

Page 13, line 28, replace ", if requested by" with "to"

Page 14, line 5, after "prohibit" insert "a high-level radioactive waste disposal exploratory drilling permit or"

Renumber accordingly

#1

Senate Bill No. 2037 (2019)

March 7, 2019 at 9:00 a.m.

Christopher S. Joseph
North Dakota Legislative Council

Senate Bill No. 2156 (2017) required the Legislative Management to study, in consultation with the Geological Division of the Department of Mineral Resources and the Environmental Health Section of the State Department of Health, whether:

- State and local level regulation of high-level radioactive waste disposal is consistent with applicable federal regulations;
- How to ensure the state has proper input into the federal location selection process for high-level radioactive waste material deposits;
- Special laws, local laws, and existing code regarding the potential existence of a legislative veto over executive branch authority to determine the size, scope, and location of high-level radioactive waste material deposits in the state and any existing conflicts with the Commerce Clause; and
- The feasibility and desirability of developing new statutes and regulations for subsurface disposal of waste and the storage and retrieval of material.

The study was assigned to the Natural Resources Committee.

Testimony and presentations were received from:

- Residents of Pierce county;
- State Geologist, Department of Mineral Resources;
- Section Chief, Environmental Health Section, State Department of Health;
- Principal Geologist, Geosciences Group Lead, Energy and Environmental Research Center; and
- North Dakota Association of Counties.

As a result of the testimony regarding the disposal of high-level nuclear waste in the state, the committee recommends Senate Bill No. 2037 (2019) to regulate the disposal and storage of high-level radioactive waste, permit the Industrial Commission to issue a notice of disapproval in regard to high-level radioactive waste disposal when the Legislative Assembly is not in session, and regulate subsurface storage and retrieval of nonhydrocarbons.

Senate Bill 2037 (2019):

- Repeals Chapter 23-20.2 (Disposal of Nuclear and Other Waste Material);

- Creates two new chapters of Century Code, one for high-level radioactive waste disposal and one for subsurface storage and retrieval of nonhydrocarbons;
- Designates the Industrial Commission as the point of contact with the Department of Energy and other federal agencies;
- Authorizes the Industrial Commission to issue a notice of disapproval if the Legislative Assembly is not in session;
- To cover the costs of permit review, sets the permit fee for a facility at not less than ~~$800,000~~;
- Establishes guidelines for reporting requirements, preventing pollution, reclamation, and bonds;
- Authorizes the Industrial Commission to regulate drilling, excavating, construction, operation, and onsite inspections;
- Requires an exploration permit from the Industrial Commission before exploring for a high-level radioactive waste facility and require a facility permit before operating a high-level radioactive waste facility;
- Authorizes the Industrial Commission to deny an application if the activity poses a threat to human health or the environment or economic impacts;
- Establishes a high-level radioactive waste fund into which funds ~~from the federal government and~~ permit fees and civil penalties are deposited;
- Creates a high-level radioactive waste advisory council to advise the Industrial Commission ~~and the Legislative Assembly~~; and
- Authorizes counties to regulate the size, scope, and the location of a facility, but not to prohibit a facility permitted by the Industrial Commission.

Mr. Ed Murphy, State Geologist, Department of Mineral Resources, will provide a more detailed explanation that covers the technical specifications of Senate Bill No. 2037.

No negative votes were cast by the Natural Resources Committee.

#2

Senate Bill 2037

House Energy and Natural Resources Committee
March 7, 2019

Comments of Ed Murphy, State Geologist

Timeline

1979 NDCC 23-20.2 (Disposal of Nuclear and Other Waste Material) was created giving regulatory authority to the Industrial Commission over the following:

1) Storage and retrieval of material in the subsurface.
2) Subsurface disposal of municipal, industrial, and domestic waste.
3) Subsurface disposal of high-level radioactive waste.

1982 Nuclear Waste Policy Act of 1982

1986 North Dakota Constitution is amended prohibiting special laws or local laws.

1987 "Concurrent resolution" language added to NDCC 23-20.2 to avoid special law or local law designation, but doing so created a potential legislative veto between legislative and executive branches.

2002 Nevada's Notice of Disapproval overridden by Congress and Yucca Mountain declared a nuclear waste repository. In 2008, DOE applied for license to construct. In 2010, DOE filed a motion to withdraw application…

2016 U.S. Department of Energy proposes to fund the drilling of a deep exploration hole in Pierce County.

2017 65th Legislative Assembly: The original version of SB 2156 added language to NDCC 23-20.2 requiring prior approval from the county and water resource district in that county before testing or exploration for a radioactive waste storage or disposal facility could occur and before any radioactive waste could be brought into the state and deposited.

SB 2156 was amended in the House so that no testing or exploration for a storage or disposal facility could be done unless the legislature had granted prior approval through concurrent resolution. A county's zoning approval could not preclude disposal if approved by the legislature, but could regulate the size, scope, and location.

The House also added study language to SB 2156 for legislative management, in consultation with the Geological Survey and Environmental Health Section (Health Dept.), to determine:

1) if state and local level regulations of high level radioactive waste disposal is consistent with applicable federal regulations;
2) ensure state has input into the federal location selection process for high level radioactive waste;
3) the mechanisms for calling a special session to approve the depositing of high level radioactive waste in the state and the notice of disapproval requirements under federal law;
4) special laws, local laws, and existing code regarding the potential existence of a legislative veto over executive branch authority to determine the size, scope, and location of high level radioactive waste deposits in the state and any existing conflicts with the commerce clause; and
5) the feasibility and desirability of developing new statutes and regulations for subsurface disposal of waste and the storage and retrieval of material.

2017-2018 Interim Study

The results of the legislative study were presented to the 65th Interim Natural Resources Committee. DMR and Health Dept. attorneys were unable to find a constitutionally approved means of bringing the legislature into session in order to vote on a concurrent resolution. Included in the study was a summary of the nuclear waste disposal laws of 13 states. The committee requested we model North Dakota law after Wyoming's law. SB2037 is the draft legislation that was passed unanimously out of the interim committee.

The Nuclear Waste Policy Act of 1982 (Subtitle A)
This federal laws establishes the following process for repository siting approval:

1) Prior to nominating a site the Secretary of Energy shall evaluate available geophysical, geologic, geochemical and hydrologic information and will not bore or excavate at a site unless existing data will not be adequate to evaluate the site.

2) The Secretary of Energy will notify the Governor and legislature of the State of the location and basis for nomination before nominating a repository site.

3) Before nominating a site the Energy Secretary shall hold public hearings in the vicinity of site.

4) The Secretary of Energy notifies the President of a nominated site accompanied by an environmental assessment (site characterization; suitability for development; effects of site on public health, safety, and the environment; comparative evaluation of site with other potential sites; description of the decision process; and assessment of the local and regional impacts of this site).

5) The President will approve or disapprove of a candidate site within 60 days (if the President does not act within the 60 day limit the site is considered to be approved). If the President submits to Congress within the 60 day limit a notice of delay, the President may take up to six months to approve or disapprove of a site (if the President does not make a decision within the six month time period, the site is considered approved).

6) Once the President recommends a repository site to Congress, the Governor or legislature of that state has up to 60 days to disapprove the site designation and submit to Congress (Speaker of the House and the President pro tempore of the Senate) a notice of disapproval. The notice of disapproval to be accompanied by a statement of reasons explaining why the State disapproved of the recommended repository site.

7) After Congress receives a notice of disapproval, it must take up a vote on the recommended repository site during the first 90 calendar days of continuous session.

8) The resolution on repository siting becomes law if passed by both houses of Congress.

The U.S. Nuclear Regulatory Commission (NRC) regulates the production of radioactive source materials, nuclear reactors, nuclear materials, and radioactive waste. The NRC would license a high-level radioactive waste repository. The U.S. Department of Energy is responsible for designing, constructing, operating, and decommissioning a permanent disposal facility for high-level radioactive waste. The U.S. Environmental Protection Agency developed standards for the protection of the general environment from offsite releases of radioactive material in repositories.

#2 SB2037
3/7/19

SUMMARY OF SENATE BILL 2037
(Senate Amendments: additions and deletions)

NDCC 38-23

Definitions

High-level radioactive waste definition includes "highly radioactive material that the commission, consistent with existing law and rules, determines requires permanent isolation."

Exploration or Testing Permit

The North Dakota Industrial Commission would issue an exploration or testing permit.

1) Permit fee based on anticipated actual cost of services rendered (monitoring and inspections).
2) Permit application to include a notice of opportunity for a position paper from county commissioners.
3) Permit applicant to provide notice to surface owner and resident of a permanently occupied dwelling located within two miles (mayors, county commissioners, newspapers out 30 miles).
4) Commission to give written notice of a permit application to county at least 45 60 days before hearing (pursuant to North Dakota rules of civil procedure, rule 3).
5) County zoning regulation may not prohibit a high-level radioactive waste exploratory test hole permitted by the Commission, but may regulate the size, scope, and location.
6) Permit may be denied if the exploration poses a threat to human health or the environment or concerns related to economic impact.
7) Reclamation bond based on the cost to properly plug the test hole and reclaim the site. If the commission requires a bond….

Facility Permit

The North Dakota Industrial Commission would issue a disposal facility permit (may be a federal facility).

1) Annual operating fee based on size and scope of the facility, not less than $1,000,000.
2) Permit application to include a notice of opportunity for a position paper from county Commissioners.
3) Permit applicant to provide notice to surface owner and resident of a permanently occupied dwelling located within two miles (mayors, county commissioners, newspapers out 30 miles).
4) Commission to give written notice of a permit application to county at least 60 days before hearing. (pursuant to North Dakota rules of civil procedure, rule 3)
5) Facility permit application to include economic impact.
6) County zoning regulation may not prohibit a high-level radioactive waste facility permitted by the Commission, but may regulate the size, scope, and location of the facility.
7) Permit may be denied if the operation poses a threat to human health or the environment or concerns related to economic impact.
8) Permit may not exceed five years.
9) Reclamation bond based on the cost to reclaim the facility and return land to a condition consistent with prior land use and productive capacity. If the commission requires a bond…
10) A permanent marker to be erected and maintained over the disposal site.

Notice of Disapproval

1) The ND Industrial Commission has the authority to issue a Notice of Disapproval when the legislature not in session.
2) The ND Legislative Assembly has the authority to issue a Notice of Disapproval when in session.

High-Level Radioactive Waste Advisory Council

State Engineer	State Health Officer	DEQ Director	DOT Director
State Geologist	Commerce Commissioner	Director of Game & Fish	
City Government Rep.	County Government Rep.	Agricultural Community Rep.	
Member of the State House	Member of the State Senate		

1) Hold at least one meeting per year (appointed members serve a four year term).
2) Review administrative rules and standards.
3) Review site suitability and issue a report for a proposed facility if requested.

High-Level Radioactive Waste Fund

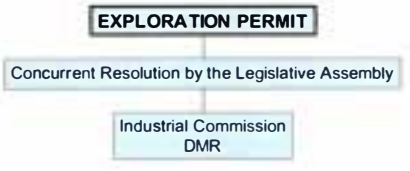
1) Federal funds, permit fees, and civil penalties to be deposited in this fund.
2) Fund to be administered by the Industrial Commission to pay for the cost of the program.

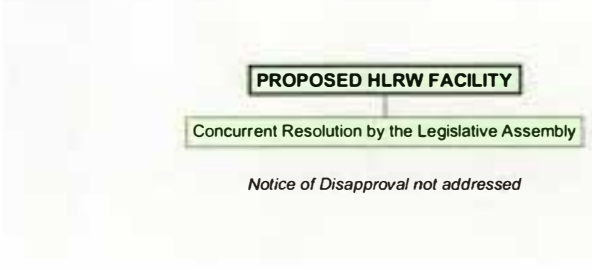
NDCC 38-24

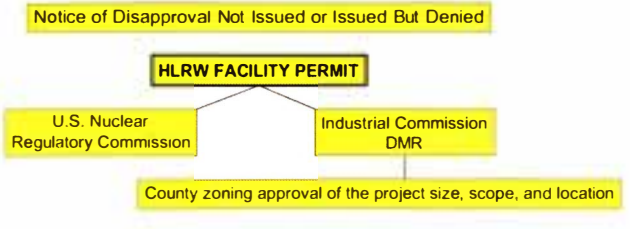
Commission would issue exploration and operating permits for subsurface storage and retrieval of nonhydrocarbons (such as compressed air).

NDCC 23-20.2 (repealed).

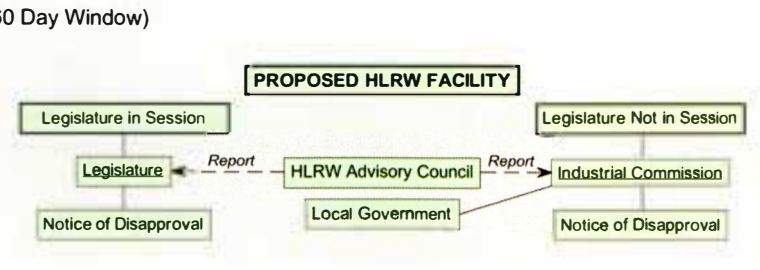
NDCC 23-20.2

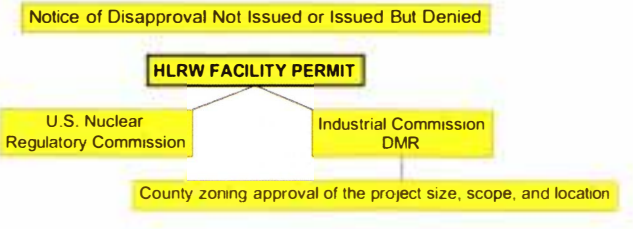






NDCC 38-23





to the DOE on Propopsed Interpretation of Radio Active Waste." We have provided a copy for each member of the committee to better explaine this issue.

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1)As currently drafted, SB #2037 does not include definitions for High Level Radioactive waste that reflect measurable classifications.
The ND Community Alliance is requesting amendments to 38-23-01 Definitions; **page 8 line 20**.
It is our intention that the definition of High-level Radioactive waste should be equal to that of the Federal Government's description in the US NRC code **61.55 Waste classification** measurement for Class C or higher, published as of Jan 2019.

We request: new verbiage to replace *"highly radioactive material that the commission determines requires permanent isolation consistent with existing laws and rules. "*

Please take time to read the NRDC report and you will see that "Existing Laws and Rules" are being reinterpreted to create an easier avenue to move High Level Radioactive Waste. So using this verbiage puts bill 2037 0n a slippery slope, vulnerable to changes and wide interpretation.

We request definitions in SB#2037, be based on a more proactive and protective measurable approach, such as we have seen used to classify High-Level Radioactive waste in Utah legislation.
(a copy of Utah Code has been provided.)

We feel Utah's usage of Class C or higher vs "High Level Radioactive waste" is a good model.
We note that the study leading up to SB#2037 uses Wyoming as a source. It is beneficial compare the differences. Even the lax and older Wyoming code uses *"High-level radioactive waste" as defined in the "Nuclear Waste Policy Act of 1982" as amended, 42 U.S.C. § 10101 et seq.*
Utah is more proactive, protective and current, as are the HLRW laws of other western states we have compared to SB#2037. Wyoming law appears to be behind the curve. We do not want to be known as a State with lean laws when Private Contractors or the DOE come looking at North Dakota for a future repository for High Level Radioactive Waste.

2) Another Primary concern with SB2037 is that the bill gives sweeping authority to the Industrial Commission, for permitting, hearings, and bonding when the Legislature is not in session. This bill does not currently provide for Legislative oversight, during the interim. In fact, as written, the greatest influence that you, our elected legislators, will have on bill #2037 is right now, by strengthening the bill prior to its passing.

The ND Community Alliance is encouraged to see the addition of a High-level Radioactive Waste Council to bill 2037. This Council, with its cross section of North Dakota residents and unelected state officials will assist the voice of North Dakotans in the event of a permitting process for exploration and future sighting of High-Level Radioactive waste. The ND Community Alliance would like to see the position of the Legislative Assembly strengthened.

We request a change to Page 13 line 30 and page 14 line 1. Changing the word "One" to "two" members from each- Senate and House. We feel this is an important consideration as it enforces democratic principal by adding elected representatives to the High-level Radioactive Waste Council.

SB Bill 2037 set to establish a state policy for High-level Radioactive Nuclear waste storage & disposal

SB 2037
3.7.19
Attachment 3

We request 4 legislative members (total), be added as members of the High-level Radioactive Waste Advisory Council; 2 members from the house and 2 members from the senate.

To further underscore the role of the HLRW Council, we ask for an addition to **Page 14 line 10 adding at the end of the sentence, *..... and submit to the Legislative Assembly or State Industrial commission an annual Public report summarizing the findings of the council.***

We request that the High-level Radioactive Waste Council prepare and file a Public report after their required Annual meeting. This report would summarize their findings on HLRW and could be accesed for public information and education. Publication of this report could be detailed in the rules.

3)The ND Community Alliance supports the inclusion of the amendment in SB 2037 that gives Counties a voice through a required Position Paper, to be attached to a permit in this process.

We request an addition to Page 11 line 17-18, be added at the end of sentence regarding this paper: "*and be accessible to the public at the time of submission*." Due to our concern for stronger county decision making and North Dakotans being informed and heard in the permitting process, we request that the County Position paper be made accessible to the public at the time it is submitted for consideration in the permit process. The publication of this paper can be detailed in the rules.

The ND Community Alliance believes if an exploratory borehole would have been drilled in Pierce County, in 2016, and the site was found to be viable or if the scientific data and technology had even minimal viability, we would now be discussing the future of the area as a Nuclear waste repository and the real possibility of Federal Eminent Domain. For this reason the ND Community Alliance wants to make sure that we have good policy in place to protect our communities, land, and water, provide ample notification to landowners, counties and cities, and to make sure we are not doing less with this issue than what other states are doing to protect their citizens in the face of the fast changing High Level Radioactive Waste Industry and the current aggressive climate in the federal government.

The North Dakota Community Alliance is optimistic and hopeful after working with legislators, the State Geologist and the Governor's office, that the final version of SB2037 can protect existing rural development initiatives and continue to promote ND as a legendary state with a bright, safe and dynamic future.

To this end the North Dakota Community Alliance offers support of an admended SB2037. The North Dakota Community Alliance encourages the Legislature and the Industrial Commission to build trust by enacting admendments that require the engagement of our elected represenatives to gain the support of the citizens of North Dakota. By ammending SB2037, the legislature can create a bill that respects county rights and the future health, safety and economic growth of communities across our state.

Rebecca Leier

North Dakota Commuity Alliance
Heartland Bison Ranch
4525 Hwy 3 South
Rugby, ND 58368
701-542-3325

19-3-302 Legislative intent.

(1)

(a) The state enacts this part to prevent the placement of any high-level nuclear waste or greater than class C radioactive waste in Utah. The state also recognizes that high-level nuclear waste or greater than class C radioactive waste may be placed within the exterior boundaries of the state, pursuant to a license from the federal government, or by the federal government itself, in violation of this state law.

(b) Due to this possibility, the state also enacts provisions in this part to regulate transportation, transfer, storage, decay in storage, treatment, and disposal of any high-level nuclear waste and greater than class C radioactive waste in Utah, thereby asserting and protecting the state's interests in environmental and economic resources consistent with 42 U.S.C.A. 2011 et seq., Atomic Energy Act and 42 U.S.C.A. 10101 et seq., Nuclear Waste Policy Act, should the federal government decide to authorize any entity to operate, or operate itself, in violation of this state law.

(2) Neither the Atomic Energy Act nor the Nuclear Waste Policy Act provides for siting a large privately owned high-level nuclear waste transfer, storage, decay in storage, or treatment facility away from the vicinity of the reactors. The Atomic Energy Act and the Nuclear Waste Policy Act specifically define authorized storage and disposal programs and activities. The state in enacting this part is not preempted by federal law, since any proposed facilities that would be sited in Utah are not contemplated or authorized by federal law and, in any circumstance, this part is not contrary to or inconsistent with federal law or congressional intent.

(3) The state has environmental and economic interests which do not involve nuclear safety regulation, and which shall be considered and complied with in siting a high-level nuclear waste or greater than class C radioactive waste transfer, storage, decay in storage, treatment, or disposal facility and in transporting these wastes in the state.

(4) An additional primary purpose of this part is to ensure protection of the state from nonradiological hazards associated with any waste transportation, transfer, storage, decay in storage, treatment, or disposal.

(5) The state recognizes the sovereign rights of Indian tribes within the state. However, any proposed transfer, storage, decay in storage, treatment, or disposal facility located on a reservation which directly affects and impacts state interests by creating off-reservation effects such as potential or actual degradation of soils and groundwater, potential or actual contamination of surface water, pollution of the ambient air, emergency planning costs, impacts on development, agriculture, and ranching, and increased transportation activity, is subject to state jurisdiction.

(6) There is no tradition of regulation by the Indian tribes in Utah of high-level nuclear waste or higher than class C radioactive waste. The state does have a long history of regulation of radioactive sources and natural resources and in the transfer, storage, treatment, and transportation of materials and wastes throughout the state. The state finds that its interests are even greater when nonmembers of an Indian tribe propose to locate a facility on tribal trust lands primarily to avoid state regulation and state authorities under federal law.

(7)

(a) This part is not intended to modify existing state requirements for obtaining environmental approvals, permits, and licenses, including surface and groundwater permits and air quality permits, when the permits are necessary under state and federal law to construct and operate a high-level nuclear waste or greater than class C radioactive waste transfer, storage, decay in storage, treatment, or disposal facility.

#3 SB 2031
3-7-19

(b) Any source of air pollution proposed to be located within the state, including sources located within the boundaries of an Indian reservation, which will potentially or actually have a direct and significant impact on ambient air within the state, is required to obtain an approval order and permit from the state under Section 19-2-108.

(c) Any facility which will potentially or actually have a significant impact on the state's surface or groundwater resources is required to obtain a permit under Section 19-5-107 even if located within the boundaries of an Indian reservation.

(8) The state finds that the transportation, transfer, storage, decay in storage, treatment, and disposal of high-level nuclear waste and greater than class C radioactive waste within the state is an ultra-hazardous activity which carries with it the risk that any release of waste may result in enormous economic and human injury.

Amended by Chapter 297, 2011 General Session

NRDC

HANFORD CHALLENGE

COLUMBIA RIVERKEEPER

NIRS
Nuclear Information and Resource Service
For a Nuclear-Free, Carbon-Free World

SOUTHWEST RESEARCH AND INFORMATION CENTER

SNAKE RIVER ALLIANCE
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www.snakeriveralliance.org

SRS WATCH
Savannah River Site Watch

Institute for Policy Studies

January 9, 2019

Via Electronic Mail

Ms. Theresa Kliczewski,
U.S. Department of Energy
Office of Environmental Management
Office of Waste and Materials Management (EM–4.2)
1000 Independence Avenue SW
Washington, D.C. 20585
Email: HLWnotice@em.doe.gov

RE: NRDC et al. Comments on Energy Department's Request for Public Comment on the Interpretation of High-Level Radioactive Waste

Dear Ms. Kliczewski:

The Natural Resources Defense Council ("NRDC"), Hanford Challenge ("HC"), Columbia Riverkeeper ("CRK"), Southwest Research & Information Center ("SRIC"), Snake River Alliance ("SRA"), Savannah River Site Watch ("SRS Watch"), Institute for Policy Studies

("IPS") and Nuclear Information & Resource Service ("NIRS") write today to comment on the Department of Energy's *Request for Public Comment on the U.S. Department of Energy Interpretation of High-Level Radioactive Waste*. 83 Fed. Reg. 50909, October 10, 2018 (hereinafter "HLW Reinterpretation Proposal") (comment deadline extended to this date (January 9, 2019), 83 Fed. Reg. 62569, December 4, 2018).

The high-level radioactive waste ("HLW") Reinterpretation Proposal, if implemented by the U.S Department of Energy ("DOE") in a final form, would be contrary to law and create a host of technically unsound, indefensible, and dangerous situations in multiple locations around the country. Bluntly, finalizing this internal order would flatly violate the express directions of Congress found in the Nuclear Waste Policy Act ("NWPA"). Those harms will elicit legal challenges, but not just because the actions are contrary to law. The legal infirmity of DOE's HLW Reinterpretation Proposal is exponentially compounded by the practical, real-world harm of setting precedent that will allow the Trump Administration DOE—and future administrations—to abandon extraordinary amounts of the world's most toxic waste at nuclear weapons cleanup sites across the country. Locations as diverse as the leaking HLW tanks next to the Columbia River in Washington; the extraordinarily toxic HLW in two "tank farms" near the Savannah River between South Carolina and Georgia; and misguided expansions of the Waste Isolation Pilot Plant ("WIPP"), the troubled and controversial operating transuranic waste site near Carlsbad, New Mexico, are all areas that can and will be deeply harmed by DOE's HLW Reinterpretation Proposal. Each area would be the recipient of more improperly managed and abandoned radioactive waste, all without adequate protection from external regulatory oversight or, indeed, any meaningful environmental standards.

Further, the Trump Administration's HLW Reinterpretation Proposal is being done in parallel with DOE's effort to reclassify HLW and thereby abandon that waste via the "Waste Incidental to Reprocessing Determination" ("WIR") effort for 16 HLW tanks at Area C of the Hanford Nuclear Reservation in Washington.[1] We view these two DOE self-regulating draft orders as inextricably linked by their subject matter – *e.g.*, the Department of Energy assuming for itself the ability to "reclassify" or "reinterpret" HLW – and their potential impacts on the final decisions, precedents, and the ultimate legal obligations for DOE under the already inadequate existing framework of nuclear waste cleanup law.

Rather than continue a course that is sure to end up in litigation, as we identified in November 2018 with respect to the Draft WIR Determination, we urge you to withdraw this HLW Reinterpretation Proposal and commence working with the immediately affected States, Tribes, Congress and interested members of the public on reforms to nuclear waste law and putting the cleanup of the nuclear weapons complex on a course that is both scientifically defensible and publicly accepted.

[1] *See*, Exhibit 1, incorporated *en bloc* for this administrative record, NRDC, Hanford Challenge & Columbia Riverkeeper Comments on *Draft Waste Incidental to Reprocessing Evaluation for Closure of Waste Management Area C at the Hanford Site, Washington*, filed Nov. 7, 2018 (cited hereinafter as "Ex. 1 at __").

I. Statements of Interest

NRDC is a national non-profit membership environmental organization with offices in Washington, D.C., New York City, San Francisco, Chicago, Los Angeles, and Beijing. NRDC has a nationwide membership of over one million combined members and activists. NRDC's activities include maintaining and enhancing environmental quality and monitoring federal agency actions to ensure that federal statutes enacted to protect human health and the environment are fully and properly implemented. Since its inception in 1970, NRDC has sought to improve the environmental, health, and safety conditions at the nuclear facilities operated by the U.S. Department of Energy ("DOE" or "Department") and its predecessor agencies, and we will continue to do so.

Hanford Challenge is a non-profit, public interest, environmental and worker advocacy organization located at 2719 East Madison Street, Suite 304, Seattle, WA 98112. Hanford Challenge is an independent 501(c)(3) membership organization incorporated in the State of Washington and dedicated to creating a future for Hanford that secures human health and safety, advances accountability, and promotes a sustainable environmental legacy. Hanford Challenge has members who work at the Hanford Site and within the Tank Farms who are at risk of imminent and substantial endangerment due to DOE's handling, storage, treatment, transportation, and disposal of Hanford's solid and hazardous waste. Other members of Hanford Challenge work and/or recreate near Hanford, where they may also be affected by hazardous materials emitted into the environment by Hanford. All members have a strong interest in ensuring the safe and effective cleanup of the nation's most toxic nuclear site for themselves and for current and future generations, and who are therefore affected by conditions that endanger human health and the environment.

Columbia Riverkeeper (CRK) is a 501(c)(3) nonprofit organization with a mission to protect and restore the Columbia River, from its headwaters to the Pacific Ocean. Since 1989, Riverkeeper and its predecessor organizations have played an active role in educating the public about Hanford, increasing public participation in cleanup decisions, and monitoring and improving cleanup activities at Hanford. Columbia Riverkeeper and its 13,000 members in Oregon and Washington have a strong interest in protecting the Columbia River, people, fish, and wildlife from contamination at Hanford, including pollution originating in Hanford's tank farms.

Southwest Research and Information Center (SRIC) is a 501(c)(3) nonprofit organization with a mission to promote the health of people and communities, protect natural resources, ensure citizen participation, and secure environmental and social justice now and for future generations. Founded in 1971, for more than forty years SRIC's board, staff, and supporters have worked to protect worker and public health and safety of WIPP, as well as technically sound, publicly accepted cleanup of DOE nuclear weapons sites.

The Snake River Alliance (Alliance) was founded in 1979, soon after the Three-Mile Island accident, by a handful of people who had just learned the Idaho National Laboratory routinely injected hazardous and radioactive waste into the Snake River Aquifer, the sole source of drinking water for a quarter of a million people. Ever since INL was named a Superfund site in

1989, the Alliance has been the most active advocate of cleanup there. The Alliance and its members work to protect Idaho's people, environment, and economy from nuclear weapons, power, and waste at the Idaho National Laboratory.

Savannah River Site Watch is a research and advocacy 501(c)(3) nonprofit organization that primarily focuses on the environmental and health impact of management of nuclear materials and of nuclear waste, including HLW in aging tanks, at DOE's Savannah River Site in South Carolina. SRS Watch endorses sound nuclear non-proliferation policies that preclude unnecessary import of highly radioactive foreign and domestic spent fuel and plutonium to SRS and that facilitate closure of the DOE's last remaining reprocessing plant, the 63-year-old H-Canyon.

Nuclear Information and Resource Service (NIRS) is a national non-profit 501(c)(3) organization devoted to a nuclear-free, carbon-free world. We have served as the information and networking hub for people and organizations concerned about nuclear power, radioactive waste, radiation, and sustainable energy issues since 1978. We work internationally to create a sustainable energy future without nuclear power and are affiliated with the World Information Service on Energy (WISE) International. We support a nuclear free, carbon free sustainable energy future, a democratically-based energy system in which communities are empowered to make decisions about their energy sources, environmental justice, just transitions that address the needs of communities during the progression from nuclear energy and fossil fuels to renewable energy and prevention of and protection from exposure to radiation.

Institute for Policy Studies is a progressive think tank dedicated to building a more equitable, ecologically sustainable, and peaceful society.

II. Summary Comments

The Trump Administration DOE has proposed to reinterpret the definition of HLW. This is not a bureaucratic exercise with minor, semantic impacts on obscure DOE operations. Rather, DOE proposes to fundamentally alter more than 50 years of national consensus on how the most toxic, radioactive, and dangerous waste in the world is managed and ultimately disposed in geologic repositories. The proposal, if implemented, would seriously endanger millions of Americans and countless future generations. Because HLW contains highly radioactive fission products and radionuclides that pose long-term dangers to human health and the environment, Congress has enacted laws defining HLW and defined DOE responsibilities to safely manage the waste at its sites and to dispose of that waste in geologic repositories. It has not given DOE authority to change the definition of HLW. The following comments describe the background and history of HLW, including legislation and litigation. We also provide specific comments on the basis and justification for the reinterpretation provided in the October 10, 2018 *Federal Register* notice.

III. Background and History on HLW

The DOE's attempt to assume for itself the ability to "reinterpret" HLW is, as an initial matter, one of statutory interpretation. It is axiomatic that "[t]he task of resolving [a] dispute over the

meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241 (1989). Where statutory language inquiry reveals plain language, "the sole function of the courts is to enforce it according to its terms." *Id.* (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917). A "[court] need not defer [to an agency if it] can ascertain congressional intent using the traditional tools of statutory construction." *Ortiz v. Meissner*, 179 F.3d 718, 723 (9th Cir. 1999) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)); *see also California Energy Comm'n v. Bonneville Power Admin.*, 909 F.2d 1298, 1306 (9th Cir. 1990). The factual elements of this matter are technical in nature, but there is no genuine dispute about those elements.

HLW has been defined by Congress and this is binding on DOE.

A. The HLW Reinterpretation Proposal Violates the Plain Language of the Nuclear Waste Policy Act

The two-step framework articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), requires that courts are "the final authority on issues of statutory construction and will reject administrative constructions which are contrary to clear congressional intent."[2] "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . ."[3] Second, if there is some question as to Congress's intent, the agency's interpretation must be "based on a permissible construction of the statute."[4]

The legality of the Trump Administration DOE's HLW Reinterpretation Proposal is a plain language matter–*Chevron* Step 1. Congress directly spoke to the issue and that should be the end of the matter.

1. Congress Plainly States that HLW is the Highly Radioactive Material Resulting from the Reprocessing of Spent Nuclear Fuel

Congress is clear. HLW by definition is:

> (A) *the highly radioactive material resulting from the reprocessing of spent nuclear fuel*, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

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[2] *American Rivers v. Federal Energy Regulatory Comm'n*, 201 F.3d 1186, 1194 (9th Cir. 2000) (*quoting Natural Resources Defense Council, Inc. v. United States Dep't of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (*citing Chevron*, 467 U.S. at 843 n.9) (internal quotations omitted)).
[3] *American Rivers*, 201 F.3d at 1194 (*quoting Chevron*, 467 U.S. at 842-3); *accord Rainsong Co. v. Federal Energy Regulatory Comm'n*, 106 F.3d 269, 272 (9th Cir. 1997).
[4] *Chevron*, 467 U.S. at 843.

> (B) other highly radioactive material that the Commission [NRC], consistent with existing law, determines by rule requires permanent isolation.[5]

Thus, the NWPA defines HLW by its source – "the highly radioactive material resulting from the reprocessing of spent nuclear fuel"– rather than specifics of its hazardous characteristics. Reprocessing waste is categorically treated as HLW and defined by its origin because it is necessarily both "intensely radioactive and long-lived."[6] Reprocessing is the act of separating the ingredients in irradiated nuclear reactor fuel and target materials, including plutonium, into constituent parts or streams.[7] The extraordinarily radioactive waste that results from this process is HLW.[8]

The language that follows the word "including" in subsection (A) in the HLW definition is there for illustrative purposes. Under traditional rules of statutory construction, the term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.[9] Congress's general principle is that HLW is defined by its source. Therefore, Congress is clear that HLW is all highly radioactive material resulting from the reprocessing of spent nuclear fuel. Such reprocessing took place at Hanford, Idaho National Laboratory and the Savannah River Site and continues in the H-Canyon reprocessing plant at SRS.

In subsection (B) of the HLW definition, Congress provides the U.S. Nuclear Regulatory Commission ("NRC") -- not DOE -- with the authority to determine via rulemaking that "other" highly radioactive material (*i.e.*, highly radioactive material that *may not be* the result of the reprocessing of spent nuclear fuel) requires permanent isolation (*i.e.*, should be disposed of in a repository pursuant to the NWPA). Subsection (B) of the HLW definition is not germane at this juncture as DOE is not subjecting its HLW Reinterpretation Proposal to the regulatory authority of the NRC.

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[5] 42 U.S.C. § 10101(12) (emphasis added). "Fission products" are radioactive elements. It should also be noted that the AEA has specifically adopted the definitions of "high-level radioactive waste" and "spent nuclear fuel" included in the NWPA. 42 U.S.C. § 2014(dd).

[6] *See* 52 Fed. Reg. 5994. *See also*, Ex. 1, Att. C, where NRDC nuclear physicist Dr. Thomas Cochran describes both the nature of reprocessing and the resulting HLW. Cochran Decl. at 5-7.

[7] *Id.*

[8] *Id.*

[9] *Public Citizen, Inc. v. Lew*, 127 F.Supp.2d 1 (D.D.C. 2000) (*citing Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)). *See also*, *F.T.C. v. MTK Marketing, Inc.*, 149 F.3d 1036, 1040 (9th Cir. 1998), *cert. denied*, *Frontier Pacific Ins. Co. v. F.T.C.*, 119 S.Ct. 1028 (1999) ("In terms of statutory construction, use of the word 'includes' does not connote limitation; in definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration."); and *U.S. v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957) ("The word 'includes' is generally a term of enlargement and not of limitation, and 'including' is not one of all embracing definition, but connotes an illustrative application of the general principle.) (citations omitted).

2. Congress Plainly States that HLW is to be Disposed of in a Deep, Geologic Repository Pursuant to the NWPA

The intent of Congress with respect to HLW is plain. HLW from the reprocessing of spent nuclear fuel is to be "disposed" of in a deep, geologic repository constructed and regulated pursuant to the NWPA.[10]

Congress also defined the term "disposal" in plain language: "[T]he emplacement *in a repository* of HLW, spent nuclear fuel, or other highly radioactive material *with no foreseeable intent of discovery*..."[11] In case there is any doubt, the NWPA's legislative history displays Congress's intent that HLW should be as isolated as possible from humans and their natural environment pursuant to the NWPA. Congress wrote:

> The Committee strongly recommends that the focus of the Federal waste management program remain, as it is today, on the development of facilities for disposal of high-level nuclear waste *which do not rely on human monitoring and maintenance to keep the waste from entering the biosphere. As has been emphasized and reiterated over the lifetime of the federal nuclear program, high level wastes should not be a burden on future generations.*[12]

Efforts by DOE to claim for itself the ability to "reinterpret" this definition when Congress has already spoken to the issue are misplaced. The reason Congress has been so clear on this topic is that DOE and its predecessor agencies have generated some 100 million gallons of extraordinarily dangerous HLW, stored in tanks in Idaho, South Carolina, and Washington. Congress addressed this fact directly in the text of the NWPA.

In response to the massive amounts of HLW at defense facilities (and spent nuclear fuel at commercial facilities), Congress directed that HLW (and commercial spent fuel) be disposed of in a deep, geologic repository, constructed and regulated pursuant to the NWPA. 42 U.S.C.§ 10101, *et seq.* As described above, the definition of HLW under the NWPA is plain ("the highly radioactive material resulting from the reprocessing of spent nuclear fuel"), and even contains two illustrations of HLW ("liquid waste produced directly in reprocessing" and "solid material derived from such waste with fission products in sufficient concentration"). In short, the waste in the tanks in Idaho, South Carolina, and Washington is defense-generated HLW, *i.e.*, highly radioactive material resulting from the reprocessing of spent nuclear fuel and is thus subject to the NWPA. Any new interpretation by DOE to arbitrarily reclassify the HLW in any of these places so that the agency may avoid compliance with the NWPA and abandon the waste in place under less protective standards or dispose of it other than in a geologic repository cannot stand under well-established tenets of statutory interpretation.

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[10] 42 U.S.C. § 10107(b)(2); *see also* August 2002 Decision at 11 ("Unless the President finds otherwise, defense high-level waste must be disposed of in civilian repositories established by the NWPA.")
[11] 42 U.S.C. § 10101(9) (emphasis added); *see also* the discussion that follows of the decades of scientific agreement on the need to dispose of reprocessing waste in a geologic repository.
[12] H.R. Rep. No. 97-491, 97th Cong., 2d Sess at 29 (1982, emphasis added).

B. The Development of the HLW Definition & Why DOE Has No Authority to Rewrite the Law.

Over the decades, there has been as yet unresolved debate and conflict over where HLW and spent nuclear fuel should be disposed of and the process for arriving at both temporary management and final disposal options. However, there has been little dispute over the basic nature of HLW—the waste resulting from the reprocessing of spent nuclear fuel—and the fundamental conception that disposal should be in a deep geologic repository, as isolated from the human biosphere as possible.

1. The AEC Years

In a 1957 report, prepared at the request of the U.S. Atomic Energy Commission ("AEC"), the National Research Council of the U.S. National Academies "endorsed the concept of geological disposal—placing high-level waste (HLW) in a carefully selected deep underground formation, where it would remain isolated from human beings and the environment long enough for the radioactivity to decay to near natural background levels."[13] Notably, until the Trump Administration DOE's latest attempt to rewrite the law with this HLW Reinterpretation Proposal, this 1957 technical observation has been the statutory baseline for federal and state governments, tribes, industry, and public interest groups. Parallel, but ultimately distinct from the long history of commercial spent nuclear fuel, the AEC first formally defined the term "high-level radioactive waste" in Appendix F to its reactor licensing rules in 1970,[14] based on the waste's origin rather than the hazard posed by its various components. The AEC wrote that high level radioactive waste means:

> those aqueous wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels.[15]

It was in 1972 that Congress first took up the term and set forth a definition, thereby superseding the agency's statements. In the Marine Protection, Research, and Sanctuaries Act of 1972, which prohibited ocean dumping of HLW, Congress wrote a definition consistent with that of the AEC's, but also included the spent fuel from commercial reactors. HLW was, at that time:

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[13] National Research Council, Disposition of High-Level Waste and Spent Fuel: The Continuing Societal and Technical Challenges, Washington, D.C.: National Academy Press, 2001, p. ix.
[14] Policy Relating to the Siting of Fuel Reprocessing Plants and Related Waste Management Facilities, 35 Fed. Reg. 17530, 17532 (Nov. 14, 1970) (10 C.F.R. Part 50, App. F). Until this treatment, the AEC had informally defined high-level waste in terms of the hazard it posed. Office of Technology Assessment, Managing the Nation's Commercial High-Level Radioactive Waste 204-205 (1985), available at http://govinfo.library.unt.edu/ota/Ota_4/DATA/1985/8514.PDF.
[15] *Id.*

> the aqueous waste resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated waste from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels, or irradiated fuel from nuclear power reactors.[16]

The AEC was abolished with the Energy Reorganization Act of 1974, and Congress transferred all civilian regulatory responsibilities to the Nuclear Regulatory Commission ("NRC") and nuclear weapons activities to the Energy Research and Development Administration ("ERDA"), which was replaced by DOE in 1977. The 1974 Act did not specifically authorize external regulation (by the NRC) of the weapons activities. It did, however, specifically authorize the NRC to license and regulate any "facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste generated by the Administration...."[17]

2. The ERDA/DOE Years

The Energy Reorganization Act, focused on the transfer of power among newly created federal agencies, did not define "high-level radioactive waste." The term was, however, interpreted to mean the same thing in the Energy Reorganization Act that it meant in the AEC's Appendix F and the Marine Sanctuaries Act.[18] ERDA plainly viewed the material stored in the tanks at Hanford and Savannah River to be high-level radioactive wastes.[19] Those wastes in the tanks remained under the self-regulatory purview of the newly created DOE a few years after, even as it was becoming clear that the ambition of a safe and economically-viable closed fuel cycle would not come true and this waste would have to be prepared in some fashion for disposal in deep geologic repositories.

In managing the HLW in the tanks and with theoretically readying that waste for final disposal, DOE has kept the HLW in huge, underground interim storage tanks at SRS, INL and Hanford. Over the many decades of storage, hundreds of thousands of gallons of this waste has leaked into the environment, primarily at Hanford. Because this HLW contains highly corrosive components, organics, and heavy metals, it is also a mixed waste regulated under the Resource Conservation & Recovery Act ("RCRA"), 42 U.S.C. §§6901-6992k.

The affected public, States, Tribes and even the Trump Administration DOE would likely agree that management and (hopefully someday) disposal of the HLW tanks is one of DOE's most difficult problems in addressing the environmental legacy of the Cold War. Various plans for tank waste management and disposal have been forwarded, acted upon, or discarded, including transferring pumpable liquids from single-shelled tanks to double-shelled tanks (at Hanford), heating the waste to convert it to a powdery form (called calcining at INL), and vitrifying the waste (a process that stabilizes radioactive waste by mixing it with molten glass) for disposal at a geologic repository pursuant to the NWPA (currently ongoing at the SRS's Defense Waste

[16] 33 U.S.C. 1402.
[17] 42 U.S.C. 5842 (4).
[18] 52 Fed. Reg. 5992, 5993 (Feb. 27, 1987).
[19] *NRDC v. Administrator, ERDA*, 451 F. Supp. 1245, 1251 (D. D.C. 1978), aff'd in part and rev'd in part, *NRDC v. NRC*, 606 F.2d 1261 (D.C. Cir. 1979).

Processing Facility ("DWPF") and in the process of being attempted at the Hanford site now for decades without success). At SRS, around 4200 large casks have been filled with vitrified waste in the DWPF, with DOE rightly asserting from the start of operation of that facility in 1996 that the casks were destined, as required by law, for disposal in a geologic facility. Since the passage of the NWPA in 1982 and a Presidential Directive issued pursuant to that Act in 1985, defense HLW has been required to be removed from these tanks and disposed of in a deep geologic repository pursuant to the requirements of the NWPA.[20]

3. The Nuclear Waste Policy Act (NWPA)

As we noted above, Congress has summarily addressed this matter in the NWPA, but that definition of HLW was not drawn from a blank slate. The first draft of the definition of "high-level radioactive waste" used in the NWPA was initially modeled after the definition found in the West Valley Demonstration Project Act, but its evolution is worth noting. The West Valley Act definition, like the AEC's original in 1970 and the first statutory definition that closely followed in 1972, defined the term as waste "produced by the reprocessing ... of spent nuclear fuel," and included "both liquid wastes which are produced directly in reprocessing" and "dry solid material derived from such liquid waste." The NWPA definition, however, also provides that the NRC may include "such other material" as may be necessary "for purposes of protecting the public health and safety."[21] Significantly, the West Valley Act gave the Commission the power to add material other than reprocessing wastes to the definition, but not to exempt any part of the reprocessing wastes from it. DOE objected to the definition and recommended that it be rewritten to "permit the regulatory agencies to exclude materials from 'high-level radioactive waste' that need not be disposed of in a repository because of low activity."[22] Congress rewrote that definition, but not as the Department asked. As enacted, the final definition provides that "high-level radioactive waste" means:

> (A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and
>
> (B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.[23]

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[20] 42 U.S.C. § 10107(b)(2).

[21] Public Law 96-368, sec. 6(4) (42 U.S.C. § 2021).

[22] H. Rept. 97-491 (part 2) at 17 (1982) (letter from Eric Fygi to Chairman Price).

[23] 42 U.S.C. § 10101(12). The Price-Anderson Amendments Act of 1988, Public Law 100-408, later incorporated the Nuclear Waste Policy Act's definition of "high-level radioactive waste" into the Atomic Energy Act of 1954 by reference. 42 U.S.C. § 2014(dd).

The NRC has interpreted subparagraph (A) as "essentially identical" to the Commission's regulatory definition,[24] with one major difference. NRC's definition includes "solids into which such liquid wastes have been converted."[25] The NWPA's definition states "solid material derived from such liquid waste *that contains fission products in sufficient concentrations*."[26] NRC read the distinction to "reflect the possibility that liquid reprocessing wastes may be partitioned or otherwise treated so that some of the solidified products will contain substantially reduced concentrations of radionuclides."[27]

4. NRC's Advance Notice of Proposed Rulemaking

In 1987, the NRC sought public comment on "whether the Commission should (1) numerically specify the concentrations of fission products which it would consider 'sufficient' to distinguish" high-level radioactive waste from non-high-level radioactive waste under subparagraph (A) of the statutory definition; or (2) define high-level radioactive waste "so as to equate" subparagraph (A) wastes "with those wastes which have traditionally been regarded as" high-level radioactive waste "under Appendix F ... and the Energy Reorganization Act."[28] After some significant discussion of its authorities, vis-a-vis setting standards for what might constitute sufficient concentrations of HLW, NRC concluded "that the preferable construction" of the NWPA's definition should "conform to the traditional definition" found in all the earlier iterations and 10 C.F.R. §60.2. What had been HLW remained HLW.[29]

5. Reclassification of HLW and the Recent (Within Last Two Decades) History of HLW Litigation

After NRC's effort at rulemaking—after some years in consultation and preparation and after the permanent abandonment of thousands of gallons of HLW in two tanks in South Carolina—DOE issued an internal rule, Order 435.1, on July 9, 1999. NRDC and the Snake River Alliance initially filed suit in the United States Court of Appeals for the 9th Circuit in January 2000 challenging one section of Order 435.1, the "waste incidental to reprocessing exemption" ("WIR" or "incidental waste exemption"). After finding that it lacked original or exclusive jurisdiction to entertain Plaintiffs' claims under 42 U.S.C. § 10139, the 9th Circuit did not dismiss the case. Rather, the Court transferred the matter to the United States District Court for the District of Idaho, expressly leaving issues of standing, ripeness, and the merits to the District Court.[30]

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[24] *See* 52 Fed. Reg. at 5994. NRC's HLW disposal rules, adopted before NWPA's 1982 enactment, include: (1) irradiated reactor fuel; (2) liquid reprocessing wastes as defined in the AEC's Appendix F; and (3) "solids into which such liquid wastes have been converted." 10 C.F.R. § 60.2.
[25] 10 C.F.R. § 60.2.
[26] 42 U.S.C. § 10101(12)(A) (emphasis added).
[27] 52 Fed. Reg. at 5994.
[28] 52 Fed. Reg. at 5994.
[29] 53 Fed. Reg. 17709 (May 18, 1988).
[30] *Natural Resources Defense Council v. Abraham*, 244 F.3d 742, 747 (9th Cir. 2001).

After the transfer, NRDC *et al.* was joined by the Yakama Nation and Shoshone-Bannock Tribes. The combined set of plaintiffs filed a Complaint in February 2002. DOE filed an Answer in April 2002 and a Motion to Dismiss the Complaint in May 2002. At this point, the states of Washington, Idaho, South Carolina, and Oregon entered appearances as "Amici Curiae" in the proceeding. The District Court issued an opinion denying DOE's Motion to Dismiss on August 9, 2002.[31] The Court found that Plaintiffs had standing[32] and that Order 435.1 was both final agency action and ripe for purposes of judicial review.[33] The District Court found that Plaintiffs had presented claims upon which relief could be granted and that the law of the case did not prevent consideration of those claims.[34] The District Court found that Order 435.1 and its accompanying Manual and Guidance necessarily implicate the disposal provisions of the NWPA by reclassifying HLW as low-level radioactive waste ("LLW").[35] The Court also held that DOE does not operate with unfettered discretion with regard to the disposal of radioactive waste.[36]

NRDC *et al* and the George W. Bush Administration's DOE then filed cross-motions for summary judgment. The District Court reaffirmed two earlier rulings: (1) its ripeness decision; and (2) its decision that DOE does not have discretion to dispose of defense HLW somewhere other than a repository established under the NWPA.[37] Specifically, the court found that the NWPA plainly required the Department to use the civilian repository for defense high-level radioactive waste once President Reagan decided that a separate repository was not required, and that the tank wastes at Hanford, Savannah River Site, and INL fall within the definition of high-level radioactive waste. The Department's assertion that it can exempt waste streams based on technical and economic constraints, the court found, "directly conflicts with" the Act's definition of high-level radioactive waste.[38] The District Court also found that Congress has spoken clearly on the subject and that DOE Order 435.1 directly conflicts with the NWPA's definition of HLW (citing *Chevron v. NRDC*, 467 U.S. 837, 842 (1984)).[39] Accordingly, the District Court granted Plaintiffs' Motion for Summary Judgment and denied DOE's Cross-Motion for Summary Judgment.[40]

Notably, the Court was clearly cognizant that we, NRDC in that instance, did not challenge the traditional notion of "incidental" waste materials contaminated during reprocessing operations that has long been recognized by the AEC and the NRC. The Court was also aware that at no point did we challenge the NRC's authority to exempt solid materials derived from liquid reprocessing waste that contain sufficiently low concentrations of fission products to not require deep geologic disposal as provided by the NWPA. Judge Winmill held that the NWPA does not give the Department the authority to adopt an alternative disposal regime for high-level

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[31] *Natural Resources Defense Council v. Abraham*, 2002 U.S. Dist. LEXIS 28418 (D. Id. Aug. 9, 2002). *See* Ex. 1, Att. F for District Court opinion.
[32] *Id.* at 20.
[33] *Id.* at 7-11.
[34] *Id.* at 15.
[35] *Id.* at 17.
[36] *Id.* at 19.
[37] ER 354-58; *see* published opinion, *NRDC v. Abraham*, 271 F.Supp.2d 1260, 1263-64 (D. Id. 2003).
[38] *Natural Resources Defense Council v. Abraham*, 271 F. Supp. 2d 1260 (D. Id. 2003).
[39] *Id.*
[40] *Id.* at 1263.

radioactive wastes merely because the Department decides "that it is too expensive or too difficult" to dispose of it in a deep geologic repository.[41]

DOE appealed the matter to the United States Court of Appeals for the 9th Circuit. The 9th Circuit subsequently found that the matter was not ripe for review.[42] Importantly, the Ninth Circuit did not reach the merits of the Idaho Federal District Court's decision and put the legality of DOE's waste reclassification actions off for another day. Washington, South Carolina, and other States filed Amicus briefs in support of NRDC at both the District Court and appellate court stages.[43] The 9th Circuit avoided deciding the issue in 2004. It may not be able to do so if DOE finalizes its Area C Draft WIR Determination as it's currently written or if the agency moves forward with its proposed reinterpretation under discussion this day.

6. The Legislation that Emerged from the HLW Litigation – Section 3116

Contemporaneous with the Ninth Circuit's review of the Idaho Federal District Court's decision, the George W. Bush Administration DOE sought to have the District Court decision legislatively reversed by Congress. DOE succeeded in part, and failed in part, with this effort, titled Section 3116 of the *FY 2005 Defense Authorization Act*. *See* P.L. 108-375, *The Ronald Reagan National Defense Authorization Act of Fiscal Year 2005* (hereinafter "NDAA" and "Section 3116"). Senator Lindsey Graham (R-SC) was the primary proponent for Section 3116 and succeeded in inserting a provision into the 2005 Defense Authorization Act that substantially amends the NWPA.

Section 3116 spelled out criteria for the Energy Secretary to determine that the HLW can be reclassified as incidental waste (and thus can be disposed of on-site and in place) via amendments that provided DOE with authority to reclassify HLW as "waste incidental to reprocessing." Therefore, under this law, DOE can dispose of this reclassified HLW according to requirements other than those specified by NWPA (*ie.*, the HLW will no longer have to be disposed of in a geologic repository and can be disposed of according to standards and performance objectives applicable to low-level radioactive waste (LLW)).

But the law restricted this activity to South Carolina and Idaho. The law states in pertinent part: "COVERED STATES—For purposes of this section, the following States are covered States: (1) The State of South Carolina. (2) The State of Idaho." Section 3116(d)(1)(2). Thus, DOE was expressly barred by the terms of Section 3116 from reclassifying HLW in Washington and New York. Under those criteria, in SC and ID only, DOE may reclassify as "incidental" waste that exceeds the performance objectives for the disposal of low-level radioactive waste, 10 C.F.R. §61.40 (i.e., waste that is not actually low-level waste), so long as it has (1) removed highly radioactive radionuclides "to the maximum extent practical" and (2) has obtained a state issued permit, authority for the issuance of which is conferred on the State outside of Section 3116. At

[41] *Id.* at 1265.
[42] *NRDC v. Abraham*, 388 F.3d 701 (9th Cir. 2004).
[43] *Id.* at 707, 708, ("Despite NRDC's anxiety, the courts must await the coming of a proper time for decision, if, in the long run, that time ever comes. Maybe it never will come because DOE will not take actions that require—or even seem to require—court intervention. Who knows? In fine, the issue is not yet ripe.").

SRS, pursuant to this authority, DOE "determined" that certain HLW in the underground tanks is "incidental" waste. 71 Fed. Reg. 3,838 (Jan. 24, 2006). As a practical matter, this means that DOE can undertake a process to reclassify HLW in South Carolina and Idaho. Conversely, DOE cannot reclassify the HLW that currently rests in the tanks at the Hanford site in Washington and in casks of vitrified waste at the West Valley site in New York.

As NRDC has repeatedly noted, this does not mean that DOE cannot remove waste from the tanks, treat it such that it no longer has fission products in sufficient concentration, and dispose of that waste in a manner other than in a geologic repository, after it has subjected that waste to approval by the NRC under its regulatory authority. What DOE cannot do in Washington or New York is declare the HLW in the tanks to be "waste incidental to reprocessing" or simply redefine or declare that HLW to be not HLW under no meaningful criteria. *See* 271 F.Supp.2d at 1265. Additional background is provided in the November 7, 2018 comments on pages 10-15.

7. The HLW Reinterpretation Proposal Would Allow DOE to Arbitrarily Reclassify HLW so that the Agency may Avoid Compliance with the NWPA

The Proposed Reinterpretation of HLW flies in the face of the plainly stated Congressional language and the clear explication of its terms by the Federal District Court in Idaho, a substantive decision that was far from explicitly reversed by the 9th Circuit Court's ripeness decision. It is worth reminding DOE of that decision at length. First, the Court noted the clear purpose of the WIR process. The Court wrote that "[t]he DOE issued Order 435.1 to govern reclassification of that waste. That Order, according to DOE, sets forth three criteria, "each of which must be met," to reclassify HLW as low-level waste." The same situation is at issue in the HLW Reinterpretation Proposal.

The District Court then went on to explain one of the deep legal infirmities in DOE's actions precisely relevant to the HLW Reinterpretation Proposal. The Court held,

> This rigorous process, DOE implies, will protect against arbitrary action. However, one of those "three criteria" is not a benchmark that could be "met." It requires that HLW reclassified as low-level waste must meet "safety requirements comparable to the performance objectives set out in 10 C.F.R. 61, Subpart C ...." In other words, DOE will treat waste that it deems to be low-level waste as low-level waste. This is not a "third criteria" that must be "met" but is simply a statement of intent or fact.[44]

The same situation is presented in the HLW Reinterpretation Proposal. DOE will have the ability to claim and treat waste that it deems to be low-level waste as low-level waste. And while DOE tries to defensively gird the process with an inadequate Performance Assessment such as that put forward by the agency for the 16 Area C tanks at the Hanford site, the weaknesses of which are identified at length in the State of Washington Comments, and in our own technical evaluation,[45]

[44] 271 F.Supp.2d at 1265.
[45] Ex. 1, Att. A, Declaration of Dr. Marco Kaltofen, *passim.*

there is no hiding the fact that there is no meaningful criteria in play here. Rather, DOE has simply made a statement of intent that it will treat HLW as LLW and dispose of it in a way that is plainly contrary to law.

More than a decade ago the Idaho Federal District Court left no room for DOE to wiggle out from under the clear directions of Congress, and its same cautions are precisely relevant to the HLW Reinterpretation Proposal and the parallel Area C Draft WIR Determination. The Court continued explaining Order 435.1, piece by piece, and further held:

> There are really only two criteria that must be met. The first is that key radionuclides are removed to the extent technically and economically practical. This means that if DOE determines that it is too expensive or too difficult to treat HLW, DOE is free to reclassify it as incidental waste. The second is that HLW incorporated into a solid form must either meet the concentration levels for Class C low-level waste or meet such alternative requirements for waste classification and characterization as DOE may authorize. These "alternative requirements, are not defined, and thus are subject to the whim of DOE. While DOE has the authority to "fill any gap left ... by Congress," Chevron, 467 U.S. at 843, it does not have the authority "to adopt a policy that directly conflicts with its governing statute." *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990).[46]

Thus, the Court found that "DOE's Order 435.1 directly conflicts with NWPA's definition of HLW. NWPA's definition pays no heed to technical or economic constraints in waste treatment. Moreover, NWPA does not delegate to DOE the authority to establish alternative requirements" for solid waste. Because Congress has spoken clearly on that subject, "that is the end of the matter," *Chevron*, 467 U.S. at 842, leaving no room for "alternative requirements." Thus, DOE's Order 435.1 must be declared invalid under *Chevron*."[47] The HLW Reinterpretation Proposal, just as the District Court found with the original Order 435.1, runs directly counter to Congress's clear directions that HLW be disposed of in a repository. Moreover, the ripeness concerns that drove the 9th Circuit's procedural reversal are clearly done away with by the explicit terms of the Draft WIR Determination and the HLW Reinterpretation Proposal.

8. The Solids and Sludges Abandoned in HLW Tanks are HLW and, in Any Event, Contain Fission Materials in Sufficient Concentration

Assuming *arguendo* that the language of the NWPA is unclear–which it is not–the second illustrative clause in the definition of HLW ("any solid material derived from such liquid waste that contains fission products in sufficient concentrations") provides no justification for an

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[46] *Id.* at 1265, 1266; In the context of the Area C Draft WIR Determination, DOE attempts to blunt some of the force of this disapproving judicial opinion by suggesting that "[t]his provision in DOE 435.1 also includes the following language: "or will meet alternative requirements for waste classification and characterization as DOE may authorize." DOE is not using or relying upon this language in this Draft WIR Evaluation to any degree whatsoever." Draft WIR Determination at 1-4, n.7. As the entirety of the Idaho decision makes clear, such lack of reliance on the "alternative requirements" clause is unavailing.

[47] 271 F.Supp.2d at 1266.

arbitrary reinterpretation of a term defined by statute. An implication of this clause—that there is solid material derived from liquid reprocessing waste that does not contain fission products in sufficient concentrations to be HLW—has no application to the waste DOE may attempt to abandon at the bottom of the HLW tanks, or simply dilute with loads of concrete and grout and send to another shallow, land based repository that is wholly unsuited as an option for the disposal of nuclear waste.

Any attempt to reclassify/rename/reinterpret the HLW sediments and solids to be abandoned in the tanks as being "derived from" liquid reprocessing waste rather than "the highly radioactive material resulting from the reprocessing of spent nuclear fuel" would be incorrect. At Hanford, for example, DOE has acknowledged the range of HLW–and that range includes solids as well as liquids (and slurry and sludge).[48] In this context, "derived from" necessarily entails additional treatment of the reprocessing waste to reduce its volume or radioactivity or to convert it into a solid form.[49]

And even if the waste was derived solid material–which it is not–it contains fission products in sufficient concentration. The HLW abandoned in the tanks is at least as radioactive (and perhaps more so) than the HLW removed from the tanks for disposal in a geologic repository.[50] Nor can DOE assume that there was up to 100-fold "dilution" of the waste by the added grout for the purposes of regulatory compliance.[51] Thus, DOE's interpretation of the NWPA is entitled to no deference since the incidental waste exemption is neither reasonable nor consistent with the statutory purpose of isolating HLW.[52]

DOE is, once again, via the HLW Reinterpretation Proposal, ignoring the definition of HLW of the NWPA to serve its purposes. First and most important, the incidental waste exemption runs directly counter to clear congressional direction that HLW be disposed of in a deep, geologic repository. The intent of Congress is clear and that should be the end of the matter. Second, assuming *arguendo*, even if Congress was silent or ambiguous on the subject of HLW disposal, DOE's action here today runs afoul of the NWPA by ignoring the basic inconsistency of treating as low-level waste the reprocessing waste that is at least as radioactive as waste removed for geologic disposal.

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[48] See Tank Waste Remediation System, Hanford Site, Final Environmental Impact Statement, Volume Two, Appendix A, at A-12. (August 1996).
[49] *See e.g.*, 52 Fed. Reg. 5993-5998.
[50] *See* Ex. 1, Att. E, Complaint, at 8 (NRC Review of SRS HLW Tank Closure Methodology, June 30, 2000), where the NRC states that key radionuclides cannot be removed preferentially from the bottom of the tanks.
[51] *See* Ex. 1, Att. C, Cochran Decl. at 9. Even when assuming a 100-fold dilution or averaging of the radioactivity of the abandoned waste with the near zero radioactivity of the grout at the SRS tanks, 37 of the 51 tanks would still be more radioactive than the low-level waste standards of 10 C.F.R. § 61.55. It should also be noted that this mathematical averaging takes place even if there is no significant physical mixing of the grout and HLW (note that if DOE could mix the solids and grout, it could readily remove the HLW). *See* Complaint Att. 19, Defense Nuclear Facilities Safety Board ("DNFSB"), SRS Report for Week Ending March 14, 1997 (1997) where the DNFSB expressed doubt about the effective mixing of the residual HLW sludge with the grout.
[52] *Reilly*, 976 F.2d at 40.

Such actions cannot stand. Exemptions from "'. . . humanitarian and remedial legislation [must] . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those *plainly and unmistakably* within its terms and spirit is to abuse the interpretative process.'"[53] The NWPA's authority over the requirements for environmentally sound and publicly accepted disposal of radioactive waste make it just such a "humanitarian and remedial" statute; thus, exemptions to it must be "narrowly construed."[54]

This HLW Reinterpretation Proposal is another step, along with allowing for the Area C WIR Determination and other reclassification decisions, to create a broad, ill-defined loophole under the NWPA that fatally undermines the purpose and intent of Congress to ensure that the highly radioactive material resulting from the reprocessing of spent nuclear fuel is disposed of in a manner protective of the environment and public health.

C. Congress has Determined that WIPP Cannot be the Geologic Repository for Any HLW.

DOE's HLW Reinterpretation Proposal also seems to be aimed at opening the door for disposal of HLW at the Waste Isolation Pilot Project (WIPP) site in New Mexico. Since WIPP's original authorization in 1979 in Public Law 96-164, Section 213, Congress, the State of New Mexico, and the public have understood that WIPP has a limited mission and that other nuclear waste disposal sites would be created. While the Department of Energy (DOE) has proposed that WIPP could have broader missions, the WIPP Land Withdrawal Act (LWA, Public Law 102-579, as amended) limited the mission to defense transuranic (TRU) waste with a capacity of up to 6.2 million cubic feet/175,564 cubic meters.[55] Section 12 of the LWA explicitly prohibits any HLW or spent fuel from being transported to, and stored and disposed at WIPP. The LWA also provides regulatory authorities to the State of New Mexico, including to issue a WIPP Permit under the Resource Conservation and Recovery Act. In October 2004, in response to a DOE proposal to rename some Hanford HLW to TRU, the WIPP Permit was modified to specifically exclude any waste from the 243 tanks at Hanford, INL, and SRS that had been managed as HLW.[56] Thus, it is undisputed that Congress has limited WIPP's mission to preclude any HLW disposal, and the State of New Mexico has further acted to prevent any HLW from Hanford, INL, SRS, and West Valley tanks through its WIPP Permit.

1. Brief Historical Background

In 1972, the Atomic Energy Commission (AEC) announced that it would operate WIPP as the nation's first geologic repository. By 1975, the AEC determined that WIPP would be for disposal of transuranic (TRU) waste only, but with a research-and-development capability for

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[53] *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)) (emphasis added).
[54] *Id.*
[55] Section 7(a)(3).
[56] New Mexico Environment Department, *Final Determination, Class 2 Modification Request,* October 29, 2004. https://www.env.nm.gov/wipp/finaldet1104.pdf. West Valley tank waste is excluded from WIPP as commercial waste.

experimentation for HLW in salt. In 1978, a DOE task force suggested that WIPP include a demonstration of retrievably storing up to 1,000 spent-fuel assemblies. Also in 1978, James Schlesinger, the first DOE Secretary, promised that New Mexico could veto WIPP. In April 1979, DOE issued a draft environmental impact statement with a "reference case" of WIPP as a licensed TRU repository; a research and development area for experiments with all types of nuclear waste, including HLW; and an "intermediate-scale facility" (ISF) for the permanent disposal of 1,000 commercial spent fuel assemblies.[57]

In December 1979, Congress passed Public Law 96-164, Section 213, which authorized WIPP "to demonstrate the safe disposal of radioactive waste resulting from the defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission." The law specifically designates WIPP as a "pilot plant," and to "demonstrate the safe disposal." Both of those designations clearly indicate that WIPP was not the sole disposal site for all TRU waste, and that HLW disposal was precluded because such disposal facilities were licensed by the NRC. Congress has maintained those legal requirements and constraints for the last 39 years. Additionally, Congress has not changed the authorization in subsequent nuclear waste laws.

In 1982, Congress passed the Nuclear Waste Policy Act (NWPA) (Public Law 97-425),

> "An Act to provide for the development of repositories for the disposal of high-level radioactive waste and spent nuclear fuel, to establish a program of research, development, and demonstration regarding the disposal of high-level radioactive waste and spent nuclear fuel, and for other purposes." Enactment heading.

The NWPA did not include WIPP, because the facility was authorized to be exempt from Nuclear Regulatory Commission (NRC) licensing, and disposal was limited to transuranic waste, while any repository for high-level defense waste would be licensed by the NRC. 42 U.S.C. 10107, Section 8(b)(3).

In 1987, Congress amended the NWPA to designate a single high-level waste and spent fuel repository, and discussed whether that facility should be WIPP, but again determined that WIPP would not be that facility, and instead designated Yucca Mountain, Nevada, as the repository. 42 U.S.C. 10172.

2. WIPP Land Withdrawal Act (LWA) - Public Law 102-579

Because DOE wanted to open the facility in 1988, WIPP land withdrawal bills were introduced in Congress, starting in 1987. The various bills were subject to congressional hearings and debate in Washington, DC and New Mexico. The requirements that WIPP would meet before receiving wastes, the capacity of the facility, whether any HLW was allowed, and the state and federal regulatory and oversight authorities were major issues in five years of debate leading to passage

[57] DOE. *Draft Environmental Impact Statement Waste Isolation Pilot Plant,* DOE/EIS-0026-D, April 1979, Vol. 1 at 2-18 and 19.

of the LWA by the House of Representatives on October 5, 1992 and the Senate on October 8, 1992.

The LWA clearly states:

> "BAN ON HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL.—The Secretary [of Energy] shall not transport high-level radioactive waste or spent nuclear fuel to WIPP or emplace or dispose of such waste or fuel at WIPP." Section 12.

Thus, Congress emphatically stated that no HLW could come to WIPP. That provision of the LWA remains unchanged today.

On November 26, 2003, the New Mexico Environment Department (NMED) issued an agency-initiated permit modification because

> "NMED has reason to believe that the inventory of waste may be expanded to include waste streams that were not considered eligible for disposal at WIPP at the time the WIPP permit application was submitted, such as waste from HLW tanks at the Hanford, INEEL, and the Savannah River Site that DOE may declare as waste incidental to reprocessing."[58]

That modification was eventually withdrawn, as DOE agreed to submit its own modification request, which was done on July 2, 2004. That modification request proposed that any waste "from tanks that has ever been managed as high-level waste is not acceptable at WIPP unless specifically approved through a subsequent Class 3 permit modification." On October 29, 2004, NMED approved the request with changes that incorporated a new Permit Condition II.C.3.i:

> Excluded Waste TRU mixed waste that has ever been managed as high-level waste and waste from tanks specified in Permit Attachment B are not acceptable at WIPP unless specifically approved through a Class 3 permit modification. Such wastes are listed in Table II.C.3.i below. Table II.C.3.i - Additional Approved Waste Streams Date Class 3 Permit Modification Request Approved Description of Waste Stream.

In addition, a new Table B-9 was incorporated into the Permit that lists 177 Hanford tanks, 51 SRS tanks, and 15 INL tanks that are subject to the Excluded Waste Provision.

The Excluded Waste provision remains in the current WIPP Permit as Section 2.3.3.8 and Waste Tanks Subject to Exclusion is Table C-4.

[58] Fact Sheet, November 26, 2003 at 4. https://www.env.nm.gov/wipp/TWBIR_Fact_Sheet.pdf

Thus, the State of New Mexico has used its statutory authority to prohibit HLW wastes from WIPP, regardless of whether DOE reinterprets its HLW definition.

Therefore, DOE must recognize in the context of the HLW Reinterpretation Proposal and otherwise, that it cannot consider WIPP for disposal of any of this waste because it is contrary to law and to the New Mexico WIPP permit.

D. The Proposed Reinterpretation of HLW Reverses Nearly a Half Century of Waste Designation

It is a well-settled principle that an agency may not shift its position without supplying a reasoned explanation for doing so.[59] Since just after the Manhattan Project, the reprocessing waste disposed of in the tanks in Washington, South Carolina, Idaho and New York has been understood to be HLW. Indeed, DOE has spent decades analyzing and managing the HLW in the tanks, as evidenced by publications such as the *SRS High-Level Waste Tank Closure Draft Environmental Impact Statement* (November 2000).[60] And in the early 2000s, when the first iteration of this contentious dispute was fought, Congress explicitly passed on giving to DOE the power of reclassification of Washington and New York's HLW, and only allowed Idaho and South Carolina a process limited by Section 3116 of the National Defense Authorization Act of 2005.[61]

Literally thousands of documents have been developed and perhaps millions of pages have been written about how to manage and dispose of HLW tanks. Now, for the sake of expediency and without technical or legal support, DOE has issued this HLW Reinterpretation Proposal in hopes of providing for itself the authority to define away its most difficult and expensive cleanup problem. No bright line standards or intelligible criteria whatsoever allow DOE's discretion to reclassify what has been, until now, universally accepted as HLW destined for a geologic repository. The failure to provide any legally adequate explanation for this reversal of position is arbitrary and capricious and in violation of the law.[62]

For the reasons articulated above, DOE should withdraw the Proposed Reinterpretation of HLW and commence working with the immediately affected States, Tribes, and interested members of the public on a cleanup trajectory for the high-level radioactive wastes (HLW) that is both scientifically defensible and publicly accepted.

IV. Specific Comments

1. DOE writes:

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[59] *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883 (D.C. Cir. 1987); *see also State Farm*, 463 U.S. at 57.
[60] *See* Tank Waste Remediation System, Hanford Site, Final Environmental Impact Statement (August 1996).
[61] NRDC *et al.* have compiled a select bibliography of sources of information on HLW, attached as Ex. 2.
[62] *State Farm*, 463 U.S. at 57.

DOE manages large inventories of legacy waste resulting from spent nuclear fuel (SNF) reprocessing activities from atomic energy defense programs, e.g., nuclear weapons production. DOE also manages a small quantity of vitrified waste from a demonstration of commercial SNF reprocessing. Reprocessing generally refers to the dissolution of irradiated SNF in acid, generating liquid or viscous wastes, and the chemical processing to separate the fission products or transuranic elements of the SNF from the desired elements of plutonium and uranium, which are recovered for reuse. HLW Reinterpretation Proposal at 50909, c. 3 – 50910, c. 1.

Comments:

As described above, HLW is the result of the reprocessing of spent nuclear fuel. Congress has defined the term "HLW" and even the required conditions of "disposal" that are to be the end result. High-level nuclear wastes remain dangerous to humans for long periods of time. The D.C. Circuit observed: "[h]aving the capacity to outlast human civilization as we know it and the potential to devastate public health and the environment, nuclear waste has vexed scientists, Congress, and regulatory agencies for the last half-century." *NEI et al.* at 1257. Because of this danger, since the National Academy of Sciences' original recommendations in 1957,[63] it has been a nearly consensus view among government, industry and environmental stakeholders that the waste from the nation's nuclear weapons program and its commercial nuclear power plants must be buried in technically sound deep geologic repositories, permanently isolated from the human and natural environments. This principle was codified as national policy nearly 30 years ago in the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10131(b)(1) and reiterated in President Obama's "*Blue Ribbon Commission on America's Nuclear Future – Report to the Secretary of Energy, January 31, 2012*".

2. DOE writes:

Liquid reprocessing wastes have been or are currently stored in large underground tanks at three DOE sites: Savannah River Site (SRS) (South Carolina), Idaho National Laboratory (INL) (Idaho), and the Office of River Protection at the Hanford Site (Washington). Solid reprocessing wastes are liquid wastes that have been immobilized in solid form and are currently stored at SRS, INL, and the West Valley Demonstration Project (New York). At 50910, c. 1

Comments:

We agree with these factual statements, though the description does not include the dangers posed by the wastes, nor the facts about the significant leaks that have occurred, especially at Hanford. See Ex 1, at 5.

3. DOE writes:

DOE's interpretation of HLW is that reprocessing waste is non-HLW if the waste:

[63] National Academy of Sciences, *The Disposal of Radioactive Waste on Land, Report of the Committee on Waste Disposal of the Division of Earth Sciences* (Washington. D.C. 1957).

I. Does not exceed concentration limits for Class C low-level radioactive waste as set out in section 61.55 of title 10, Code of Federal Regulations; or

II. Does not require disposal in a deep geologic repository and meets the performance objectives of a disposal facility as demonstrated through a performance assessment conducted in accordance with applicable regulatory requirements.

Under DOE's interpretation, waste meeting either of these criteria is non-HLW and may be classified and disposed of in accordance with its radiological characteristics. Ibid.

Comments:

As we explained in detail above, the Trump Administration DOE has no basis under the law to reinterpret or redefine a term clearly defined under statute. DOE's interpretation misstates the relevant law, inaccurately describes the clear intent of Congress, and suggests a regulatory control and oversight process that is functionally non-existent. There is no legal basis for DOE's proposed term of "non-HLW."

First, as a straightforward matter of statutory interpretation, the NWPA defines HLW by its source – "the highly radioactive material resulting from the reprocessing of spent nuclear fuel"– rather than its hazardous characteristics. Reprocessing waste is categorically treated as HLW and defined by its origin as it is necessarily both "intensely radioactive and long-lived."[64] Reprocessing is the act of separating the ingredients in irradiated nuclear reactor fuel and target materials into constituent parts or streams.[65] The extraordinarily radioactive waste that results from this process is HLW.[66]

The language that follows the word "including" in subsection (A) in the HLW definition is there for illustrative purposes. Under traditional rules of statutory construction, the term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.[67] Congress's general principle is that HLW is defined by its source. Therefore, Congress is clear that HLW is all highly radioactive material resulting from the reprocessing of spent nuclear fuel.

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[64] *See* 52 Fed. Reg. 5994. For purposes of explanation, Dr. Cochran describes both the nature of reprocessing and the resulting HLW. *See also*, Ex. 1, Att. C, at 5-7.

[65] *Id.*

[66] *Id.*

[67] *Public Citizen, Inc. v. Lew*, 127 F.Supp.2d 1 (D.D.C. 2000) (*citing Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)). *See also*, *F.T.C. v. MTK Marketing, Inc.*, 149 F.3d 1036, 1040 (9th Cir. 1998), *cert. denied*, *Frontier Pacific Ins. Co. v. F.T.C.*, 119 S.Ct. 1028 (1999) ("In terms of statutory construction, use of the word 'includes' does not connote limitation; in definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration."); and *U.S. v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957) ("The word 'includes' is generally a term of enlargement and not of limitation, and 'including' is not one of all embracing definition, but connotes an illustrative application of the general principle.) (citations omitted).

In subsection (B) of the HLW definition, Congress provides the NRC (not DOE) with the authority to determine via rulemaking that "other" highly radioactive material (*i.e.*, highly radioactive material that *may not be* the result of the reprocessing of spent nuclear fuel) requires permanent isolation (*i.e.*, should be disposed of in a repository pursuant to the NWPA). Subsection (B) of the HLW definition is not germane at this juncture as DOE is not subjecting its HLW Reinterpretation Proposal to the regulatory authority of the NRC.

Second, DOE's suggestions that HLW that either "does not exceed concentration limits for Class C low-level radioactive waste" or "[d]oes not require disposal in a deep geologic repository and meets the performance objectives of a disposal facility as demonstrated through a performance assessment conducted in accordance with applicable regulatory requirements" flatly violate the law. In the first criteria – HLW that does not exceed the concentration limits for Class C, DOE could simply average the HLW at the bottom of a tank in any of the HLW sites and thereby suggest that the HLW is magically no longer HLW. The Idaho Federal District Court refused DOE on this ground in 2004 and such a suggestion is sure to elicit legal challenge.

To adopt DOE's second criteria—simply stating that the HLW does not require disposal in a deep geologic repository—would violate Congress's explicit instructions that HLW is to be disposed of in just such a repository. Further, for all intents and purposes, DOE is self-regulating with respect to its *management* of nuclear waste and thus we have no idea which or whose applicable regulatory requirements DOE refers to here. What are the regulatory standards for the stated Performance Assessment? Again, who is the applicable regulator? Is it a state? The NRC? Someone else? And under what statute and protective regulatory scheme will the waste formerly known as HLW be disposed of? The Trump Administration explains none of this.

4. DOE writes:

At this time, DOE is not making—and has not made—any decisions on the disposal of any particular waste stream. Disposal decisions, when made, will be based on the consideration of public comments in response to this Notice and prior input and consultation with appropriate state and local regulators and stakeholders. DOE will continue its current practice of managing all its reprocessing wastes as if they were HLW unless and until a specific waste is determined to be another category of waste based on detailed technical assessments of its characteristics and an evaluation of potential disposal pathways. Ibid.

Comments:

As evidenced by the Draft WIR Determination for the Area C Tanks at the Hanford site, DOE has, in fact, already made decisions about the disposal and classification of particular HLW streams. That determination serves notice that DOE will depart from its current practice of managing all its reprocessing wastes as if they were HLW and do so in a manner that violates the law. *Cf.* Ex. 1, *passim.*

At SRS, it is clear that the intent of DOE may already be to apply the new definition of HLW in order to reduce costs and speed disposal of HLW at SRS. In a January 23, 2018

recommendation to DOE entitled "Investigate Feasibility of Reclassifying Certain High-Level Waste to Enable Acceleration of Disposal and Reduction of Costs,"[68] the SRS Citizens Advisory Board (SRS CAB) recommended "that DOE investigate the feasibility of reclassifying the used DWPF melters and some portion of HLW canisters as TRU waste or LLW to expedite disposal, reduce costs, and to free-up storage space in the temporary GWSBs [Glass Waste Storage Buildings]."

In a July 30, 2018 response to the SRS CAB,[69] DOE accepted the recommendation and stated "DOE-SRS accepts this recommendation. At the DOE-headquarters level, consideration is being given to a potential revision to DOE Order 435.1, *Radioactive Waste Management*, that would enhance the risk-based components of the current definition of 'high-level radioactive waste.' A more risk-based approach could potentially provide more cost-effective and timely alternatives to the current disposal path for the items identified in your recommendation." DOE's response letter fails to point out that HLW is required by law to be disposed of in a geologic repository. Likewise, DOE is unable in the response letter to make the claim that Congress has altered the definition of HLW.

5. DOE writes:

DOE interprets the term ''high-level radioactive waste'', as stated in the Atomic Energy Act of 1954 as amended (AEA),[1] and the Nuclear Waste Policy Act of 1982 as amended (NWPA) in a manner that defines DOE reprocessing wastes to be classified as either HLW or non-HLW based on the radiological characteristics of the waste and their ability to meet appropriate disposal facility requirements. [Note 1 states: 42 U.S.C. 2011 et seq. This definition of HLW as first enacted in the Nuclear Waste Policy Act of 1982, as amended, and incorporated into the AEA in 1988.]

The basis for DOE's interpretation comes from the AEA and NWPA definition of HLW: "(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and (B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation."

In paragraph A, Congress limited HLW to those materials that are both ''highly radioactive'' and ''resulting from the reprocessing of spent nuclear fuel.'' Reprocessing generates liquid

[68] Savannah River Site Citizens Advisory Board recommendation Number 354 to DOE "Investigate Feasibility of Reclassifying Certain High-Level Waste to Enable Acceleration of Disposal and Reduction of Costs," January 23, 2018, https://www.srs.gov/general/outreach/srs-cab/library/recommendations/Rec_354_-_Reclassify_High-Level_Waste.pdf

[69] U.S. Department of Energy response to SRS Citizens Advisory Board Recommendation Number 354 to DOE "Investigate Feasibility of Reclassifying Certain High-Level Waste to Enable Acceleration of Disposal and Reduction of Costs," July 30, 2018, https://www.srs.gov/general/outreach/srs-cab/library/responses/DOE_Response_to_CAB_Rec_354.pdf. (Website accessed January 9, 2019).

wastes, with the first cycle of reprocessing operations containing the majority of the fission products and transuranic elements removed from the SNF. Thus, in paragraph A, Congress distinguished HLW with regard to its form as both ''liquid waste produced directly in reprocessing'' and ''any solid material derived from such liquid waste that contains fission products in sufficient concentrations.'' Id. c.1 & 2.

Comments:

DOE misstates the law. Congress did not limit HLW to "both" the result of reprocessing and constituents that are highly radioactive. The word "both" is not in the text of the definition, no matter how much DOE might wish it were or try to insert it via this misplaced HLW Reinterpretation Proposal. Rather, Congress wrote that HLW is "the highly radioactive material resulting from the reprocessing of spent nuclear fuel," and we addressed this in detail above. *Supra* at 4-7.

6. DOE writes:

In paragraph B, Congress defined HLW also to include ''other highly radioactive material'' that the Nuclear Regulatory Commission (NRC) determines by rule ''requires permanent isolation.'' HLW under paragraph B includes highly radioactive material regardless of whether the waste is from reprocessing or some other activity. Further, under paragraph B, classification of material as HLW is based on its radiological characteristics and whether the material requires permanent isolation. The common element of these statutory paragraphs defining HLW is the requirement and recognition that the waste be ''highly radioactive.'' Additionally, both paragraphs reflect a primary purpose of the NWPA, which is to define those materials for which disposal in a deep geologic repository is the only method that would provide reasonable assurance that the public and the environment will be adequately protected from the radiological hazards the materials pose. The terms ''highly radioactive,'' and ''sufficient concentrations'' are not defined in the AEA or the NWPA. By providing in paragraph A that liquid reprocessing waste is HLW only if it is ''highly radioactive,'' and that solid waste derived from liquid reprocessing waste is HLW only if it is ''highly radioactive'' and contains fission products in ''sufficient concentrations'' without further defining these standards, Congress left it to DOE to determine when these standards are met. Given Congress' intent that not all reprocessing waste is HLW, it is appropriate for DOE to use its expertise to interpret the definition of HLW, consistent with proper statutory construction, to distinguish waste that is non-HLW from waste that is HLW. At 50910, c. 2 & 3.

Comments:

No part of DOE's textual analysis is accurate. First, that the terms ''highly radioactive'' and ''sufficient concentrations'' are not defined in the AEA or the NWPA in no way obviates the glaring detail that "HLW" and "disposal" are, in point of fact, defined in explicit terms. Second, paragraph A in no way asserts that liquid reprocessing waste is HLW only if it is ''highly radioactive.'' Congress wrote in no such limitation and if it had felt necessary to do so, it could have done so and has not. Further, it's not as if Congress has not had this matter before it during

the years and at no point has it taken steps to provide the department with the authority it so clearly seeks today.

DOE then moves on to ignore traditional rules of statutory construction and suggest that the term "including" is not simply an illustrative application of the general principle, but that it somehow provides DOE with wide authority to define out of existence a substance—HLW—that is the entire purpose of the law where it is defined in the first instance. Congress is clear that HLW is all highly radioactive material resulting from the reprocessing of spent nuclear fuel. The inquiry can halt there and there is no place for DOE's expertise, and certainly not in rewriting the law or in the technical exercise of trying to alter HLW by simply abandoning it under layers of concrete or attempting to dilute it to improperly shift its disposal path.

Further, attempts to conflate the powers that Congress granted the NRC in Paragraph B—HLW is … "other highly radioactive material that the Commission [NRC], consistent with existing law, determines by rule requires permanent isolation"—and somehow magically reassign them to the Energy Department must fail. Congress's direction could not be more plain. HLW was defined by its source in Paragraph A, with an illustrative example provided. The NRC, the ultimate licensing body under the NWPA, may determine by rule that other highly radioactive may also require permanent isolation and therefore be disposed of in whatever repositories are ultimately selected. Attempting to transmute the authority expressly provided another agency by Congress as some wide-ranging assignment of authority provided to DOE that would flatly violate the precise intentions of the law—that HLW is to be disposed of in a deep geologic repository—has no merit. These assertions alone should cause DOE to retract this notice and start over.

It is also telling that DOE provides no citations to support the inaccurate assertions about Congress's intent in the NWPA. DOE also does not cite other relevant laws, including the Federal Facilities Compliance Act (Public Law No. 102-386), which were enacted to provide additional regulation of DOE.

7. DOE writes:

The DOE interpretation is informed by the radiological characteristics of reprocessing waste and whether the waste can be disposed of safely in a facility other than a deep geologic repository. This interpretation is based upon the principles of the NRC's regulatory structure for the disposal of low-level radioactive wastes. In its regulations, NRC has identified four classes of low-level radioactive waste (LLW)—Class A, B or C—for which near-surface disposal is safe for public health and the environment, and greater-than-Class C LLW for which near-surface disposal may be safe for public health and the environment. This waste classification regime is based on the concentration levels of a combination of specified short-lived and long-lived radionuclides in a waste stream, with Class C LLW having the highest concentration levels. Waste that exceeds the Class C levels is evaluated on a case-specific basis to determine whether it requires disposal in a deep geologic repository, or whether an alternative disposal facility can be demonstrated to provide safe disposal. The need for disposal in a deep geologic repository results from a combination of two radiological characteristics of the waste: high activity

radionuclides, including fission products, which generate high levels of radiation; and long-lived radionuclides which, if not properly disposed of, would present a risk to human health and the environment for hundreds of thousands of years. Because the NRC has long- standing regulations that set concentration limits for radionuclides in waste that is acceptable for near-surface disposal, it is reasonable to interpret ''highly radioactive'' to mean, at a minimum, radionuclide concentrations greater than the Class C limits. Reprocessing waste that does not exceed the Class C limits is non-HLW. DOE interprets ''sufficient concentrations'' in the statutory context in which the definition was enacted, which, as discussed above, is focused on protecting the public and the environment from the hazards posed by nuclear waste. In addition to the characteristics of the waste itself, the risk that reprocessing waste poses to human health and the environment depends on the physical characteristics of the disposal facility and that facility's ability to safely isolate the waste from the human environment. Relevant characteristics of a disposal facility may include the depth of disposal, use of engineered barriers, and geologic, hydrologic, and geochemical features of the site. Taking these considerations into account, it is reasonable to interpret ''sufficient concentrations'' to mean concentrations of fission products in combination with long-lived radionuclides that would require disposal in a deep geologic repository. At 50910, c. 3 – 50911, c. 1.

Comments:

Again, almost every sentence in the above cited paragraph has explicit flaws, unlawful and unsupported assertions, and will result in severe environmental harms in multiple locations if enacted and carried out by the Trump Administration DOE.

With respect to the claim that DOE's interpretation is "informed by the radiological characteristics of reprocessing waste and whether the waste can be disposed of safely in a facility other than a deep geologic repository," there is no basis provided for the assertion. And the assertion ignores the above discussion that Congress has spoken to this issue in the definition of HLW. In any event, the NRC is the licensing body that can decide to expand the universe of what can be disposed of in a repository, not DOE.

Next, DOE embarks on a flight of fancy, suggesting that its "interpretation is based upon the principles of the NRC's regulatory structure for the disposal of low-level radioactive wastes," which, notably, is not relevant to the disposal of HLW and spent nuclear fuel as those substances have their own law proscribing the terms of their disposal – the NWPA. Congress has spoken to this matter. The fact that Greater than Class C waste exists and that the NRC may evaluate it on a case-specific basis to determine whether it requires disposal in a deep geologic repository, is beside the point when articulating what it is DOE can do with HLW. DOE goes on to suggest that "[b]ecause the NRC has long-standing regulations that set concentration limits for radionuclides in waste that is acceptable for near-surface disposal, it is reasonable to interpret ''highly radioactive'' to mean, at a minimum, radionuclide concentrations greater than the Class C limits." No, it's not reasonable when the substances DOE is attempting to reinterpret have already been defined by Congress in the particular law DOE is attempting to evade.

DOE shows its hand in the next sentence—"[r]eprocessing waste that does not exceed the Class C limits is non-HLW." It is well understood via DOE's attempt to revive the WIR process that the agency will simply work to dilute, abandon and average any HLW with any necessary amount of concrete or some other substance such that the agency will claim it is no longer HLW. This transparent attempt at semantically defining out of existence the world's most toxic, long-lasting waste (but not actually doing away with the waste in any meaningful fashion) endangers the environment and public health of communities across the country. DOE's recitation of characteristics of unidentified and wholly unregulated "disposal facilities" is a meaningless exercise that insults the states and communities that will be affected for centuries by HLW abandoned or improperly and unlawfully disposed of. DOE is unregulated with respect to its management of radioactive (not chemical) waste. If the department succeeded in reinterpreting the definition of HLW and then redefined any amount of HLW out of existence as it sees fit, there is little any state or community could do to halt DOE from improper abandonment of this most dangerous material.

8. DOE writes:

Accordingly, under DOE's interpretation, solid waste that exceeds the NRC's Class C limits would be subject to detailed characterization and technical analysis of the radiological characteristics of the waste. This, combined with the physical characteristics of a specific disposal facility and the method of disposal, would determine whether the facility could meet its performance objectives, and if the waste can be disposed of safely. This approach would be governed by the waste characterization and analysis process and performance objectives for the disposal facility established by the applicable regulator, and thereby protective of human health and the environment. At 50911, c. 1.

Comments:

DOE's claims that reinterpreted and reclassified HLW would be "subject to detailed characterization and technical analysis of the radiological characteristics of the waste" ignores, again, that DOE is self-regulating with respect to how it manages its radioactive waste. DOE fails to identify the regulator that would ensure this proper characterization, nor does DOE identify any specific criteria that would be employed in arriving at specific protective standards (and the agency exacerbates the profound problems with this assertion in the paragraph that follows). Indeed, the fact that DOE asserts that this—whomever or whatever "this" is—"combined with the physical characteristics of a specific disposal facility and the method of disposal, would determine whether the facility could meet its performance objectives, and if the waste can be disposed of safely" is functionally meaningless.

Indeed, via statements in the 2001-2005 HLW litigation, DOE presented a clear picture of what it intends. There, DOE challenged NRDC et al.'s factual presentation that the HLW the department intended to reclassify under Order 435.1 at the SRS and abandon in the tanks would have comparable – and potentially much higher – concentrations of radioactive elements than the

HLW removed from the tanks.[70] DOE defended its actions as proper not by calculating the radioactive concentration of the abandoned waste, but by averaging the highly radioactive material of the HLW with the near zero radioactivity of the "grout credited for binding up the wastes."[71]

Mathematical averaging, or "dilution", or "taking grout credit," renders meaningless the objective of disposing of HLW in a repository. For that matter, it also renders meaningful the objective of establishing concentration limits for Class C and other waste categories in 10 CFR § 61.55. As NRDC noted more than a dozen years ago when DOE first attempted such games, DOE could just as well average the residual radioactivity in the tanks with arbitrary volumes (or mass) of earth under the tanks or the groundwater adjacent to the tanks.[72]

Allowing DOE's newly suggested interpretation—i.e., the NWPA allows for defining away the problem of HLW and thereby abandoning it under grout or diluting it in concrete for disposal in an inappropriate site—would render meaningless the Congressional directive that HLW be disposed of in a repository. The concept of disposal by dilution of the nation's most highly radioactive waste was discarded for good nearly 50 years ago with the passage of the NWPA. If dilution were an acceptable option, Congress would not have directed HLW to be consolidated and disposed of in a geologic repository that does not rely on human monitoring and maintenance to keep the wastes from entering the biosphere. *See* House Report at 29. Ultimately, acceptance of DOE's new interpretation would nullify the entire approach Congress took to disposal of HLW because DOE (or, for that matter, commercial nuclear operators) could avoid compliance with the NWPA by averaging their HLW with the requisite amount of unmixed non-radioactive material rather than disposing of it in a repository. 42 U.S.C. §§ 10101(9), 10131. DOE may not adopt a policy—such as this interpretation of the NWPA's HLW definition—that so directly conflicts with its governing statute. *Maislin*, 497 U.S. at 134-35; *Chevron*, 467 U.S. at 843.

9. DOE writes:

The DOE interpretation does not require the removal of key radionuclides to the maximum extent that is technically and economically practical before DOE can define waste as non-HLW. Nothing in the statutory text of the AEA or the NWPA requires that radionuclides be removed to the maximum extent technically and economically practical prior to determining whether waste is HLW. DOE has determined that the removal of radionuclides from waste that already meets existing legal and technical requirements for safe transportation and disposal is unnecessary and inefficient, and does not benefit human health or the environment. To the contrary, it potentially presents a greater risk to human health and the environment because it prolongs the temporary storage of waste. At 50911, c. 1 & 2.

[70] *See* Ex. 1, Att. E, at 3.
[71] This exchange and supporting documentation are found in Ex. 1, Att. D, Cochran 2nd Decl. ¶¶ 39-46. As evidenced in that exchange, it is NRDC's opinion that the only significant difference between the abandoned HLW and the HLW destined for a geologic repository is a layer of grout.
[72] Ex. 1, Att. D, at ¶ 46.

Comments:

DOE's attempt at a newly created waste classification of material that is defined under long-standing statute has no legal merit and makes even less sense. First, DOE creates a new term out of whole cloth – "non-HLW" – and at that same moment in the same sentence, strips away any suggestion that its brand new term might bring with it any obligation to protect public health and the environment. However much DOE might like the idea that it can create a new classification – non-HLW – it cannot. Congress has already spoken to the issue. *See supra* at 4-7. Continuing the stacking of its house of cards, DOE pleads that "[n]othing in the statutory text of the AEA or the NWPA requires that radionuclides be removed to the maximum extent technically and economically practical prior to determining whether waste is HLW." Regrettably for DOE, and fortunately for the environment and public health, there is nothing in those statutes that allows DOE this authority in the first instance. And as a technical matter with extraordinary implications, the immediately affected states, communities and tribes should find cold comfort from any cleanup assurances from DOE when the department is explicit that it is not required to remove radionuclides to the maximum extent.

The rest of the DOE's assertions are equally misplaced and, frankly, confusing. Putting aside the fact it has no authority to do this in the first instance, DOE suggests that it has "determined that the removal of radionuclides from waste that already meets existing legal and technical requirements for safe transportation," with no explanation as to what HLW it writes about, what legal and technical requirements it will meet, or why radionuclide removal "does not benefit human health or the environment." Nor does DOE explain how it manages to arrive at its risk/benefit calculation that "it" – whatever "it" is, "potentially presents a greater risk to human health and the environment because it prolongs the temporary storage of waste."

As discussed (*supra*, 4-7), simply stating that the HLW does not require disposal in a deep geologic repository violates Congress's explicit instructions that HLW is to be disposed of in just such a repository. And now DOE makes clear that it plans to put some sizable percentage – or perhaps all? Who knows? – under DOE's self-regulating authority as it manages its nuclear waste. And exacerbating matters, DOE even goes so far as to suggest that the fig leaves available under Section 3116 or the Draft WIR determinations that require "removal of key radionuclides to the maximum extent that is technically and economically practical" are not even operable. Under DOE's new interpretation, there would be no regulator for HLW, no protective standards or criteria. Indeed, there would be no regulatory scheme at all. This contrary to law and a stunning display of disregard for a profound national environmental problem that will last for hundreds of thousands of years.

10. DOE writes:

Therefore, under DOE's interpretation, waste resulting from the reprocessing of SNF is non-HLW if the waste:

I. Does not exceed concentration limits for Class C low-level radioactive waste as set out in section 61.55 of title 10, Code of Federal Regulations; or

II. Does not require disposal in a deep geologic repository and meets the performance objectives of a disposal facility as demonstrated through a performance assessment conducted in accordance with applicable regulatory requirements. Reprocessing waste meeting either I or II of the above is non-HLW, and may be classified and disposed in accordance with its radiological characteristics in an appropriate facility provided all applicable requirements of the disposal facility are met. At 50911, c. 2.

Comments:

DOE repeats its Draft HLW Reinterpretation Proposal and for the reasons stated above, DOE should withdraw this notice and start over.

11. Other Violations Under Law.

A. The Proposed HLW Reinterpretation Violates the APA.

The Proposed HLW Reinterpretation is arbitrary and capricious and fails under the Administrative Procedure Acts ("APA"), 5 U.S.C. § 701 *et seq.* Under the APA, a regulation must be struck down if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[73] First, courts must ". . . reject constructions of a statute that are inconsistent with the statutes or that frustrate the policy Congress sought to implement."[74] As discussed above, the DOE's proposed action is clearly inconsistent with the NWPA and would frustrate the intent of Congress. Second, it is well-settled that an agency's decision must be supported by the administrative record, and there is no administrative record here at all to support the agency's proposed reinterpretation.[75] And finally, an agency may not shift its position without supplying a reasoned explanation for doing so.[76] For decades, DOE has managed the reprocessing waste in the tanks at Hanford and the other sites as HLW, and now seeks to grant itself the authority to frustrate the intent of Congress without support from the administrative record and a rational explanation. For these reasons, the proposed reinterpretation of HLW is in violation of the APA.

Further, DOE exercises controls over environmental, safety and health primarily through its system of "orders," but notably, DOE neither uses nor references the term "order" at any point in its HLW Reinterpretation proposal. In fact, DOE restricts its request for comments to its "interpretation," likely attempting to avoid the invocation of a specific caution from another federal agency. According the NRC,

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[73] 5 U.S.C. § 706(2)(A). The Draft WIR Determination is also impermissible and contrary to the APA for these reasons.

[74] *Bonneville Power Admin.*, 909 F.2d at 1306.

[75] *Sierra Club v. Dombeck*, 161 F.Supp.2d 1052, 1070 (D.Ariz. 2001), *citing Motor Vehicle Mfgs. Ass'n. v. State Farm*, 463 U.S. 29, 43 (*State Farm*).

[76] *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883 (D.C. Cir. 1987); see also *State Farm*, 463 U.S. at 57.

> DOE Safety Orders were not promulgated according to the Administrative Procedures Act requirements and are not legally binding. The Administrative Procedures Act requires public noticing and a comment period, among other things, before an Order is promulgated. Absent this process, Orders can be incorporated into a contract to be administratively enforceable under the terms and remedies provided in the contract. Without a statutory or contractual requirement, implementation of a particular Order typically involved an agreement by DOE to compensate the contractor for any additional burden associated with Order compliance.[77]

And because DOE sites and the cleanup of HLW in the DOE nuclear weapons complex operate under cost-plus contracts,[78] the Energy Department must pay the additional costs of compliance with safety orders. Avoiding the formality of federal notice and comment rules and, for that matter, even DOE's own internal order system, will allow DOE to potentially avoid a host of safety requirements at individual sites, without any legal requirement for public knowledge or opportunity to weigh in on the matter. Safety orders for practices involving highly radioactive and/or toxic materials can be watered down for any number of financial reasons—if schedules slip, if costs are exceeded, or, sometimes, if a contractor simply stands to lose out on a bonus.

Thus, removing vast amounts of HLW by a semantic wave of a magic reinterpretation wand could have enormous cost savings for DOE. By contrast, NRC, which regulates HLW generated by the US commercial nuclear reactor fleet – and putting aside for another day the adequacy of these regulations – has a developed system of formal regulations that have the force of law, are subject to fines and penalties; and unlike DOE's orders, NRC standards are subject to the transparency requirements of the APA and are issued to licensees as mandatory obligations. DOE's actions, in this instance, are arbitrary and capricious. We would also note the fact that previous AEC/ERDA/DOE "cost-saving actions" (i.e., single-shelled tanks) have resulted in *increased* long-term costs, as well as additional environmental contamination.[79]

B. The Proposed HLW Reinterpretation Violates the National Environmental Policy Act.

As a last matter, it should also go without saying that DOE's HLW Reinterpretation Proposal falls squarely within the four corner of the National Environmental Policy Act, 42 U.S.C. §4321, *et seq*. The Proposal, if finalized, would be a major federal action affecting the environment and there is no DOE NEPA document that specifically addresses the myriad of environmental harms attendant to this proposed decision to abandon waste in the HLW tanks. Nearly 8 years ago,

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[77] *See, Overview and Summary of NRC Involvement with DOE in the Tank Waste Remediation System-Privatization (TWRS-P) Program,* U.S, Nuclear Regulatory Commission, NUREG-1749, (2001), at 259.

[78] DOE uses cost-plus-award-fee (CPAF), cost-plus-incentive-fee (CPIF), and cost-plus-fixed-fee (CPFF) contracts where a contractor can be paid for all of its allowed expenses, plus additional payment to allow for a profit. *See* https://www.energy.gov/em/em-contractor-fee-determinations.

[79] *See*, Ex. 2.

NRDC and HC addressed DOE's Tank Closure and Waste Management Draft Environmental Impact Statement and we incorporate by reference those comments here today.[80]

But further, for DOE to proceed without any NEPA coverage at all of this explicit action (and segment the NEPA review of a later and likely WIR Determination resulting from this action) is to avoid the fundamental requirement of NEPA, to search and subject to a "hard look" the *environmental impact comparison of reasonable alternatives* required under NEPA.[81] CEQ's regulations governing implementation of NEPA direct that Federal agencies "shall to the fullest extent possible....(b)...emphasize *real environmental issues and alternatives*...(e) Use the NEPA process to identify and assess the *reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions* upon the quality of the human environment."[82] In setting out the fundamental purpose of an EIS, CEQ's regulations also state, "It [the EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the *reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment*. Agencies shall focus on *significant environmental issues and alternatives*...."[83] Satisfying these requirements is a non-discretionary duty of the DOE's NEPA process and obligations under the law.

These are not idle, semantic concerns. DOE's HLW Reinterpretation Proposal makes clear that DOE has intentions to either abandon or improperly dispose of HLW in near surface disposal, precisely contrary to the directions of Congress under the NWPA. Any such major federal action should be accompanied by a NEPA analysis that addresses the potential environmental and social impacts of plainly necessary institutional controls.

Institutional controls, long a part of environmental law, play a crucial role in selecting how best to protect the public from incomplete cleanups where contamination is left on site for extended periods of time. Institutional controls are shorthand descriptions for restrictions placed on land, surface water or groundwater use when it is either technically impossible or economically prohibitive to permanently remove the source of pollution or contamination. The types of restrictions can be "active" institutional controls – often colloquially described as "guns, gates and guards" – or "passive" institutional controls, which range from warning notices to keep trespassers off contaminated sites to deed restrictions specifying how the land can be used henceforth. Regardless of whether institutional controls are active or passive, the purpose is to isolate the remaining contamination or potential harm from the public in an enduring fashion. The study of institutional controls in environmental law and policy is a legacy of incomplete cleanup of both chemical and radioactive sites around the country. Indeed, the United States has thousands of large and small contaminated sites overlain by a myriad of state and federal regulatory regimes where it was either not cost-effective or technically feasible to reduce the volume of contamination to levels that provide adequate protection for unrestricted uses. Thus, institutional controls exist, agencies adopt policies to implement those controls, and in this HLW

[80] NRDC and Hanford Challenge, *Draft Tank Closure and Waste Management Environmental Impact Statement Comments*, May 3, 2010, attached as Ex. 3.
[81] *See* NEPA, 42 U.S.C. §4321, *et seq.*; *see also* 40 C.F.R. §1502.14, 10 C.F.R. 51.85, and § 51.10-125 and App A.
[82] 40 C.F.R. §1500.2 (emphasis added).
[83] 40 C.F.R. §1502.1 (emphasis added).

Reinterpretation Proposal, DOE suggests it can properly "reinterpret" what has heretofore been HLW out of existence and ensure safe disposal, without any specific explanation of how the HLW has been changed and how applicable institutional controls might persevere.

Several agencies, including DOE, have adopted policies either implementing or relying on institutional controls. Each agency explicitly declines to rely on active institutional controls for more than 100 years and on passive controls or engineered barriers for more than 500 years. The NRC's licensing requirements for land disposal of radioactive waste as an example, state:

> The land owner or custodial agency shall carry out an institutional control program to physically control access to the disposal site following transfer of control of the disposal site from the disposal site operator. The institutional control program must also include, but not be limited to, carrying out an environmental monitoring program at the disposal site, periodic surveillance, minor custodial care, and other requirements as determined by the Commission; and administration of funds to cover the costs for these activities. The period of institutional controls will be determined by the Commission, but institutional controls may not be relied upon for more than 100 years following transfer of control of the disposal site to the owner.

10 C.F.R. §61.59(b).

Unfortunately, institutional controls have become necessities for the simple reason the polluting entity or government cannot always remove the entirety of contamination from a particular site. Federal agencies have adopted regulations explicitly recognizing the difficulties of long-term reliance on institutional controls. And more to the point, there are numerous examples of how and why the institutional controls fail. Even a few examples illustrate the problems facing reliance on institutional controls and the difficulties in formulating "durable," protective remedies for long-term contaminated sites.

DOE itself, for example, created the Office of Legacy Management in its Environmental Management Program. The Office of Legacy Management's mission is to manage the long-term stewardship of contaminated nuclear weapons sites *after* whatever cleanup has been done has concluded.[84] Despite a multi-billion per year cleanup program and this office, the government appears to have lost track of significant numbers of formerly utilized sites that remain contaminated. A series in the Wall Street Journal by John Emshwiller documented continuing problems at a variety of sites which have receded from the institutional memory of the agencies responsible for assuring they are cleaned up.[85]

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[84] *See* DOE's Office of Legacy Management online at http://energy.gov/lm/office-legacy-management.

[85] *See*, e.g., Emshwiller and Singer-Vine, "Waste-Lands: A Forgotten Legacy of Nuclear Buildup," *Wall Street ournal,* October 30, 2013. *Cf.*, for an even more dispiriting example, Jacob Darwin Hamblin, *Poison in the Well: Radioactive Waste in the Oceans at the Dawn of the Nuclear Age,* Rutgers University Press, 2008; and W. Jackson Davis, John Van Dyke, Daniel Hirsch, Mary Anne Magnier, Sherry P. Broeder, *Evaluation of Oceanic Radioactive Dumping Programs,* study presented by the nations of Naura and Kiribati to the London Dumping Convention, LDC7/INF.2, 1982. Here, from 1946 to approximately 1970, the AEC approved disposing of radioactive wastes by

Finally, in a thorough report addressing concerns that institutional controls may not effectively protect human health and the environment in the context of chemical contamination, in 2005 the Government Accountability Office reviewed (1) the extent to which institutional controls are used at sites addressed by EPA's Superfund and RCRA corrective action programs; (2) the extent to which EPA ensures that institutional controls at these sites are implemented, monitored, and enforced; and (3) EPA's challenges in implementing systems to track these controls.[86] The GAO found institutional controls were used at most of the Superfund and RCRA sites where cleanup was completed and waste was left in place. Further, the GAO found that while EPA's guidance advises that four key factors be taken into account in selecting controls for a site (the objective, mechanism, timing and responsibility for the institutional control), 69 of the 108 remedy decision documents examined did not demonstrate that all of these factors were sufficiently considered to ensure that planned controls will be adequately implemented, monitored, and enforced.[87] The GAO explained:

> Although EPA has taken a number of steps to improve the management of institutional controls in recent years, we found that controls at the Superfund sites we reviewed were often not implemented before site deletion, as EPA requires. In some cases, institutional controls were implemented after site deletion while, in other cases, controls were not implemented at all. An EPA program official believed that these deviations from EPA's guidance may have occurred because, during the sometimes lengthy period between the completion of the cleanup and site deletion, site managers may have inadvertently overlooked the need to implement the institutional controls.[88]

We conclude this final section of our comments on DOE's arbitrary and capricious reinterpretation proposal with the National Academy of Sciences observation that "institutional controls *will fail*."[89] As was explained to the Ninth Circuit in the original round of litigation years ago describing the reprocessing waste, the half-life (the time it takes for one-half of an unstable isotope of the element to be lost through radioactive decay) of some of the isotopes which have leaked are as follows: cesium-137, 30 years; strontium-90, 29 years; plutonium-239, 24,110 years; and uranium-238, about 4.5 billion years. A rule of thumb is that after 10 times the half-life of an isotope, about 0.1 percent of its original value remains and the rest has decayed away. Thus, it will take about 240,000 years before plutonium-239 has all but decayed away. By way of comparison, the civilization recognized by many historians to be among the oldest—the

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dumping at sea. Wastes were placed in various kinds of packages, predominantly 55-gallon drums, placed on tugs or ships, taken out to ocean dumpsites, and tossed overboard.

[86] See *Hazardous Waste Sites: Improved Effectiveness Of Controls At Sites Could Better Protect The Public,* Government Accountability Office, GAO-05-163, January 2005, http://www.gao.gov/assets/250/245140.pdf.

[87] Id. at 5.

[88] *Id.* at 6.

[89] *See* National Academy of Sciences/National Research Council, Board on Radioactive Waste Management, *Committee on the Remediation of Buried and Tank Waste, Long-Term Institutional Management of the U.S. Department of Energy Legacy Waste Sites*, August 2000, at page 97 (emphasis added).

Mesopotamian—is understood to have begun less than 6,000 years ago. Kennewick Man walked near DOE's Hanford site on the "Columbia Plateau an estimated 8,340 to 9,200 years ago."[90] The last Lake Missoula flood that scoured eastern Washington and rerouted rivers at the end of the most recent Ice Age was only about 12,000 years ago.[91] To assert that DOE's newly proposed "interpretation" of HLW – which could lead to the abandonment and improper disposal of the most toxic waste in the world – could have lasting implications, vastly understates the matter.

V. Conclusion

For the reasons stated above, we urge you to withdraw this HLW Reinterpretation Proposal and commence working with the immediately affected States, Tribes, Congress and interested members of the public on reforms to nuclear waste law and putting the cleanup of the nuclear weapons complex on a course that is both scientifically defensible and publicly accepted.

Sincerely,

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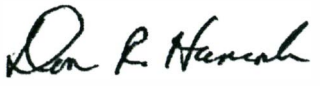
[90] *Bonnichsen v United States*, 357 F.3d 962, 966 (9th Cir. 2004).
[91] Response Brief of Appellees Natural Resources Defense Council and Snake River Alliance at 8, n.6.



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#4 3-7-19

19.0038.06001
Title.

Prepared by the Legislative Council staff for
Representative J. Nelson
March 6, 2019

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2037

Page 13, line 29, replace "One senator" with "Two senators"

Page 14, line 1, replace "One representative" with "Two representatives"

Renumber accordingly

#4 3-7-19

19.0038.06002
Title.

Prepared by the Legislative Council staff for
Representative J. Nelson
March 6, 2019

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2037

Page 14, after line 19, insert:

"d. Report its findings biennially to the commission and to the legislative assembly."

Renumber accordingly

#4 3-7-19

19.0038.06003
Title.

Prepared by the Legislative Council staff for
Representative J. Nelson
March 6, 2019

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2037

Page 11, line 18, after the underscored period insert "A county position paper must be made public at the time the permit application is submitted."

Renumber accordingly

CHAPTER 459 - HAZARDOUS MATERIALS

WESTERN INTERSTATE NUCLEAR COMPACT

ROCKY MOUNTAIN LOW-LEVEL RADIOACTIVE WASTE COMPACT

COMMITTEE ON HIGH-LEVEL RADIOACTIVE WASTE

NUCLEAR PROJECTS

STATE CONTROL OF RADIATION

General Provisions

Possession, Transfer and Disposal of Radioactive Material

Enforcement, Violations and Penalties

REGULATION OF MILLS AND BY-PRODUCTS

REGULATION OF HIGHLY HAZARDOUS SUBSTANCES AND EXPLOSIVES

General Provisions

Administration

Committee to Oversee the Management of Risks

Enforcement and Penalties

DISPOSAL OF HAZARDOUS WASTE

PROGRAM FOR VOLUNTARY CLEANUP OF HAZARDOUS SUBSTANCES AND RELIEF FROM LIABILITY

HANDLING OF HAZARDOUS MATERIALS

General Provisions

Transportation; Reporting and Collection of Information

State Emergency Response Commission

Responding to Spills, Accidents, Motor Vehicle Crashes and Incidents

Penalties

IMMUNITY FROM LIABILITY REGARDING PLANNING FOR AND RESPONDING TO DISCHARGE OF HAZARDOUS MATERIAL

STORAGE TANKS

FUND FOR BROWNFIELD PROJECTS

MISCELLANEOUS PROVISIONS

WESTERN INTERSTATE NUCLEAR COMPACT

NRS 459.001 Enactment; text. The Western Interstate Nuclear Compact, denominated in NRS 459.001 to 459.005, inclusive, as the "compact," is hereby enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as follows:

ARTICLE I. POLICY AND PURPOSE

The party states recognize that the proper employment of scientific and technological discoveries and advances in nuclear and related fields and direct and collateral application and adaptation of processes and techniques developed in connection therewith, properly correlated with the other resources of the region, can assist substantially in the industrial progress of the West and the further development of the economy of the region. They also recognize that optimum benefit from nuclear and related scientific or technological resources, facilities and skills requires systematic encouragement, guidance, assistance, and promotion from the party states on a cooperative basis. It is the policy of the party states to undertake such cooperation on a continuing basis. It is the purpose of this compact to provide the instruments and framework for such a cooperative effort in nuclear and related fields, to enhance the economy of the West and contribute to the individual and community well-being of the region's people.

ARTICLE II. THE BOARD

E. A party state may be excluded from this compact by a two-thirds' vote of the members representing the other party states, acting in a meeting, on the ground that the state to be excluded has failed to carry out its obligations under this compact. Such an exclusion may be terminated upon a two-thirds' vote of the members acting in a meeting.

ARTICLE 9

CONSTRUCTION AND SEVERABILITY

A. The provisions of this compact shall be broadly construed to carry out the purposes of the compact.
B. Nothing in this compact shall be construed to affect any judicial proceeding pending on the effective date of this compact.
C. If any part or application of this compact is held invalid, the remainder, or its application to other situations or persons, shall not be affected.
(Added to NRS by 1983, 1251)

NRS 459.008 Appointment of member of Board by Governor; designation of alternate member.
1. The Governor shall appoint the member of the Rocky Mountain Low-Level Radioactive Waste Board to represent this State. The member serves at the pleasure of the Governor.
2. The member representing this State on the Rocky Mountain Low-Level Radioactive Waste Board may, in the member's absence, be represented on the Board by an alternate designated by the member. Such an alternate may discharge the member's duties and perform the member's functions to the extent and during the time designated by the member, pursuant to subsection B of article 6 of the Compact.
(Added to NRS by 1983, 1259)

NRS 459.0083 State surcharge: Imposition; collection; distribution; deposit for credit to Fund for Care of Sites for Disposal of Radioactive Waste. There is hereby imposed a state surcharge of $2 per cubic foot of radioactive waste received at Nevada's regional facility in Beatty. This state surcharge must be collected at the same time and in the manner provided for the compact surcharge collected pursuant to Article 5 of the Rocky Mountain Low-level Radioactive Waste Compact. Any money collected pursuant to this section which is not otherwise distributed by specific legislative appropriation must be deposited with the State Treasurer for credit to the Fund for the Care of Sites for the Disposal of Radioactive Waste created pursuant to NRS 459.231.
(Added to NRS by 1987, 1748; A 1997, 125)

COMMITTEE ON HIGH-LEVEL RADIOACTIVE WASTE

NRS 459.0085 Creation; membership; powers and duties; compensation and expenses of members.
1. There is hereby created a Committee on High-Level Radioactive Waste. It is a committee of the Legislature composed of:
(a) Four members of the Senate, appointed by the Majority Leader of the Senate.
(b) Four members of the Assembly, appointed by the Speaker.
2. The Legislative Commission shall review and approve the budget and work program for the Committee and any changes to the budget or work program. The Legislative Commission shall select a Chair and a Vice Chair from the members of the Committee.
3. Except as otherwise ordered by the Legislative Commission, the Committee shall meet not earlier than November 1 of each odd-numbered year and not later than August 31 of the following even-numbered year at the call of the Chair to study and evaluate:
(a) Information and policies regarding the location in this State of a facility for the disposal of high-level radioactive waste;
(b) Any potentially adverse effects from the construction and operation of a facility and the ways of mitigating those effects; and
(c) Any other policies relating to the disposal of high-level radioactive waste.
4. The Committee may conduct investigations and hold hearings in connection with its functions and duties and exercise any of the investigative powers set forth in NRS 218E.105 to 218E.140, inclusive.
5. The Committee shall report the results of its studies and evaluations to the Legislative Commission and the Interim Finance Committee at such times as the Legislative Commission or the Interim Finance Committee may require.
6. The Committee may recommend any appropriate legislation to the Legislature and the Legislative Commission.
7. The Director of the Legislative Counsel Bureau shall provide a Secretary for the Committee on High-Level Radioactive Waste.
8. Except during a regular or special session of the Legislature, each member of the Committee is entitled to receive the compensation provided for a majority of the members of the Legislature during the first 60 days of the preceding regular session for each day or portion of a day during which the member attends a Committee meeting or is otherwise engaged in the work of the Committee plus the per diem allowance provided for state officers and employees generally and the travel expenses provided pursuant to NRS 218A.655. Per diem allowances, salary and travel expenses of members of the Committee must be paid from the Legislative Fund.
(Added to NRS by 1985, 685; A 1987, 399; 1989, 1221; 1995, 1454; 2009, 1156; 2013, 3759)

NUCLEAR PROJECTS

NRS 459.009 Definitions. As used in NRS 459.009 to 459.0098, inclusive, unless the context otherwise requires:
1. "Agency" means the Agency for Nuclear Projects.
2. "Commission" means the Commission on Nuclear Projects.
3. "Executive Director" means the Executive Director of the Agency.
4. "Radioactive waste" is limited to:
(a) The highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste and any solid material derived from the liquid waste that contains concentrations of matter produced by nuclear fission sufficient to require permanent isolation, as determined by the Nuclear Regulatory Commission;
(b) Spent nuclear fuel that has been withdrawn from a reactor following irradiation and has not been separated into its constituent elements by reprocessing; and
(c) Other material that the Nuclear Regulatory Commission determines must be permanently isolated.
(Added to NRS by 1985, 2303)

NRS 459.0091 Commission on Nuclear Projects: Creation; membership; terms and salary of members.
1. The Commission on Nuclear Projects, consisting of seven members, is hereby created.
2. The Commission consists of:
(a) Three members of the Governor's own choosing.
(b) Two members chosen by the Governor from a list of three names submitted to the Governor by the Legislative Commission.
(c) Two members chosen by the Governor, one of whom is chosen from a list of three names submitted to the Governor by a statewide organization of county governments and one of whom is chosen from a list of three names submitted to the Governor by a statewide

NRS 459.706 Motor carriers: Prerequisites to issuance of permit to transport radioactive waste; assessment for investigation, inspection or audit outside of State.

1. The Department shall not issue a permit required pursuant to NRS 459.7052 to a motor carrier who is seeking to transport radioactive waste upon a public highway of this State without first determining that the carrier transporting the waste is in compliance and will continue to comply with all laws and regulations of this State and the Federal Government respecting the handling and transportation of radioactive waste and the safety of drivers and vehicles.

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2. Any motor carrier who maintains his or her books and records outside of this State must, in addition to any other assessments and fees provided by law, be assessed by the Department for an amount equal to the per diem allowance and travel expenses of employees of the Department for investigations, inspections and audits which may be required to be performed outside of this State in carrying out the provisions of subsection 1. The per diem allowance and travel expenses of the employees of the Department must be assessed at the rate established by the State Board of Examiners for state officers and employees generally.

3. The assessment provided for in subsection 2 must be determined by the Department upon the completion of each such investigation, inspection or audit and is due within 30 days after the date on which the affected motor carrier receives the assessment. The records of the Department relating to the additional costs incurred by reason of necessary travel must be open for inspection by the affected carrier at any time within the 30-day period.

(Added to NRS by 1999, 3346; A 2001, 901; 2007, 604)

NRS 459.708 Motor carriers: Rejection of and liability for certain packages of radioactive waste.

1. A motor carrier who is transporting radioactive waste shall reject any package containing the waste which is tendered to the motor carrier for transport in this State if the package:
   (a) Is leaking or spilling its contents;
   (b) Does not bear a:
      (1) Marking required pursuant to 49 C.F.R. Part 172, Subpart D;
      (2) Label required pursuant to 49 C.F.R. Part 172, Subpart E; or
      (3) Placard required pursuant to 49 C.F.R. Part 172, Subpart F; or
   (c) Is not accompanied by a:
      (1) Shipping paper required pursuant to 49 C.F.R. Part 172, Subpart C; or
      (2) Manifest required pursuant to 10 C.F.R. Part 20, Appendix G.

2. A carrier who accepts radioactive waste for transport in this State is liable for any package in the custody of the carrier which leaks or spills its contents, does not bear the required marking, label or placard, or is not accompanied by the required shipping paper or manifest, unless, in the case of a leak or spill of the waste and by way of affirmative defense, the carrier proves that he or she did not and could not know of the leak when the carrier accepted the package for transport.

(Added to NRS by 1993, 846; A 1999, 3351; 2001, 901)

NRS 459.709 Motor carriers: Prerequisites to transportation of high-level radioactive waste or spent nuclear fuel.

1. A motor carrier shall not transport any high-level radioactive waste or spent nuclear fuel upon a public highway of this State unless:
   (a) The high-level radioactive waste or spent nuclear fuel is contained in a package that has been approved for that purpose pursuant to 10 C.F.R. Part 71; and
   (b) The carrier has complied with the provisions of 10 C.F.R. Part 71 and 10 C.F.R. Part 73 requiring the advance notification of the Governor of this State or the Governor's designee.

2. As used in this section:
   (a) "High-level radioactive waste" has the meaning ascribed to it in 10 C.F.R. § 72.3.
   (b) "Spent nuclear fuel" has the meaning ascribed to it in 10 C.F.R. § 72.3.

(Added to NRS by 1999, 3346; A 2001, 901)

NRS 459.900 Submission to governmental agencies of information regarding manufacture, processing, use and disposal of toxic chemicals. The forms required to be submitted pursuant to 42 U.S.C. § 11023 must be submitted to governmental agencies in Nevada designated by the Governor.

(Added to NRS by 1989, 335)

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NRS 459.910 Unlawful to store high-level radioactive waste in State.

1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.
2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

(Added to NRS by 1989, 2113)

NRS 459.920 Prerequisites for operation or display of radar gun or similar device.

1. A person or governmental entity shall not operate or display or cause to be operated or displayed a radar gun or similar device unless it is:

(a) Or was at the time of purchase, on the Conforming Product List of the International Association of Chiefs of Police; and

(b) Inspected at least every 3 years to determine whether its level of power and structural integrity comply with the minimum performance specifications for that model established by the United States Department of Transportation.

2. Any person or governmental entity that causes to be operated or displayed a radar gun or similar device that emits nonionizing radiation shall adopt procedures for its use that protect the health and safety of the operator of the radar gun or device.
3. A peace officer must successfully complete a course of training in the proper use of a radar gun or similar device approved by the Peace Officers' Standards and Training Commission before the peace officer may be authorized to operate a radar gun or similar device.

(Added to NRS by 1993, 1152; A 1999, 2430; 2007, 92)

NRS 459.930 Immunity from liability for certain persons for response actions and cleanup with respect to certain real property at which hazardous substance has been or may have been released.

1. Notwithstanding any other provision of law to the contrary and regardless of whether he or she is a participant in a program, a person who:

(a) Is a bona fide prospective purchaser is not liable for any response action or cleanup that may be required with respect to any real property pursuant to NRS 445A.300 to 445A.730, inclusive, 445B.100 to 445B.640, inclusive, 459.400 to 459.600, inclusive, or any other applicable provision of law.

(b) Is an innocent purchaser is not liable for any response action or cleanup that may be required with respect to any real property pursuant to NRS 445A.300 to 445A.730, inclusive, 445B.100 to 445B.640, inclusive, 459.400 to 459.600, inclusive, or any other applicable provision of law.

(c) Owns real property that:

(1) Is contiguous to or otherwise similarly situated with respect to; and

(2) Is or may be contaminated by a release or threatened release of a hazardous substance from,

➥ other real property that the person does not own, is not liable for any response action or cleanup that may be required with respect to the release or threatened release, provided that the person meets the requirements set forth in section 107(q)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(q)(1).

2. A person described in paragraph (a), (b) or (c) of subsection 1 shall report to the Division, in a manner prescribed by the Commission:

(a) Any of the following substances that are found on or at real property owned by the person:

(1) Hazardous substances at or above the required reporting levels designated pursuant to sections 102 and 103 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9602 and 9603; and

(2) Petroleum products of such type and in such amount as are required by the Division to be reported; and

(b) Any response action or cleanup that has been performed with respect to the real property described in paragraph (a).

3. The provisions of this section do not otherwise limit the authority of the Administrator, the Commission or the Division to require any person who is responsible for the contamination or pollution of real property, by improperly managing hazardous substances at or on that real property, to perform a response action or cleanup with respect to that real property.
4. If there are costs relating to a response action or cleanup that are incurred and unrecovered by the State of Nevada with respect to real property for which a bona fide prospective purchaser of the real property is not liable pursuant to the provisions of this section, the State of Nevada:

(a) Has a lien against that real property in an amount not to exceed the increase in the fair market value of the real property that is attributable to the response action or cleanup, which increase in fair market value must be measured at the time of the sale or other disposition of the real property; or

(b) May, with respect to those incurred and unrecovered costs and by agreement with the bona fide prospective purchaser of the real property, obtain from that bona fide prospective purchaser:

(1) A lien on any other real property owned by the bona fide prospective purchaser; or

(2) Another form of assurance or payment that is satisfactory to the Administrator.

5. The provisions of this section:

(a) Do not affect the liability in tort of any party; and

(b) Apply only to real property that is acquired on or after the date that is 60 days after May 26, 2003.

6. As used in this section:

(a) "Administrator" means the Administrator of the Division.

(b) "Bona fide prospective purchaser" has the meaning ascribed to it in section 101(40) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(40).

(c) "Commission" means the State Environmental Commission.

(d) "Division" means the Division of Environmental Protection of the State Department of Conservation and Natural Resources.

(e) "Hazardous substance" has the meaning ascribed to it in NRS 459.620.

(f) "Innocent purchaser" means a person who qualifies for the exemption from liability set forth in section 107(b)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(b)(3).

(g) "Participant" has the meaning ascribed to it in NRS 459.622.

(h) "Program" means a program of voluntary cleanup and relief from liability set forth in NRS 459.610 to 459.658, inclusive.

(i) "Response action" means any action to mitigate, attempt to mitigate or assist in the mitigation of the effects of a leak or spill of or an accident or motor vehicle crash involving a hazardous substance, including, without limitation, any action to:

(1) Contain and dispose of the hazardous substance;

(2) Clean and decontaminate the area affected by the leak, spill, accident or crash; or

(3) Investigate the occurrence of the leak, spill, accident or crash.

(Added to NRS by 2003, 978; A 2007, 1910; 2015, 1686)

NRS 353.2655 Nevada Protection Account.

1. There is hereby created the Nevada Protection Account in the State General Fund.

2. The money in the Account must be used to protect the State of Nevada and its residents through funding activities to prevent the location of a federal nuclear waste repository at Yucca Mountain.

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3. The Account must be administered by the Governor, who may:

(a) Apply for and accept any gift, donation, bequest, grant or other source of money for deposit in the Account; and

(b) Expend any money received pursuant to paragraph (a) in accordance with subsection 2.

4. The interest and income earned on the money in the Account, after deducting any applicable charges, must be credited to the Account.

5. The money in the Account must remain in the Account and does not revert to the State General Fund at the end of any fiscal year.

(Added to NRS by 2001, 2645)

vehicles or fleets, rental vehicles, utility trailers and rental trucks shall be distributed monthly to the counties in the ratio that the total miles of primary, secondary and interstate highways in each county bears to the total miles of primary, secondary and interstate highways in the state.

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(b) Fees collected pursuant to W.S. 31-18-401(a)(i) and subsection (a) of this section shall be distributed by county treasurers in the same proportions and manner as property taxes are distributed.

(c) All other fees shall be credited to the state highway fund except as otherwise provided.

(d) Except as otherwise provided no fees shall be refunded unless paid and collected by mistake.

31-18-407. Emergency response fee.

(a) In addition to any other fees and taxes provided by law, an emergency response fee of two hundred dollars ($200.00) shall apply to each package of radioactive waste transported through this state in accordance with W.S. 37-14-103. The department of transportation shall collect this fee based on a permit issued by the department which is not inconsistent with federal law. The department shall promulgate rules on issuing and revoking permits which are not inconsistent with federal law. The department shall promulgate rules on quarterly reporting and payment of fees, retention of records and audit requirements. All emergency response fees shall be deposited in the general fund.

(b) As used in this section:

(i) "Radioactive waste" means:

(A) Highway route controlled quantities of radioactive waste as defined in 49 C.F.R. 173.403(1) as amended as of January 1, 1989; and

(B) Nuclear waste being transported to the waste isolation pilot plant in New Mexico, to any facility established pursuant to section 135 of the federal "Nuclear Waste Policy Act of 1982" as amended, 42 U.S.C. 10101 et seq., to any repository licensed for the permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel, or to any monitored retrievable storage facility established pursuant to section 141 of the federal "Nuclear Waste Policy Act of 1982" as amended.

(ii) "Package" means a container plus its contents that are assembled to assure compliance with the minimum federal packaging requirements for radioactive waste.

31-18-408. Provision of sales and use tax information; penalty.

(a) Any person engaged in the business of selling tangible personal property, at retail, outside of this state, and operating any motor vehicle in this state delivering to the purchaser or the purchaser's agent in this state any goods sold by the vendor shall, upon entering this state, provide necessary information to the department of revenue for the purposes of the collection of any sales or use tax which may be due under the provisions of W.S. 39-15-101 through 39-16-311. The department shall provide forms furnished by the department of revenue for the operator to provide the necessary information for the department of revenue to collect any use tax

19-3-302 Legislative intent.

(1)

(a) The state enacts this part to prevent the placement of any high-level nuclear waste or greater than class C radioactive waste in Utah. The state also recognizes that high-level nuclear waste or greater than class C radioactive waste may be placed within the exterior boundaries of the state, pursuant to a license from the federal government, or by the federal government itself, in violation of this state law.

(b) Due to this possibility, the state also enacts provisions in this part to regulate transportation, transfer, storage, decay in storage, treatment, and disposal of any high-level nuclear waste and greater than class C radioactive waste in Utah, thereby asserting and protecting the state's interests in environmental and economic resources consistent with 42 U.S.C.A. 2011 et seq., Atomic Energy Act and 42 U.S.C.A. 10101 et seq., Nuclear Waste Policy Act, should the federal government decide to authorize any entity to operate, or operate itself, in violation of this state law.

(2) Neither the Atomic Energy Act nor the Nuclear Waste Policy Act provides for siting a large privately owned high-level nuclear waste transfer, storage, decay in storage, or treatment facility away from the vicinity of the reactors. The Atomic Energy Act and the Nuclear Waste Policy Act specifically define authorized storage and disposal programs and activities. The state in enacting this part is not preempted by federal law, since any proposed facilities that would be sited in Utah are not contemplated or authorized by federal law and, in any circumstance, this part is not contrary to or inconsistent with federal law or congressional intent.

(3) The state has environmental and economic interests which do not involve nuclear safety regulation, and which shall be considered and complied with in siting a high-level nuclear waste or greater than class C radioactive waste transfer, storage, decay in storage, treatment, or disposal facility and in transporting these wastes in the state.

(4) An additional primary purpose of this part is to ensure protection of the state from nonradiological hazards associated with any waste transportation, transfer, storage, decay in storage, treatment, or disposal.

(5) The state recognizes the sovereign rights of Indian tribes within the state. However, any proposed transfer, storage, decay in storage, treatment, or disposal facility located on a reservation which directly affects and impacts state interests by creating off-reservation effects such as potential or actual degradation of soils and groundwater, potential or actual contamination of surface water, pollution of the ambient air, emergency planning costs, impacts on development, agriculture, and ranching, and increased transportation activity, is subject to state jurisdiction.

(6) There is no tradition of regulation by the Indian tribes in Utah of high-level nuclear waste or higher than class C radioactive waste. The state does have a long history of regulation of radioactive sources and natural resources and in the transfer, storage, treatment, and transportation of materials and wastes throughout the state. The state finds that its interests are even greater when nonmembers of an Indian tribe propose to locate a facility on tribal trust lands primarily to avoid state regulation and state authorities under federal law.

(7)

(a) This part is not intended to modify existing state requirements for obtaining environmental approvals, permits, and licenses, including surface and groundwater permits and air quality permits, when the permits are necessary under state and federal law to construct and operate a high-level nuclear waste or greater than class C radioactive waste transfer, storage, decay in storage, treatment, or disposal facility.

(b) Any source of air pollution proposed to be located within the state, including sources located within the boundaries of an Indian reservation, which will potentially or actually have a direct and significant impact on ambient air within the state, is required to obtain an approval order and permit from the state under Section 19-2-108.

(c) Any facility which will potentially or actually have a significant impact on the state's surface or groundwater resources is required to obtain a permit under Section 19-5-107 even if located within the boundaries of an Indian reservation.

(8) The state finds that the transportation, transfer, storage, decay in storage, treatment, and disposal of high-level nuclear waste and greater than class C radioactive waste within the state is an ultra-hazardous activity which carries with it the risk that any release of waste may result in enormous economic and human injury.

Amended by Chapter 297, 2011 General Session

ARTICLE 15 - RADIOACTIVE WASTE STORAGE FACILITIES

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35-11-1501. Definitions.

(a) As used in this article:

(i) "High-level radioactive waste" means as defined in the "Nuclear Waste Policy Act of 1982" as amended, 42 U.S.C. § 10101 et seq.;

(ii) "High-level radioactive waste storage" means the emplacement of high-level radioactive waste or spent nuclear fuel regardless of the intent to recover that waste or fuel for subsequent use, processing or disposal;

(iii) "High-level radioactive waste storage facility" includes any facility for high-level radioactive waste storage, other than a permanent repository operated by a federal agency pursuant to the Nuclear Waste Policy Act of 1982, as amended. "High-level radioactive waste storage facility" includes an independent spent fuel storage installation as defined in title 10 of the Code of Federal Regulations part 72 section 3;

(iv) "Spent nuclear fuel" means as defined in the Nuclear Waste Policy Act of 1982 as amended, 42 U.S.C. § 10101 et seq.

35-11-1502. Application to site a high-level radioactive waste storage facility; requirements; payment of costs.

(a) Any person undertaking the siting of any high-level radioactive waste storage facility shall do so in accordance with this article. Facilities subject to this article are exempt from the jurisdiction of the Industrial Development Information and Siting Act, W.S. 35-12-101 et seq.

(b) Any person undertaking the siting of any facility governed by this section shall submit an application documenting the following information to the director:

(i) The criteria upon which the proposed site was chosen, and information showing how the site meets the criteria of the nuclear regulatory commission and the department pursuant to W.S. 35-11-1506(c)(xvi);

(ii) The technical feasibility of the proposed waste management technology;

(iii) The environmental, social and economic impact of the facility in the area of study;

(iv) Conformance of the plan with the federal guidelines for a high-level radioactive waste storage facility.

(c) The application shall be accompanied by an initial deposit of eight hundred thousand dollars ($800,000.00) plus any excess amount collected from the feasibility agreement pursuant to W.S. 35-11-1506(c). Effective July 1, 2018, and annually thereafter, the amount of the initial deposit shall be adjusted for inflation by the department using the consumer price index or its successor index of the United States department of labor, bureau of labor statistics, for the calendar year immediately preceding the date of adjustment. The purpose of the initial deposit and additional monthly payments as billed to the applicant shall be to cover the costs to the state associated with the investigation, review and processing of the application and with the preparation and public review of the report required in W.S. 35-11-1503 and

35-11-1504. Unused fees under this subsection shall be refunded to the applicant. The initial deposit shall be held in an interest bearing account in reserve by the department to guarantee that sufficient funds are available to pay for any outstanding costs incurred by the state in the event that the applicant is unable to complete the application process for any reason. Any costs to the state for application processing, preparation of the report required in W.S. 35-11-1503 and 35-11-1504 and for any other costs incurred by the state to fulfill any requirement of article 15 of this act, shall be billed by certified mail and reimbursed to the state by the applicant on a monthly basis at a rate established by the state for comparable other similar permitting reviews. The applicant may appeal the assessment to the department within twenty (20) days after receipt of the written notice. The appeal shall be based only upon the allegation that the particular assessment is erroneous or excessive. Failure of the applicant to pay within thirty (30) days of the date of mailing shall be cause for suspension or termination of the application process. Upon termination of the process, any unused sum remaining in said reserve account shall be returned to the applicant.

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(d) Any applicant for a permit to construct and operate a high-level radioactive waste storage facility shall share pertinent information relevant to both state and nuclear regulatory commission permitting. It is the intention of this article that an applicant can supply information common to both state and federal permitting, without duplication of effort.

(e) Upon receipt of an application under subsection (b) of this section, the director shall, at the earliest possible date, apply for any funds which may be available to the state from the Interim Storage Fund or the Nuclear Waste Fund under the provisions of 42 U.S.C. § 10156 and 42 U.S.C. § 10222. The director may apply for other funds which may become available to the state under any other federal or state program for high-level radioactive waste storage facilities. Nothing in this subsection shall be construed as authorizing the siting, construction or operation of any high-level radioactive waste storage facility not otherwise authorized under this article.

35-11-1503. Preparation of the report by the department.

(a) Except as otherwise provided in this subsection, the department shall within twenty-one (21) months of receipt of an application and the application fee under W.S. 35-11-1502, prepare a report which examines the environmental, social and economic impacts of any proposal to site a high-level radioactive waste storage facility within the state. The director may determine that more than twenty-one (21) months is required to complete the report. If the director makes this determination, the director shall extend the deadline as appropriate and notify the applicant and the legislature of the additional time required. The director may employ experts, contract with state or federal agencies, or obtain any other services through contractual or other means to prepare the report.

(b) Any report prepared under this section shall evaluate and assess all probable impacts associated with any proposal to site a high-level radioactive waste storage facility within the state, including but not limited to short term impacts and any other impacts which may be serious, reversible or irreversible. In developing the report under this section, the director may consider the guidelines and standards for preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C). If appropriate and to the extent practicable, the department shall prepare a joint report with the nuclear regulatory commission under the National Environmental Policy Act.

(c) The report shall evaluate the environmental, social and economic impacts to the state from a range of alternative actions, including the siting of the high-level radioactive waste storage facility as proposed, the no action alternative and other alternatives.

(d) The report shall include a proposed benefits agreement, which shall be negotiated with the person who proposes to site the high-level radioactive waste storage facility.

(e) The director shall, in the preparation of the report, identify a recommended action from among the alternatives evaluated.

35-11-1504. Public review of any report for the siting of a high-level radioactive waste storage facility; submission to legislature.

(a) The department shall submit any report prepared under W.S. 35-11-1503 for public review as required under this section. The public shall be afforded an opportunity to review the report and provide comments to the director. The director shall hold public hearings in the county or counties where the proposed storage facility will be located and throughout the state, to the extent practicable, to receive comments on the report.

(b) Following any public review of the report as provided in this section, but in no event before the United States department of energy issues a final environmental impact statement in accordance with the law along with a license application for a permanent repository for high-level radioactive waste, the director shall submit the report to the legislature. The submission by the director shall include:

(i) The report;

(ii) The director's preferred or recommended alternative;

(iii) Any conditions proposed by the director regarding siting, construction, operation, monitoring, decontamination or decommissioning, or any other element of the proposed project that the director determines to be necessary to protect the public health or environment of the state, or to mitigate local or statewide social or economic impacts;

(iv) The proposed benefits agreement, including but not limited to:

(A) The number of jobs that will be created in planning, permitting, licensing, site analysis and preparation, purchasing, construction, transportation, operation and decommissioning;

(B) Local and state taxes generated by all aspects of the project;

(C) Benefits from job training, education, communication systems, monitoring and security systems;

(D) Mitigation payments to the affected communities;

(E) Cash and other in kind benefits that will offset any adverse effects;

(F) The duration of benefits from the project of all kinds.

(v) A summary of and a discussion of the considerations given by the department to any public comments received.

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35-11-1505. Benefits agreement.

No benefits agreement shall be finally effective until authorized by the legislature under W.S. 35-11-1506. The benefits agreement shall be sufficient to offset adverse environmental, public health, social or economic impacts to the state as a whole, and specifically to the local area hosting the storage facility. The benefits agreement shall be attached to and made part of any permit for the facility. Failure to adhere to the benefits agreement shall be considered grounds for enforcement up to and including permit termination. No benefits agreement as provided in this section shall limit or waive any rights afforded to the state by the Nuclear Waste Policy Act, as of March 1, 1995, including any right to disapprove any site or siting.

35-11-1506. Legislative approval of the siting of high-level radioactive waste storage facilities; conditions.

(a) Except as provided in subsection (e) of this section, no construction may commence, nor shall any high-level radioactive waste storage facility be sited within this state, unless the legislature has enacted legislation approving the siting, construction and operation of the facility in accord with this section. Any authorization of a facility under this section shall not be considered to grant to any person an exclusive right or franchise to store high-level radioactive wastes within the state.

(b) In addition to any facility which meets the requirements of subsection (e) of this section, the legislature may authorize one (1) or more facilities under subsection (a) of this section if it finds that:

(i) The siting of a high-level radioactive waste storage facility within the state is in the best interests of the people of Wyoming;

(ii) The siting of a high-level radioactive waste storage facility within the state can be accomplished without causing irreversible adverse environmental, public health, social or economic impacts to the state as a whole, and specifically to the local area hosting the proposed storage facility;

(iii) The proposed benefits agreement is sufficient to offset any adverse environmental, public health, social or economic impacts to the state as a whole, and specifically to the local area hosting the proposed storage facility; and

(iv) Sufficient safeguards, by contractual assurances or other means, exist to provide that:

(A) The authorization to site, construct and operate any proposed storage facility shall be limited to no more than forty (40) years, provided that extensions may be granted if the legislature enacts legislation authorizing nuclear waste storage facilities to operate for more than forty (40) years;

(B) Any wastes in storage at any facility shall remain the property of the waste generator or civilian nuclear power reactor owner, until transferred to permanent storage or until the federal government takes title to the wastes under the provisions of the Nuclear Waste Policy Act, 42 U.S.C. § 10101 et seq.;

(C) Conditions substantially equivalent to the licensing conditions imposed upon monitored retrievable storage facilities under 42 U.S.C. § 10168(d) existing as of March 1, 1995 shall be effective for any high-level radioactive waste storage facility authorized under this article; and

(D) There exists either a cooperative agreement between the state and the nuclear regulatory commission, or such other legally binding agreement for specific performance between the director and the applicant, which shall provide for state regulation of the facility.

(c) With permission of the governor and the management council, an applicant for either a monitored retrievable storage facility or an independent spent fuel storage installation may enter into a preliminary but nonbinding feasibility agreement and study with the director which shall be submitted to and reviewed by the director, governor and the management council. The public shall be afforded a thirty (30) day public comment opportunity to review the feasibility agreement prior to its submission to the governor and the management council. The purposes of this feasibility agreement and study are to allow the state to make a preliminary determination, whether, on the basis of the feasibility agreement and study, the proposed benefits substantially outweigh any adverse effects and to allow an applicant based on the state's preliminary review of any proposed benefit to determine whether or not a prudent investor, planner, builder and operator would decide to proceed with an application. Upon entering into a feasibility agreement, the applicant shall pay to the state a fee of eighty thousand dollars ($80,000.00). Effective July 1, 2018, and annually thereafter, the fee shall be adjusted for inflation by the department using the consumer price index or its successor index of the United States department of labor, bureau of labor statistics, for the calendar year immediately preceding the date of adjustment. The fee shall be used by the department for costs attendant to the preliminary agreement. Excess funds collected may be used by the department to review an application submitted under W.S. 35-11-1502. Appropriate time shall be afforded the director, the governor, the management council and the applicant to prepare and to evaluate the preliminary agreement and study, but neither the state nor the applicant shall unnecessarily delay the feasibility agreement and study. The preliminary feasibility agreement and study shall not supersede nor replace other requirements under this act. This agreement and study shall set forth the following:

(i) The source and adequacy of the financing for the facility and the applicant's ability to fulfill the terms of any contract entered into regarding the siting, construction or operation of the facility. The information required under this paragraph shall include, but is not limited to, audited financial statements covering the five (5) year period prior to the feasibility agreement, a listing of all partners if the applicant is a partnership and a listing of all persons owning or controlling five percent (5%) or more of its stock if the applicant is a corporation;

(ii) Financial strengths of prospective storage customers;

(iii) The technical experience of the applicant and his associates in permitting before the nuclear regulatory commission, and in design, construction and operation of nuclear facilities;

(iv) The preliminary design plan and technical feasibility of the planned temporary fuel rod storage facility;

(v) The best estimate of a range of costs for the permitting, planning and construction of the facility, based upon available information; SB 2037 3.7.19 Attachment 5

(vi) The proposed storage capacity of the planned facility, necessary to give reasonable assurance of economic feasibility, with evidence to show that the proposed storage capacity will not adversely affect the health and safety of Wyoming people or the environment;

(vii) How the applicant will proceed with the facility to assure that its construction, operation and decommissioning will neither temporarily nor permanently adversely affect the health and safety of Wyoming people;

(viii) A best estimate of a time frame required to obtain the necessary permits, including nuclear regulatory commission licensing, design and construction, and a suggested time frame for decisions by Wyoming government to meet the target timetable;

(ix) An outline of transportation plans, including rail and highway;

(x) Substantial assurances that the facility is temporary, including options for that assurance including a time frame for the movement of the temporarily stored fuel rods to a permanent repository, delivery of the stored rods to reprocessing centers or to a purchaser, domestic or foreign, buying the rods for future reprocessing;

(xi) A range of benefits the nearby communities and the state might expect in return for temporarily storing the fuel rods, and a best estimate of when the benefits might begin to be received by the nearby communities and state;

(xii) A mutual review, by the state and applicant, of a range of taxes the state might reasonably impose on the facility and the fuel rods while they are in temporary storage including the annual acceptance taxes to be levied on fuel rods, based upon the kilograms of fuel rods stored at the Wyoming facility;

(xiii) A description of security measures that would be installed in and around the facility to isolate and protect it from intruders;

(xiv) A description of an emergency response procedure in the event of an unusual occurrence;

(xv) An outline of the information program an applicant would initiate to explain its plans to the community and state;

(xvi) A description of site suitability characteristics and evidence that the applicant's proposed site for the facility meets those characteristics;

(xvii) Evidence of support from nearby Wyoming communities for exploring the project.

(d) If the legislature authorizes the siting of a facility under subsection (a) of this section, the department shall issue a permit incorporating the conditions presented to the legislature including the benefits agreement. The issuance of the permit is not appealable to the environmental quality council. The permit shall also include a provision for

payment by the permittee of inspection and review costs unless such costs are included in the benefits agreement.

(e) The legislature hereby authorizes the siting of temporary high level radioactive waste storage facilities within this state subject to the following:

(i) A facility shall only be authorized if it is operated on the site of and to store the waste produced by a nuclear power generation facility operating within the state;

(ii) The applicant for the facility shall otherwise comply with the requirements of this act;

(iii) The department shall review the application submitted pursuant to W.S. 35-11-1502 and determine specifically if the facility meets the safety considerations in paragraph (b)(iv) of this section and any other potential safety or environmental concerns;

(iv) After preparation of the report under W.S. 35-11-1503 and public review under W.S. 35-11-1504, the department may authorize siting and construction of the facility;

(v) If a facility is authorized by the department under paragraph (iv) of this subsection, the benefits agreement shall be the agreement as negotiated with the applicant under W.S. 35-11-1503(d).

35-11-1507. Injunction proceedings; penalties.

(a) When, in the opinion of the governor, a person is violating or is about to violate any provision of this article, the governor shall direct the attorney general to apply to the appropriate court for an order enjoining the person from engaging or continuing to engage in the activity. Upon a showing that the person has engaged, or is about to engage in the activity, the court may grant a permanent or temporary injunction, restraining order or other order.

(b) In addition to being subject to injunctive relief any person convicted of violating any provision of this article may be imprisoned for up to one (1) year, fined up to ten thousand dollars ($10,000.00), or both.

Effective 5/8/2018

19-3-301 Restrictions on nuclear waste placement in state.

(1) The placement, including transfer, storage, decay in storage, treatment, or disposal, within the exterior boundaries of Utah of high-level nuclear waste or greater than class C radioactive waste is prohibited.

(2) Notwithstanding Subsection (1) the governor, after consultation with the county executive and county legislative body of the affected county and with concurrence of the Legislature, may specifically approve the placement as provided in this part, but only if:

(a)

(i) the federal Nuclear Regulatory Commission issues a license, pursuant to the Nuclear Waste Policy Act, 42 U.S.C.A. 10101 et seq., or the Atomic Energy Act, 42 U.S.C.A. 2011 et seq., for the placement within the exterior boundaries of Utah of high-level nuclear waste or greater than class C radioactive waste; and

(ii) the authority of the federal Nuclear Regulatory Commission to grant a license under Subsection (2)(a)(i) is clearly upheld by a final judgment of a court of competent jurisdiction; or

(b) an agency of the federal government is transporting the waste, and all state and federal requirements to proceed with the transportation have been met.

(3) The requirement for the approval of a final court of competent jurisdiction shall be met in all of the following categories, in order for a state license proceeding regarding waste to begin:

(a) transfer or transportation, by rail, truck, or other mechanisms;

(b) storage, including any temporary storage at a site away from the generating reactor;

(c) decay in storage;

(d) treatment; and

(e) disposal.

(4)

(a) Upon satisfaction of the requirements of Subsection (2)(a), for each category listed in Subsection (3), or satisfaction of the requirements under Subsection (2)(b), the governor, with the concurrence of the attorney general, shall certify in writing to the executive director of the Department of Environmental Quality that all of the requirements have been met, and that any necessary state licensing processes may begin.

(b) Separate certification under this Subsection (4) shall be given for each category in Subsection (3).

(5)

(a) The department shall make, by rule, a determination of the dollar amount of the health and economic costs expected to result from a reasonably foreseeable accidental release of waste involving a transfer facility or storage facility, or during transportation of waste, within the exterior boundaries of the state. The department may initiate rulemaking under this Subsection (5)(a) on or after March 15, 2001.

(b)

(i) The department shall also determine the dollar amount currently available to cover the costs as determined in Subsection (5)(a):

(A) under nuclear industry self-insurance;

(B) under federal insurance requirements; and

(C) in federal money.

(ii) The department may not include any calculations of federal money that may be appropriated in the future in determining the amount under Subsection (5)(b)(i).

(c) The department shall use the information compiled under Subsections (5)(a) and (b) to determine the amount of unfunded potential liability in the event of a release of waste from a storage or transfer facility, or a release during the transportation of waste.

(6)

(a) State agencies may not, for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste, enter into any contracts or any other agreements prior to:

(i) the satisfaction of the conditions in Subsection (4); and

(ii) the executive director of the department having certified that the requirements of Sections 19-3-304 through 19-3-308 have been met for the purposes of a license application proceeding for a storage facility or transfer facility.

(b) Political subdivisions of the state may not enter into any contracts or any other agreements for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste.

(c) This Subsection (6) does not prohibit a state agency from exercising the regulatory authority granted to it by law.

(7)

(a) Notwithstanding any other provision of law, any political subdivision may not be formed pursuant to the laws of Utah for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility prior to the satisfaction of the conditions in Subsection (4). These political subdivisions include:

(i) a cooperative;

(ii) a local district authorized by Title 17B, Limited Purpose Local Government Entities - Local Districts;

(iii) a special service district under Title 17D, Chapter 1, Special Service District Act;

(iv) a limited purpose local governmental entity authorized by Title 17, Counties;

(v) any joint power agreement authorized by Title 11, Cities, Counties, and Local Taxing Units; and

(vi) the formation of a municipality, or any authority of a municipality authorized by Title 10, Utah Municipal Code.

(b)

(i) Subsection (7)(a) shall be strictly interpreted. Any political subdivision authorized and formed under the laws of the state on or after March 15, 2001, which subsequently contracts to, or in any manner agrees to provide, or does provide goods, services, or municipal-type services to a storage facility or transfer facility is formed in violation of Subsection (7)(a).

(ii) If the conditions of Subsection (7)(b)(i) apply, the persons who formed the political subdivision are considered to have knowingly violated a provision of this part, and the penalties of Section 19-3-312 apply.

(8)

(a) An organization may not be formed for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility prior to:

(i) the satisfaction of the conditions in Subsection (4); and

(ii) the executive director of the department having certified that the requirements of Sections 19-3-304 through 19-3-308 have been met.

(b) A foreign organization may not be registered to do business in the state for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility prior to:

(i) the satisfaction of the conditions in Subsection (4); and

(ii) the executive director of the department having certified that the requirements of Sections 19-3-304 through 19-3-308 have been met.

(c) The prohibitions of Subsections (8)(a) and (b) shall be strictly applied, and:

(i) the formation of a new organization or registration of a foreign organization within the state, any of whose purposes are to provide goods, services, or municipal-type services to a storage facility or transfer facility may not be licensed or registered in the state, and the local or foreign organization is void and does not have authority to operate within the state;

(ii) any organization which is formed or registered on or after March 15, 2001, and which subsequently contracts to, or in any manner agrees to provide, or does provide goods, services, or municipal-type services to a storage facility or transfer facility has been formed or registered in violation of Subsection (8)(a) or (b) respectively; and

(iii) if the conditions of Subsection (8)(c)(ii) apply, the persons who formed the organization or the principals of the foreign organization, are considered to have knowingly violated a provision of this part, and are subject to the penalties in Section 19-3-312.

(9)

(a)

(i) Any contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement of high-level nuclear waste or greater than class C radioactive waste at a storage facility or transfer facility within the state are declared to be against the greater public interest, health, and welfare of the state, by promoting an activity which has the great potential to cause extreme public harm.

(ii) These contracts or agreements under Subsection (9)(a)(i), whether formal or informal, are declared to be void from inception, agreement, or execution as against public policy.

(b)

(i) Any contract or other agreement to provide goods, services, or municipal-type services to storage or transfer facilities may not be executed within the state.

(ii) Any contract or other agreement, existing or executed on or after March 15, 2001, is considered void from the time of agreement or execution.

(10)

(a) All contracts and agreements under Subsection (10)(b) are assessed an annual transaction fee of 75% of the gross value of the contract to the party providing the goods, services, or municipal-type services to the storage facility or transfer facility or transportation entity. The fee shall be assessed per calendar year, and is payable on a prorated basis on or before the last day of each month in accordance with rules established under Subsection (10)(d), and as follows:

(i) 25% of the gross value of the contract to the department; and

(ii) 50% of the gross value of the contract to the Department of Heritage and Arts, to be used by the Utah Division of Indian Affairs as provided in Subsection (11).

(b) Contracts and agreements subject to the fee under Subsection (10)(a) are those contracts and agreements to provide goods, services, or municipal-type services to a storage or transfer facility, or to any organization engaged in the transportation of high-level nuclear waste or greater than class C radioactive waste to a transfer facility or storage facility, and which:

(i) are in existence on March 15, 2001; or

(ii) become effective notwithstanding Subsection (9)(a).

(c) Any governmental agency which regulates the charges to consumers for services provided by utilities or other organizations shall require the regulated utility or organization to include the

fees under Subsection (10)(a) in the rates charged to the purchaser of the goods, services, or municipal-type services affected by Subsection (10)(b).

(d)

(i) The department, in consultation with the State Tax Commission, shall establish rules for the valuation of the contracts and assessment and collection of the fees, and other rules as necessary to determine the amount of and collection of the fee under Subsection (10)(a). The department may initiate rulemaking under this Subsection (10)(d)(i) on or after March 15, 2001.

(ii) Persons and organizations holding contracts affected by Subsection (10)(b) shall make a good faith estimate of the fee under Subsection (10)(a) for calendar year 2001, and remit that amount to the department on or before July 31, 2001.

(11)

(a) The portion of the fees imposed under Subsection (10) which is to be paid to the Department of Heritage and Arts for use by the Utah Division of Indian Affairs shall be used for establishment of a statewide community and economic development program for the tribes of Native American people within the exterior boundaries of the state who have by tribal procedure established a position rejecting siting of any nuclear waste facility on their reservation lands.

(b) The program under Subsection (11)(a) shall include:

(i) educational services and facilities;
(ii) health care services and facilities;
(iii) programs of economic development;
(iv) utilities;
(v) sewer;
(vi) street lighting;
(vii) roads and other infrastructure; and
(viii) oversight and staff support for the program.

(12) It is the intent of the Legislature that this part does not prohibit or interfere with a person's exercise of the rights under the First Amendment to the Constitution of the United States or under Utah Constitution Article I, Sec. 15, by an organization attempting to site a storage facility or transfer facility within the borders of the state for the placement of high-level nuclear waste or greater than class C radioactive waste.

Amended by Chapter 281, 2018 General Session

Historical Code

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Index Utah Code
Title 19 Environmental Quality Code
Chapter 3 Radiation Control Act
Part 2 Interstate Compact on Low-Level Radioactive Waste
Section 203 Acceptance of low-level waste by facilities in party states -- Requirements for acceptance of waste generated outside region of party states -- Cooperation in determining site of facility required within region of party states -- Allowance of access to low-level waste and hazardous chemical waste disposal facilities by certain party states -- Establishment of fees and requirements by host states.

19-3-203. Acceptance of low-level waste by facilities in party states -- Requirements for acceptance of waste generated outside region of party states -- Cooperation in determining site of facility required within region of party states -- Allowance of access to low-level waste and hazardous chemical waste disposal facilities by certain party states -- Establishment of fees and requirements by host states.

(1) Facilities located in any party state, other than facilities established or maintained by individual low-level waste generators for the management of that party state's own low-level waste, shall accept low-level waste generated in any party state if the waste has been packaged and transported according to applicable laws and regulations.

(2) No facility located in any party state may accept low-level waste generated outside of the region comprised of the party states, except as provided in Section 19-3-204.

(3) Until Subsection (2) takes effect, facilities located in any party state may accept low-level waste generated outside of any of the party states only if the waste is accompanied by a certificate of compliance issued by an official of the state in which the waste shipment originated. The certificate shall be in the form required by the host state, and shall contain at least the following:

(a) the generator's name and address;

(b) a description of the contents of the low-level waste container;

(c) a statement that the low-level waste being shipped has been inspected by the official who issued the certificate or by his or her agent or by a representative of the United States Nuclear Regulatory Commission, and found to have been packaged in compliance with applicable federal regulations;

(d) additional requirements imposed by the host state; and

(e) a binding agreement by the state of origin to reimburse any party state for any liability or expense incurred as a result of an accidental release of the waste during shipment or after the waste reaches the facility.

(4) (a) Each party state shall cooperate with the other party states in determining the appropriate site of any facility that may be required within the region comprised of the party states, in order to maximize public health and safety while minimizing the use of any party state as the host of the facilities on a permanent basis.

(d) The party states recognize that the issue of hazardous chemical waste management is similar in many respects to that of low-level waste management. Therefore, in consideration of the state of Washington allowing access to its low-level waste disposal facility by generators in other party states, party states such as Oregon and Idaho which host hazardous chemical waste disposal facilities will allow access to the facilities by generators within other party states.

(b) Nothing in this compact prevents any party state from limiting the nature and type of hazardous chemical or low-level wastes to be accepted at facilities within its borders or from ordering the closure of the facilities, so long as the action by a host state is applied equally to all generators within the region comprised of the party states.

(6) Any host state may establish a schedule of fees and requirements related to its facility, to assure that closure, perpetual care, maintenance, and contingency requirements are met including adequate bonding.

Renumbered and Amended by Chapter 112, 1991 General Session

<< Previous Section (19-3-202) Download Options PDF | RTF | XML Next Section (19-3-204) >>

Good Morning members of the committee, my name is Dallas Hager and I speak to with you today about Senate Bill 2037 (disposal and storage of high level nuclear waste).

As we get into this legislation, I feel it is important for you to understand a couple of my points of view. I am not a member of the Arbor Foundation nor do I belong to the Greenpeace organization. That being said, I am a 4th generation farmer in Pierce County and I take great pride in the land I farm as well as providing safe and reliable food to people throughout North Dakota, the United States, and foreign countries.

I do believe in coal, oil, gas, wind, solar, and last but not least nuclear as viable and necessary forms of energy to power our future. There are many pros and cons to each energy form, it goes without saying that depending upon ones political or financial interest, opinions will be swayed one way or another.

I recognize the task before the International Energy Agency (IEA) and U.S. Department of Energy (DOE) to address the energy issues we face today as well as the underlying nuclear waste hangover we are experiencing within the United States and abroad. Great strides have been made to develop new forms of energy, however this where the rubber meets the road. We have not given the same amount of attention to the consequences of nuclear fission and effects of it. The thought may be running through your head....well how can Dallas' or residents of Pierce County, or members of the North Dakota Community Alliance make such assertions. Well for me it is very simple...I had the chance to ask Andrew Griffith, U.S. Department of Energy one question during the information session regarding the proposed borehole experiment in Pierce County in February of 2016. I asked if there was a better way than borehole disposal. He responded that in the past studies had been done about putting waste in

a volcano, the Sun and in the Mariana Trench but found that geologic disposal was less risky. Now this response I would consider to be "thinking outside the box", if you were a 3rd grader. This is not a response that I can accept from a government or international agency that claims to have put its best foot forward.

Because of this, we have to ensure the interests of Pierce County, Wells County, Cass County, all counties within North Dakota have a voice in the matter of what...if anything can be transported or stored within our State. I stand before you today as a citizen, a farmer, husband, and a father that you do right by the citizens of North Dakota and ensure that we have a voice in the matter regarding nuclear waste storage within our state. I ask that you strengthen our laws regarding nuclear transportation and storage by examining those of other states such as Utah and Nevada and that we not be the least restrictive state. Give the people a choice so that we can decide for ourselves, our kids and generations to come.

The nuclear waste issues facing the Unites States today are real, however solutions proposed thus far are merely acts to quickly and quietly kick the can down the road. For this reason alone we cannot and should not take a wait a see approach.

As elected members of your community, it is your responsibility to ensure that citizen's rights are not infringed upon. This is your devotion as an elected member of your community.

I ask that you ensure SB 2037 gives due process to the citizens who elected you as part of their community.

Dallas Hager
Pierce County Resident

Testimony of Dakota Resource Council
Senate Bill 2037
March 7th, 2019

SB 2037
3.7.19
Attachment 1

Chair and members of the committee, my name is Liz Anderson and I am here on behalf of Dakota Resource Council. I stand here today to discuss some of the challenges in the bill SB 2037.

Dakota Resource Council has spent the last 40 years working to empower local communities to speak for themselves on issues that affect their communities. We understand that there is a need for a regulatory process surrounding high-level radioactive waste facilities. SB 2037, as it is currently written, is not strong enough to protect local communities from these facilities. We agree with the amendments made in the Senate and urge this committee to carefully review this bill which addresses a novel energy sector issue. This regulatory process should not be created at the expense of local control. SB 2037 takes away some of the ability for North Dakota's communities to use their voice.

Definitions are very important in legislation and we believe that the definition of "high-level radioactive waste" in SB 2037 isn't specific or clear enough. We request that SB 2037 be amended to include the same classification system that is used at the federal level and that the bill be in accordance with existing regulation. In this request, our state classification would be the same as the classification in the US Nuclear Regulatory Committee code measurement of Class C or higher. This system of classification would provide more clarity as we move forward into new policy territory.

A high-level radioactive waste facility has the potential to affect the entire state and have far-reaching consequences. Therefore, we recommend an amendment adding an additional elected official from both chambers to serve as members for the advisory council that is created

in SB 2037. This provides additional legislative oversight for this regulatory process. In addition to legislative oversight, we believe strongly that local control should not be taken away.

National experts recommend a "consent-based" siting process for radioactive waste disposal. According to "Reset of America's nuclear waste management: strategy and policy" Stanford report (2018), many site selection projects fail because they do not have public involvement or social support. Yucca Mountain is currently held up due to political tension over the site, even though billions of dollars have already been spent. North Dakota does not want to fall into a similar situation which could prove to be time-consuming and expensive. This report has two clear recommended objectives for public engagement saying it "establishes strong bonds of trust between localities, tribes, and states" and "fairly reallocates power among the parties." Please reference this article for more information on achieving these objectives[1]

A recommendation for additional public involvement, we recommend an amendment that requires the advisory council to write a report from their annual meeting and that report made available to the public.

SB 2037 allows for a county to submit a position paper. An additional recommended amendment that we have for the committee is that the county position paper is made public at the time of submission. North Dakota is a land of beautiful prairies, big sky, rivers, lakes, and families. We want to see everything possible done to protect all these things and more from a

[1] Stanford University Center for International Security and Cooperation George Washington University Elliott School of International Affairs. (2018). *Reset of America's Nuclear Waste Management: Strategy and Policy.* Retrieved from https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/reset_report_2018_final.pdf

radioactive waste disposal facility. North Dakota provides significant crops and other resources globally, and a stronger policy would help to protect them. Our waters are a part of an international watershed which places significant responsibility on North Dakota to put forth the best policy to protect our great state.

As it is currently written, we disagree with SB 2037 because it is set to be one of the weakest policies in the nation on this issue. For this reason, we recommend the previously stated amendments, Senate amendments kept, and careful consideration moving forward developing the regulatory process.

Dacotah Chapter of Sierra Club
Testimony before the ND House Energy and Natural Resource Committee
Bill 2037 March 7, 2019
Presented by Wayde Schafer, Conservation Organizer

The Purpose of 2037 is to create a regulatory regime within the Century Code to enable North Dakota to interact meaningfully with the Federal Department of Energy should that Department move toward exploration or siting of a deep geologic disposal or storage facility for High Level Nuclear Waste within North Dakota. While we do not disagree with the need of the state to develop such regulations, the removal to the right of a county to deny a permit for such a facility in sec.38-23-08 of 2037 runs contrary to Local Government control, contrary to the concept of reigning in Big State Government, and contrary to the process of the federal government, who has control of the process of High Level Nuclear Waste disposal.

Bear in mind that such facilities are highly controversial and such a facility is the grand-daddy of all controversial facilities. Since this bill has been working its way through the legislature you have no doubt become familiar with the Yucca Mountain Nevada Facility, and the Waste Internment Pilot Project near Carlsbad, New Mexico. Yucca Mountain is located in the desert of Nevada near the nuclear testing site and The Waste Isolation plant in the desert of New Mexico. Neither of these sites was located in populated areas where commerce and agriculture take place. In fact, as far back as World War II nuclear testing sites were chosen for their remoteness and NO population. Nuclear waste disposal sites were selected using that same criteria in mind.

Yucca mountain has been moth-balled by the Energy Department and The Waste Isolation Pilot Plant has had enormous difficulties and accidents. In reaction to a halting, if not failing, effort to store or dispose of US High Level Nuclear Waste, the nation has embarked on a path to better understand and identify the path of dealing with the 70,000 tons of Uranium, transuranic waste and Plutonium from nuclear power facilities and nuclear weapons production.

The Federal "Blue Ribbon Commission on America's Nuclear Future" was formed in 2010 and in 2012 released its Final Report. It's first recommendation. 1. A new consent-based approach to siting. Basically, the Federal Government does not want another Yucca Mountain type scenario where decades and billions are spent, only to run into a political blockade. According to the Blue Ribbon Commission Report:

"We believe this approach makes sense given that, under the process we have recommended, the potential host community, tribe, and state would have had to consent to be considered for a waste site, with full knowledge of the relevant safety standards and siting criteria."(pg. 57, Blue Ribbon Commission on America's Nuclear Future Final Report, 2012).

It is clear that, as far as the federal government is concerned that both state and local government must give consent. This principal is well recognized in state and federal law and regulation.

Key to that is "Host Community" as defined by the Federal Government : 42 USC 10101: DefinitionsText contains those laws in effect on February 19, 2019

From Title 42-THE PUBLIC HEALTH AND WELFARECHAPTER 108-NUCLEAR WASTE POLICY

(28) The term "unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.

(31) The term "affected unit of local government" means the unit of local government with jurisdiction over the site of a repository or a monitored retrievable storage facility. Such term may, at the discretion of the Secretary, include units of local government that are contiguous with such unit.

Consent is the other half of that equation. Again the Blue Ribbon Commission has made their view clear.

***"Another question highlighted in numerous comments to the BRC is the question of how to define "consent." Some stakeholders, for example, have suggested that consent within a state could be measured by a state-wide referendum or ballot question. On the other hand, the WIPP facility was sited, opened, and has been operated without the state's elected leaders employing such consent-measuring mechanisms. The Commission takes the view that the question of how to determine consent ultimately has to be answered by a potential host jurisdiction, using whatever means and timing it sees fit. We believe that a good gauge of consent would be the willingness of the host state (and other affected units of government, as appropriate) to enter into legally binding agreements with the facility operator, where these agreements enable states, tribes, or communities to have confidence that they can protect the interests of their citizens."* (Blue Ribbon Commission on America's Nuclear Future, Final Report, 2012, Page 57)**

It is therefore contrary to the process of establishing a regulatory regime in North Dakota law to be contradictory to the process established by the Federal government that has purview over all High Level Nuclear Waste. In the origins of 2037, there was perhaps a misinterpretation of this ongoing process from Legislative Council to Legislators. Sen. Roers did mention that restricting local zoning authority to size scope and location was suggested for legal and feasibility reasons by the legislative council. Why Legislative Council took that opinion, and gave that advice in light of the federal approach, only the Legislative Council can tell you.

County commissioners are elected , in part to defend the health and safety of the citizens of their county. Just as State Legislators do, County Commissioners take that charge seriously, and have at their disposal technical tools and advice to make these decisions. County Commissioners represent their county citizens and they are best situated to make the first decision on siting. I urge that sec. 38-23-08 be removed from the language of this bill, thus retaining a County's right to deny a permit for a High Level Nuclear Waste Disposal Facility. Thank you.

My name is Larry Heilmann. I live in Fargo. I am a retired research biochemist with the USDA and worked at the Biosciences Research Laboratory at NDSU. During my career I had about thirty years experience using radioactive isotopes in my work. Admittedly those were much different from the materials were discussing for this project but I know the rules of use and what is dangerous and not dangerous. The high level waste products proposed for this project are not the NORM and TENORM from the oilfields. I once proposed that the state should build and operate a disposal site for TENORM. It could be done safely in western North Dakota. The high level waste is entirely different. It can kill you tomorrow. It requires special handling and special sites for safe disposal. I do not think eastern North Dakota is a suitable site.

It has been said that this bill, #2037, is merely a management adjustment to ensure that the state will have some rules in place if the federal government ever decides to bring such waste to North Dakota. I see it as an invitation for industry and government to come here for that purpose. The rules and requirements in the bill are minimal and would act more as a roadmap to help the establishment of such a waste dump. Please come!

There are many things wrong with this bill and with the idea of establishing a high level radioactive waste disposal site in North Dakota. I will concentrate on two related to the site apparently already selected in Pierce County. The fact that his site was selected some three years ago by the Energy and Environment Research laboratory in collaboration with the Battelle Corporation without any notice to local or state officials only makes the story worse. There is a clause in the bill that requires the operator to notify the state Industrial Commission of what they are disposing of. There is apparently no requirement that they

inform the public of what they are disposing of. If this bill passes it must be amended to make the operations totally transparent for the public

Two sites have been extensively studied by the federal government as possible disposal sites. One in Nevada and one in New Mexico. Both were selected on the basis of a near total lack of water that could dissolve the radioactive material and carry it to distant sites. This was considered a very critical requirement. Pierce County is definitely not a very dry desert. It is in fact in the prairie pothole region with considerable surface water and also subsurface aquifers. The site is near the headwaters of the Sheyenne River. Any material spilled or lost will potentially go down the river to Valley City, Fargo, Grand Forks, and Winnipeg. The basin it is in drains to the north and into Canada. Has anyone informed the Canadian government about what is being planned only fifty miles from the border?

The other problem is how is this toxic material going to get to Pierce County. That is obviously one of the reasons this area was chosen. Crossing Pierce County is the mainline BNSF railroad with a station in Rugby. Waste currently stored in large swimming pools at nuclear power plants in Minnesota would be loaded onto trains and transported through the twin cities, Fargo, Grand Forks and Devils Like to an unloading point near Rugby. Most of the waste designated for disposal hare would come from the former Plutonium Factory at Hanford, Washington. Some of this dates back to World War II. It would be loaded on trains and transported to Spokane where it connects with the BNSF. A thousand miles later it arrives in Rugby after passing through Williston, Tioga, Stanley, Minot and Towner in addition to all the towns of Washington, Idaho and Montana. Transporting this highly dangerous material through multiple towns and cities would pose a considerable

hazard given the record of rail derailments in North Dakota. Does anybody remember the ammonia derailment in Minot in 2002?

In all, this would be a bad place to put a waste dump of this type. Prime farmland and nuclear waste just do not mix. Any spill or contamination would be very difficult to clean up. This bill seems to ignore those possibilities. It simply requires when the dump is full and closed that there be a sign erected to warn people. This idea seems to be being promoted as economic development, JOBS! JOBS! This is exactly the type of development we do not want or need. I ask that the committee give this bad bill a DO NOT PASS recommendation and a NO vote of the entire House of Representatives. Do not make Pierce County a national sacrifice zone.

March 14, 2019

Testimony on Requested Amended Senate Bill #2037

I offer my testimony here today for all of those who have spent tireless hours, days and years putting together well-informed education for all of us here today. Our needs are to address the concerns of a federal blunder that had no concrete plan of permanent safety and storage of high level nuclear energy and wartime waste. We have now learned, that no one in an educated society can even guess the half-life of imminent danger or how to safely store and dispose of this high level waste.

It is sad today that all of us have to make a decision in placing some sort of state governance and responsibility for a decision that should not have been ours to make. Those of us with the knowledge, now that has been acquired through time, realize that our addressing these issues will not be an end-all measure, but feel this legislation is a necessary piece for the decisions to come. There are many things that we may not be allowed to address due to federal jurisdiction.

Some examples might be the safety of transportation and knowledge of what actually is safe storage of this waste. Communities that may have, or may not have invited the production of high level nuclear energy to their communities, almost for certain have the contamination at the site. Any disposal locations or methods should be exercised at those locations rather than expanding the risk of transportation and additional land or water contamination at other locations affecting generations to come. Permanent signage at these locations that will be understandable for many civilizations to come is a mystery at best.

In conclusion, in no way, shape, or form should any part of this legislation we have presented become a road map to anyone's unwanted location. We now, offer senate bill # 2037as amended as our best message option at this time, well aware that it is not a perfect bill for the important needs of our state, now or in the future that may need to be addressed.

We are requesting an amendment to bill 2037, using revised language that exists in bill 2156 .
Section 3: 23-20.2-09. The intention is to exclude commercial contractors and add measurable classifications to the bill.
1) A person, firm, corporation, limited liability company, or other commercial enterprise may not deposit, or cause or permit to be deposited in this state, *any high-level nuclear waste or greater than class C radioactive waste* which has been brought into this state for that purpose.
2) A person, firm, corporation, limited liability company, or other commercial enterprise may not conduct any testing or exploration for the development of a private storage or disposal facility for *any high-level nuclear waste or greater than class C radioactive waste* material to be brought into the state.

Thank you,

Blaine Schmaltz
Pierce County ND Farmer/Landowner
Member of the ND Community Alliance

SB Bill 2037 set to establish a state policy for High-level Radioactive Nuclear waste storage & disposal

North Dakota Community Alliance, Rugby ND NDCommunityalliance@gmail.com

The North Dakota Community Alliance is an active alliance of farmers, ranchers, engineers, accountants business owners from Pierce County. We are not a lobby group, but a group of neighbors who have been active, since 2016, when a proposed deep bore-hole project with the potential for High-level Radioactive Waste storage came to our county.

We have continued to encourage North Dakotan citizens, especially Pierce county residents, to become educated about the fastmoving Nuclear Waste Industry and its potential to affect our state. The ND Community Alliance hosts an informational web-site, and public meetings. We host live quarterly web-casts, at our local high school, of the US Nuclear Waste Technical Review Board. We also remain in contact, with residents and professionals in other states who have experienced or are experiencing pressure from the Nuclear Waste Industry. We follow reporting of the individual member groups of the national "Natural Resources Defense Council" and keep abreast of current issues such as the US Department of Energy's recent Public Commentary Period on the Federal Government Reinterpretation Proposal to "reclassify high level radioactive waste."

Members of the North Dakota Community Alliance have been working with Rep Jon Nelson, State Geologist Ed Murphy and Policy Advisor Reice Haase and State Chief of Environmental Health Dave Glatt, to foster understanding regarding our concerns. Our objective is to gain some key, common sense provisions within SB2037, that would protect the interests of North Dakota communities, in the event a High-level Radioactive waste storage, disposal, or experimental site would be proposed in a North Dakota location. We have been encouraged by their openness to discuss issues. They have explained that in creating bill 2037, the goal is to create a disapproval process for the future probability of federal interest in North Dakota for placement of High-level Radioactive Waste. They have also explained there are things we can and cannot do within the bill, such as prohibit the Federal Government or compromise multi-state Alliances such as the one that exists between ND and California, Arizona and South Dakota which cover low and midrange radioactive waste.

At this time, we see the rapid advancement of Private contractors in the Nuclear Waste industry to be as great a concern as the Department of Energy was to Peirce county in 2016 and we see the aggressive proposals to "Reinterpret" the term "High-level Radioactive waste" as an important issue that was not considered in the Legislative study, leading to bill #2037.

The ND Community Alliance has reached a consensus that there is a need for the inclusion of an amendment to the bill that states clearly, intent and measurable classification, as other states including Utah do. This is what we have requested with our testimony last Thursday. We want, as the example from Utah states," the *intent of this state is to prevent the surface or subsurface exploration for siting or placement, of any high-level nuclear waste or greater than class C radioactive waste, by any private or public person, in the state.... of North Dakota.*

With an amendment to this effect, we understand from our research, that we can preempt HLRW private contractors from using our bill as a "road map" to permitting yet gain a process that can precipitate a notice of disapproval to the Federal Government.

After an amended bill 2037 becomes law, this process can then become tighter and stronger with the creation of the Rules, that have the oversight of the proposed, newly created HLNW Advisory Council.

Adding the following amendment to the bill during the Legislative process, in effect, gives the legislature more oversight to the process, as they are creating this bill and after its creation the oversight resets to the State Industrial Commission for most of the permitting process.

As we showed in our testimony last Thursday, and as you have seen through your own studies and from reading of the NRSC report provided in committee, High-level Radioactive Waste is a beyond anything we have ever dealt with in North Dakota. We do not, nor have we ever had a Century Code that we can reference as an example to use in legislating High-level Radioactive Waste. In fact HLNW has never been dealt with successfully anywhere in the nation. This is an industry that once permitted, will be out of State control, with the potential to create havoc for generations to come.

If the intent of the Legislature is to prohibit the entrance of the High-level Radioactive Waste industry into the state of North Dakota, then let that intent be clearly stated in our bill. Since 2017, Millions of dollars and thousands of hours have been spent by states such as New Mexico and Texas, in their recent attempts to halt HOTEC and Interim Storage Partners LLC, from gaining permitting for Consolidated Interim Storage Facilities within those two states. If the intent of the Legislature is to keep the HLNW industry from gaining a foot hold in North Dakota, then why leave an open loop hole with a permitting process that, once established, will have to be defended, at great cost, over a span of years, with no certain outcome?

This is the time to use the strength of the Legislature, as the voice of the citizens of North Dakota. This is the time for the Men and Women who represent the citizens of North Dakota and the future of North Dakota to act in unison to for the health, safety and well being of our state, its environment and economy, for generations to come.

We are asking you to Strengthen bill 2037 and put to rest the numerous voices in North Dakota that feel there is a "Predetermined Agenda" for the removal of 23-20.2-09 as stated in Bill 2156, thus opening a door for HLNW commercial enterprises to come into the State, through the Industrial Commission, circumventing Legislative authority, for private financial gain, at the expense of the safety and wellbeing of the citizens of North Dakota citizens and communities. This may sound extreme, but it is the commentary that members of the ND Community Alliance hear again and again from a large cross section of citizens in our community and other communities in the state.

SB Bill 2037 set to establish a state policy for High-level Radioactive Nuclear waste storage & disposal

North Dakota Community Alliance, Rugby ND NDCommunityalliance@gmail.com

We are requesting an amendment to bill 2037, using revised language that exists in bill 2156.
Section 3: 23-20.2-09. The intention is to exclude private, commercial enterprises and add measurable classifications to the bill.
To amend as follows:

1) A ~~person~~, firm, corporation, limited liability company, or other commercial enterprise may not deposit, or cause or permit to be deposited in this state, *any high-level nuclear waste or greater than class C radioactive waste* which has been brought into this state for that purpose.

2) A ~~person~~, firm, corporation, limited liability company, or other commercial enterprise may not conduct any testing or exploration for the development of a private storage or disposal facility for *any high-level nuclear waste or greater than class C radioactive waste* material to be brought into the state.

We respectfully ask you to consider the logic of this request and create a bill that is protective and proactive for the future good of our State with strong amendments to bill #2037.

Respectfully,

Rebecca Leier
Heartland Bison Ranch
Member North Dakota Community Alliance
Rugby, ND 58368

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2037

Page 1, after line 11, insert:

"**38-~~32~~-23-01. General Prohibition.**

The placement, including storage, treatment, or disposal, of high-level radioactive waste within the exterior boundaries of North Dakota is prohibited. ~~In the eventthat~~ If this provision is superseded by federal law, the remaining provisions of this chapter ~~shall~~ continue to apply. ~~Nothing in this~~This section ~~limits~~ does not limit the authority of the legislative assembly or ~~commission's authority~~the commission to issue a notice of disapproval under this chapter."

Renumber accordingly

SB 2037
4.11.19
#1
Pg.1

19.0038.06006
Title.

Prepared by the Legislative Council staff for
Representative J. Nelson
April 5, 2019

PROPOSED AMENDMENTS TO REENGROSSED SENATE BILL NO. 2037

That the House recede from its amendments as printed on pages 1025 and 1026 of the Senate Journal and pages 1219 and 1220 of the House Journal and that Reengrossed Senate Bill No. 2037 be amended as follows:

Page 8, line 12, after "**38-23-01.**" insert "**General prohibition.**

The placement, including storage, treatment, exploration, testing, or disposal, of high-level radioactive waste within the exterior boundaries of North Dakota is prohibited. If this provision is superseded by federal law, the remaining provisions of this chapter continue to apply. This section does not limit the authority of the legislative assembly or the commission to issue a notice of disapproval under this chapter.

38-23-02."

Page 8, line 29, replace "**38-23-02**" with "**38-23-03**"

Page 11, line 13, replace "**38-23-03**" with "**38-23-04**"

Page 11, line 18, after the underscored period insert "A county position paper must be made public at the time the permit application is submitted."

Page 13, line 1, replace "**38-23-04**" with "**38-23-05**"

Page 13, line 9, replace "**38-23-05**" with "**38-23-06**"

Page 13, line 12, replace "**38-23-06**" with "**38-23-07**"

Page 13, line 17, replace "**38-23-07**" with "**38-23-08**"

Page 13, line 29, replace "One senator" with "Two senators"

Page 14, line 1, replace "One representative" with "Two representatives"

Page 14, after line 19, insert:

"d. Report its findings biennially to the commission and to the legislative management."

Page 14, line 20, replace "**38-23-08**" with "**38-23-09**"

Renumber accordingly

SB 2037
4.11.19
#2
Pg. 1

Senate Bill 2037
April 11, 2019

Page 8, line 12, after "38-23-01." insert **"General prohibition.**

The placement, ~~including~~ storage, treatment, exploration, testing, or disposal~~,~~ of high-level radioactive waste within the exterior boundaries of North Dakota is prohibited. If this provision is superseded by federal law, the remaining provisions of this chapter continue to apply. This section does not limit the authority of the legislative assembly or the commission to issue a notice of disapproval under this chapter.

38-23-02."

POSSIBLE REQUEST

Page 13, Line 22

38 - 23 - 07. High - level radioactive waste fund - Appropriation. There is established a high-level radioactive waste fund into which funds received under an agreement entered under this chapter, permit fees, and civil penalties must be deposited. The commission shall administer the fund and may use the fund to fulfill any of the commission's powers and duties under this chapter. This fund must be maintained as a special fund and all moneys transferred into the fund are hereby appropriated and must be used and disbursed solely for the purposes in this chapter.