United States General Accounting Office

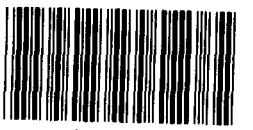
GAO

Report to the Chairman, Committee on Energy and Natural Resources, U.S. Senate

July 1990

NUCLEAR WASTE

DOE Needs to Ensure Nevada's Conformance With Grant Requirements



GAO/RCED-90-173

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-202377

July 9, 1990

The Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate

Dear Mr. Chairman:

As requested, we have reviewed the Department of Energy's program to provide financial assistance to the state of Nevada under the Nuclear Waste Policy Act of 1982, as amended. This report discusses Nevada's use of about $32 million in grant funds provided through June 1989 and the Department of Energy's administration of the grants.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to appropriate congressional committees, the Secretary of Energy, the Governor of Nevada, Nevada's Agency for Nuclear Projects, and other interested parties. We will also make copies available to others upon request.

This work was performed under the direction of Victor S. Rezendes, Director, Energy Issues, who may be reached on (202) 275-1441. Other major contributors are listed in appendix I.

Sincerely yours,

Kenneth O. Fulton, Jr.

J. Dexter Peach
Assistant Comptroller General

Executive Summary

Purpose

The state of Nevada opposes the Department of Energy's (DOE) development of a nuclear waste repository at Yucca Mountain, Nevada. This opposition has created an environment conducive to disputes over the appropriate use of the financial assistance DOE provides Nevada to pay the state's repository program costs. At the request of the Chairman, Senate Committee on Energy and Natural Resources, GAO reviewed Nevada's use of $32.3 million in grant funds provided through June 1989 and DOE's administration of the grants. GAO reviewed in detail the state's use of the $11 million provided for the year ended June 30, 1989, and relied on independent audits of prior years' expenditures.

Background

The Nuclear Waste Policy Act of 1982 charged DOE with investigating potential sites for licensing, constructing, and operating a nuclear waste repository. December 1987 amendments to the act limited DOE's investigation of candidate sites to Yucca Mountain. Nevada's legislature, however, has passed resolutions opposing use of Yucca Mountain for a repository and has enacted legislation banning nuclear waste storage in the state. The state believes these actions constitute a notice of disapproval, as permitted by the act, of the Yucca Mountain site. Accordingly, in January 1990 Nevada sued DOE and asked the Ninth Circuit Court of Appeals to order DOE to terminate all site investigation activities. Shortly thereafter, DOE initiated its own suit in the U.S. District Court asking that Nevada be (1) required to act on the work permits DOE needs to begin site investigations and (2) prohibited from unlawfully interfering in DOE's site investigation activities. These cases are not expected to be settled until sometime in 1991.

DOE must provide financial assistance grants to Nevada and affected local governments for the general purpose of overseeing DOE's waste program activities within their jurisdictions. Guidance on the use of grant funds is provided by the nuclear waste act, court decisions, appropriations acts, Office of Management and Budget circulars, and DOE regulations. Formal grant agreements and periodic amendments to the agreements establish the terms under which DOE provides grant funds. DOE then primarily relies on annual audits made by independent accounting firms to ensure compliance with laws, regulations, and grant provisions. These audits are required by the Single Audit Act (31 U.S.C. 7501-7507).

Results in Brief

Nevada improperly spent about $1 million of its $32.3 million in grant funds. Specifically, the state

- used as much as $683,000 for lobbying and litigation expenses that were not authorized or were expressly prohibited by law, court decision, or grant terms;
- exceeded a legislative spending limit on socioeconomic studies by about $96,000; and
- used, contrary to grant terms, about $275,000 from one grant period to pay expenses incurred in the prior year.

Also, the state did not always exercise adequate internal controls over grant funds, such as timely liquidation of funds advanced to contractors.

A recent independent audit also questioned the state's use, with DOE's approval, of grant funds for legislative expenses. GAO concluded, however, that the nuclear waste act provides DOE with sufficient discretion to approve the use of grant funds for this purpose.

A permissive approach to grant administration by DOE contributed to Nevada's inappropriate use of grant funds. For example, DOE did not always obtain agreement on grant terms before, or even after, releasing funds to the state. Furthermore, DOE has not taken corrective action on the annual audit findings including, for example, the recovery of funds spent for unallowable purposes.

Principal Findings

Nevada Improperly Used Some Funds

Although Nevada properly used most grant funds, it spent some funds for activities that were not authorized and/or were expressly prohibited by law, regulation, court decision, or grant provision. Specifically, Nevada:

- Spent up to $608,000 of grant funds on congressional lobbying activities during the 3 years ended in June 1989. Lobbying was expressly prohibited by a provision DOE added to the grant for the period beginning March 1987 and by DOE's fiscal year 1988 and 1989 appropriations acts. Also, lobbying is not authorized by the nuclear waste act.
- Used up to $75,000 to pay expenses incurred in litigation against DOE, until a federal court ruled in September 1987 that litigation is not one of the purposes of financial assistance grants listed in the nuclear waste

act. The independent auditors' reports of 1986-88 took exception to litigation expenses for the same reason.

- Exceeded by about $96,000 a spending limit of $1.5 million, contained in DOE's fiscal year 1989 appropriations act, for socioeconomic studies.

Nevada also did not always have effective internal controls over grant funds. For example, the state used $275,000 from one grant period to pay expenses incurred in the prior period and did not adequately control about $226,000 in advances of funds to contractors. One of the advances effectively resulted in an interest-free loan of $210,000.

An independent audit for the year ended June 1988 also questioned the state's use of $69,000 of grant funds for state legislative activities because federal guidelines prohibit, and there is no explicit statutory authority for, the use of grant funds for this purpose. DOE had approved this use of grant funds. On the basis of the nuclear waste act and applicable court rulings, GAO concluded that DOE had sufficient discretion to approve the use of grant funds for this purpose.

Weaknesses in DOE Grant Administration

In 1985 a federal court held that DOE is required to fund Nevada's proposed tests and studies related to DOE's investigation of Yucca Mountain if they meet certain conditions. Subsequently, because of the court's decision and other factors, DOE adopted a permissive approach to administering the state's grant that has contributed to Nevada's improper uses of funds.

Specifically, DOE provided funds to the state without reaching agreement on all terms for the grants made from May 1986 through June 1990. Nevada altered grant agreements signed and executed by DOE—including deleting the provision prohibiting lobbying that DOE had included in the grant for the period beginning March 1987—and signed and returned the revised agreements to DOE. DOE did not agree to these changes but nonetheless released grant funds to the state. Independent auditors subsequently found that Nevada had used grant funds for lobbying. After GAO discussed the lack of resolution of disputed grant terms with DOE management, DOE notified the state in writing that the changes Nevada had made to the approved grant terms for the period ending in September 1990 were not acceptable.

GAO found that DOE is not taking corrective actions on annual audit report findings in a timely manner. Although DOE regulations require that reported problems be resolved within 6 months of the date that the reports are formally presented to DOE's program staff, this is not being

done. Informational copies of the audit reports are available to DOE's program staff within about 6 months after the audit period; however, the reports are not formally presented to DOE for resolution of audit findings for about another 9 months. This is because the reports must be subjected to the quality control procedures called for by the Single Audit Act, including a quality review by DOE's Office of the Inspector General. Thus, DOE's program staff have several months to familiarize themselves with the reported problems before they formally receive the reports and the 6-month action period begins.

In addition, DOE has not acted to recover as much as $75,000 that Nevada spent on litigation against DOE. The state's use of grant funds for this purpose was first questioned by the independent auditors in a June 1986 audit report but DOE has not yet recovered these funds by withholding the amount from new grants. Instead, DOE is considering recovering the amount from certain payments that a different provision of the act requires DOE make to the state—payments that are equal to the taxes the state would receive if it were authorized to tax DOE's site characterization activities.

Recommendations

GAO is recommending that DOE take a number of specific actions to improve its administration of the grant program and to help ensure that activities funded by grants fully comply with applicable laws, regulations, and grant agreements.

Agency Comments

Because of the requester's time-critical need for this report, GAO did not obtain comments on the report from DOE and the state of Nevada. GAO did, however, discuss the results of its review with DOE and Nevada officials and considered their comments in preparing the report.

Contents

Abbreviations

DOE	Department of Energy
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982
OCRWM	Office of Civilian Radioactive Waste Management
OMB	Office of Management and Budget

Introduction

In 1982 the Congress found that federal efforts to dispose of radioactive waste accumulating at nuclear power plants had not been successful and that this waste had become a major source of public concern. To help ensure safe disposal of the waste, the Congress enacted the Nuclear Waste Policy Act of 1982 (NWPA). The NWPA established a process for identifying and selecting candidate repository sites for two geologic repositories, charged the Department of Energy (DOE) with implementing the program, assigned responsibility to the Nuclear Regulatory Commission (NRC) to license and regulate the repositories, and established a Nuclear Waste Fund to be used to finance the program. In December 1987 the Congress amended NWPA.[1] The amendments directed DOE to characterize (investigate) only the Yucca Mountain, Nevada, site for possible use as a repository. The amendments also suspended, for about 20 years, all site-specific activities directed toward identifying candidate sites for a second repository.

In enacting NWPA the Congress recognized that state and public participation in planning and developing the repositories was essential to promote public confidence in the nuclear waste disposal program. In addition, the Congress included in the act a mechanism by which a state could express its disapproval of a repository site within its borders. Specifically, the act permitted, after the President had recommended selection of a repository site, either the governor or the legislature of a state to file a notice of disapproval of the President's recommendation. Such disapproval would become effective unless overridden by resolution of the Congress. Therefore, the NWPA provided for the active participation of affected states and required DOE to provide financial assistance (grants) to ensure that these states could participate in the program.

Nevada Opposes the Yucca Mountain Project

The state of Nevada opposes DOE's Yucca Mountain project. Legislative and administrative actions by Nevada and legal challenges by both the state and DOE in the last year illustrate this opposition. In April 1989, for example, the Nevada legislature passed two joint resolutions opposing the Yucca Mountain repository. The first expressed the legislature's "adamant opposition" to a nuclear waste repository in the state and the second refused the state's consent for a repository at Yucca Mountain. Nevada also enacted legislation in July 1989 making it "unlawful for any person or governmental entity to store high-level radioactive waste in Nevada."

[1]The Nuclear Waste Policy Amendments Act of 1987, contained in Title V of the Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203).

On the basis of these resolutions and legislation, Nevada has refused to act on DOE's applications for the environmental permits necessary to begin site investigations. In the state's view, the two resolutions constituted a valid and effective notice of its disapproval, under section 116 of NWPA, of the Yucca Mountain site. Therefore, on January 5, 1990, Nevada sued DOE and asked the Ninth Circuit Court of Appeals to, among others things, order DOE to terminate all site characterization activities at the site. In addition, Nevada sued DOE on two previous occasions, which resulted in court decisions affecting the way that DOE administers the state's grant and the way that Nevada uses the grant funds.

On January 25, 1990, DOE sued Nevada in the United States District Court, District of Nevada, and, among other things, asked the court to

- require Nevada to act on all pending permits needed by DOE to perform exploratory efforts at Yucca Mountain, and
- prohibit Nevada from unlawfully interfering in DOE's site characterization of Yucca Mountain.[2]

A DOE attorney told us that he anticipates that Nevada's suit will be decided by the Circuit Court before the end of the year. DOE's suit, which is stayed pending the outcome of Nevada's suit, would then have to be decided. If Nevada loses and does not file an appeal, the attorney said that DOE's case could be decided sometime in January 1991.

Grant Program Purpose, Funding, and Administration

DOE makes grants from the Nuclear Waste Fund to Nevada and affected local governments so they can participate in oversight of DOE's waste program activities. The fund, which is a separate Treasury account, consists of fees paid by generators and owners of nuclear waste and interest earned on investments of funds that are surplus to the current program needs. The fees collected and interest earned are government funds, and DOE can obligate from the fund only moneys that have been appropriated by the Congress.

The NWPA, as amended, provides that grants shall be made to enable the grantee to

[2]For a more complete discussion of these lawsuits, see Nuclear Waste: Quarterly Report as of September 30, 1989 (GAO/RCED-90-103, Mar. 2, 1990).

- review DOE's activities at Yucca Mountain to determine the potential economic, social, public health and safety, and environmental impacts of a repository on the state and its residents;
- develop a request for financial and technical assistance to mitigate the effects of construction of a repository;
- engage in any monitoring, testing, or evaluation activities related to DOE's site characterization program;
- provide information to Nevada residents about DOE, NRC, and state activities with respect to the site; and
- request information from, and provide comments and recommendations to, the Secretary of Energy regarding DOE's nuclear waste repository program activities.

The act precludes the use of grant funds for salary and travel expenses that the grantee would ordinarily incur.

Concerned about the rising costs of the grant program and the type of activities being financed by the grants, the Congress began limiting the amount of funds DOE could provide to Nevada and placing restrictions on the use of the funds. In July 1988 the Congress, through DOE's fiscal year 1989 appropriations act (P.L. 100-371), limited the amount of funds available to Nevada from July 1, 1988, through June 30, 1989, to $11 million. This was less than one-half of the $23.1 million requested by the state in its March 3, 1988, application. The Congress also prohibited use of Nuclear Waste Fund moneys to influence the Congress and to lobby. It also limited the amount of the funds that Nevada could spend for transportation and socioeconomic studies to $1.5 million in each category.

The Congress placed even tighter restrictions on the fiscal year 1990 grant program. In DOE's appropriations act for fiscal year 1990 (P.L. 101-101), the Congress again included the prohibition on use of funds for influencing the Congress and lobbying, and

- provided $5 million to Nevada, of which (1) $1 million was earmarked for infrastructure studies at the University of Nevada-Reno and (2) no more than $1 million could be spent for both socioeconomic and transportation studies, and
- gave the Secretary of Energy the discretion to provide the state with an additional $6 million to conduct appropriate NWPA grant activities.

In addition, the act provided the University of Nevada, Las Vegas, with $10 million for computing resources to support the state's independent analyses and oversight responsibilities and for use by the university.

DOE has obligated funds under two grants and several grant amendments to provide funds for specific budget periods. The first grant was in effect between March 3, 1983, and February 28, 1985. On February 1, 1985, DOE issued a new grant and thereafter extended the grant, by means of several amendments, through June 30, 1989. Although the two grants overlapped, DOE did not provide funds under the first grant after September 30, 1984. DOE had obligated about $32.3 million to support Nevada's oversight activities between March 1983 and June 1989. (See table 1.1.)

Table 1.1: Summary of Grant Obligations

Period	Approximate months in budget period	Amount obligated
March 1983-September 1983	7	$350,000
October 1983-February 1985	17	646,083
February 1985-April 1986	15	1,898,778
May 1986-February 1987	10	4,418,754
March 1987-June 1988	16	13,998,663
July 1988-June 1989	12	11,000,000
Total		**$32,312,278**

Source: Compiled from DOE data.

DOE's Office of Civilian Radioactive Waste Management has overall responsibility for administering the grant program at the national level. DOE's Nevada Operations and Yucca Mountain Project Offices administer the grant program at the local level. Nevada's Agency for Nuclear Projects—the grantee—administers the grant for the state.

The grantee submits its grant applications to DOE's Nevada Operations Office for review and approval. DOE reviews the applications, which show planned activities and budgetary data, to ensure that the activities proposed by the grantee (1) reasonably relate to the oversight of the Yucca Mountain Project; (2) are allowed by NWPA, subsequent related court decisions, congressional restrictions, and Office of Management and Budget (OMB) circulars; (3) do not interfere with or delay DOE's planned activities; and (4) are consistent with the grant terms. Following this review, DOE awards grants on the basis of the activities and funding levels proposed and reviewed. The grantee is required to submit

periodic progress and financial reports to DOE. DOE relies principally on annual audits performed by independent accounting firms under the Single Audit Act to monitor compliance with applicable laws, rules, and regulations.[3]

Objectives, Scope, and Methodology

The Chairman, Senate Committee on Energy and Natural Resources, requested us to review Nevada's use of DOE's grant funds and DOE's administration of the grants.

Because the state's use of grant funds through Nevada's fiscal year 1988 had been audited by independent accounting firms, the Chairman's office agreed that we should concentrate our review on the funds expended for the year ended June 30, 1989. For the earlier period, we identified expenditures questioned by prior audits. We also reviewed relevant activities occurring after June 30, 1989.

To accomplish our first objective, we identified Nevada's grant fund expenditures for July 1, 1988, through June 30, 1989. We interviewed state officials and reviewed appropriate documents, such as invoices, vouchers payable, and correspondence relating to these expenditures. We also reviewed the appropriateness of these expenditures under the provisions of the NWPA and DOE appropriation acts, federal regulations (such as OMB circulars and DOE's regulations), and the grant agreements and periodic amendments to the basic agreements. Finally, as requested by the Chairman's office, we identified whether grant funds for the period were spent within or outside the state of Nevada. The House-Senate Conference Report on DOE's fiscal year 1989 appropriations act stated that the Congress intended that grant funds be spent to the maximum extent possible within the state of Nevada. We used the address on the grantee's contracts with firms and individuals as our criterion for determining if contracts were awarded to firms and individuals within Nevada.

For expenditures of grant funds prior to July 1, 1988, we used information contained in the annual audits and correspondence concerning the resolution of these audit findings. We obtained additional information from the audit organization regarding selected findings contained in the audit reports for the years ended June 30, 1987 and 1988.

[3]The act requires state and local governments that receive specified amounts of federal financial assistance to have a single audit conducted.

To accomplish our second objective, we reviewed DOE's procedures for (1) reviewing and approving grant applications, (2) monitoring grant activities, and (3) resolving annual audit findings. We interviewed DOE officials and reviewed appropriate documents, such as grant applications, DOE staff evaluations of grant applications, and relevant correspondence. We also used information in our prior reports, such as our report to the Secretary of Energy on DOE's budgeting procedures for Nevada's grant funds.[4]

Because federal court rulings affect certain aspects of the administration of the program, we obtained and reviewed the Ninth Circuit Court of Appeals rulings relating to DOE, Nevada, and the NWPA. We also reviewed information, such as state hearings and legislation, related to the state legislative activities funded by the grant.

Our review was conducted primarily at DOE's Nevada Operations and Yucca Mountain Project Offices in Las Vegas, Nevada, and at the state of Nevada's Agency for Nuclear Projects in Carson City. We discussed the results of our review with (1) DOE officials at the operations and project offices and at DOE headquarters and (2) grantee officials. Subsequent to our discussion with grantee officials, the grantee's Executive Director provided additional comments on the results of our review in a letter of March 14, 1990. We considered the comments of all of the DOE and Nevada officials, including those comments made in the grantee's March letter, in preparing our report. Also, we included the officials' comments in our report where appropriate. Our review was conducted between August 1989 and April 1990 in accordance with generally accepted government auditing standards.

[4]Nuclear Waste: DOE's Budgeting Process for Grants to Nevada Needs Revision (GAO/RCED-90-20, Oct. 20, 1989).

Nevada Has Used Some Grant Funds Contrary to Laws, Regulations, and Grant Terms

Nevada spent most of the $32 million in nuclear waste act grants properly; however, about $1 million of the $32 million was used for activities that were not authorized and/or were expressly prohibited by law, regulation, court decision, or grant terms. Specifically, the grantee

- used as much as $608,000 for lobbying;
- used about $75,000 to pay costs of litigation against DOE; and
- exceeded, by about $96,000, the limit on spending for socioeconomic studies for the year ending in June 1989.

A recent independent audit also questioned the state's use, as approved by DOE, of grant funds for legislative expenses because of a prohibition in federal guidelines and the absence of explicit statutory authority. After reviewing the nuclear waste act and applicable court rulings, we concluded that it is within DOE's discretion to approve the use of grant funds for this purpose.

Finally, because of weaknesses in the grantee's internal controls over grant funds, the grantee used $275,000 from one grant period to pay claims from a prior grant period, did not adequately control advances of funds to contractors, and did not require annual audits of all subrecipients of grant funds in accordance with the requirements of the Single Audit Act.

Nevada Used Most Grant Funds Properly

DOE provided Nevada with about $32.3 million in grants through June 1989. The major portion of these funds was used properly to contract for independent studies, technical studies, and review of program activities. For example, our detailed review of the $11 million budgeted for the year ended June 30, 1989, showed that the grantee spent about $10.2 million primarily to finance studies on the suitability of the Yucca Mountain site, the effects of a repository on Nevada residents, and transportation matters. A detailed breakdown of the amounts budgeted and spent is shown in table 2.1.

About $8 million of the $10.2 million the grantee expended for the year ended June 30, 1989, was used to contract for independent studies, technical advice, and reviews of DOE's waste program activities. Other expenditures included about $1.2 million to fund the grantee's direct operating expenses (including $434,000 for five individuals hired on a contract basis), $435,000 to local governments and Indian tribes, $230,000 for legal services, and $83,000 for a Nevada legislative committee. Our audit of the grantee's expenditures for that year showed

that the amounts Nevada reported as spent were accurate and that all funds were accounted for.

Table 2.1: Budget and Expenditures for the Year Ended June 30, 1989

Category	Budget	Expenditures
Agency support		
Salaries and fringe benefits	$904,729	$919,558
Travel costs	84,344	90,891
Operating expenses	184,460	154,591
Equipment purchases	16,275	5,526
Subtotal	**$1,189,808**	**$1,170,566**
Contract services		
Legal services	330,000	230,538
Public information	242,000	198,515
CPA assistance	50,000	13,406
Hydrology	2,400,000	2,563,760
Geology	1,520,000	1,382,833
Socioeconomic	1,500,000	1,438,542
Transportation	1,500,000	1,007,787
Quality assurance	100,000	66,776
Repository engineering	200,000	246,861
Environmental	750,000	746,127
Subtotal	**$8,592,000**	**$7,895,145**
Technical advisors		
Hydrology advisor	112,000	172,162
Health physicist advisor	10,000	3,750
Materials science advisor	25,000	12,642
Planning advisor	300,192	159,860
Geology advisor	50,000	69,968
Transportation advisor	[a]	96,331
Subtotal	**$497,192**	**$514,713**
Support to others		
Legislative	75,000	82,500
Local governments and tribes	536,000	434,761
Other state agencies	110,000	59,994
Subtotal	**$721,000**	**$577,255**
Total	**$11,000,000**	**$10,157,679**

[a]Transportation advisor costs included with the planning advisor.

Source: GAO table developed from DOE and Nevada data.

Nearly all the grant funds were used to hire individuals and firms under contracts. In the year ended June 30, 1989, the grantee had 80 contracts,

worth $9.4 million, with 69 contractors. Of the 80 contracts, 48 were awarded to Nevada contractors, for a total of about $5.9 million (63 percent), and 32 were awarded to out-of-state contractors, for a total of $3.5 million (37 percent).

Nevada Used Grant Funds to Lobby the Congress

Although the Congress included prohibitions against lobbying in DOE's fiscal year 1988 and 1989 appropriations acts, Nevada employed law firms between July 1986 and June 1989 that, among other things, performed lobbying activities. Also, DOE included a specific provision in a 1987 grant amendment prohibiting lobbying. The amounts spent for lobbying during the 3-year period could have been as much as $608,000.

Lobbying Not Permitted

Lobbying activities are not expressly included in NWPA as one of the purposes for which financial assistance grants are provided. In 1987, however, an attorney in the chief counsel's office of DOE's Nevada Operations Office learned from a newspaper article that the grantee might have contracted with a Washington, D.C., law firm to, among other things, lobby the Congress.[1] This attorney reviewed the grantee's contract with the law firm and the grantee's supplemental grant application and concluded that there was reason to caution the grantee against using grant funds to lobby. The grantee's contract with the law firm requires the firm to

> assist the office with its overall congressional strategy and with its relations with key members of Congress and their staffs regarding the siting of a high-level radioactive waste repository; provide policy analysis relative to the Agency's [Nevada's Agency for Nuclear Projects] legislative mandate; critique and analyze congressional and/or federal agency initiatives and actions regarding high-level radioactive waste disposal; represent the Agency at key meetings; and provide general advice and assistance to the Agency on issues pertaining to high-level radioactive waste disposal.

Because of this contract, DOE included a provision in the grant amendment from March 1987 through June 1988 prohibiting the use of grant funds to influence federal legislation.[2] The grantee, however, deleted this provision and, in a January 1988 letter, the grantee's Executive Director told the Nevada Operations Office that "Nevada objects to and

[1]This firm was registered as a lobbyist for the grantee, on matters relating to nuclear waste legislation, under the Federal Regulation of Lobbying Act, from August 1987 through March 1990.

[2]In addition to the grant provision, DOE's appropriations act for fiscal year 1988, enacted in December 1987, contained a DOE-wide lobbying prohibition.

will not comply with" the provision. The reasons for the grantee's objections were that the provision was "arbitrary, unreasonable, and violates the intent of the NWPA, and would likely lead to legal action if the condition remains intact." Although the grantee asked DOE to acknowledge the retraction, DOE did not do so.

Beginning with the grant amendment for the year ended June 30, 1989, DOE revised the grant terms to include the lobbying prohibition contained in DOE's fiscal year 1989 appropriations for the Nuclear Waste Fund. The language in that provision states that

> none of the funds herein appropriated may be used directly or indirectly to influence legislative action on any matter pending before Congress or a state legislature or for any lobbying activity as provided in 18 U.S.C. 1913.[3] The grantee did not delete this grant provision.

Auditors Questioned Funds Used for Lobbying Through June 1988

The Single Audit Act audit report on Nevada's grant for the year ended June 30, 1988, said that the Washington, D.C., law firm's vouchers showed that the grantee was billed and paid for lobbying services. The auditors questioned the entire $240,000 that the law firm was paid but said that the law firm's billings were often too vague to determine what specific services were rendered. The auditors also noted that in the previous year the grantee had spent about $155,000 of grant funds for similar services under the same contract.

The grantee's Executive Director disagreed with the finding. He stated that NWPA authorizes Nevada to have extensive interaction with the Congress. He also interpreted a December 1985 decision of the Ninth Circuit Court of Appeals as stating that NWPA must be read permissively regarding Nevada's use of grant funds.[4] In that decision, the court found that sections of DOE's guidelines intended to minimize the state's independent testing and studies of the Yucca Mountain site were unlawful because they undermined the independent oversight role that the Congress envisioned for affected states. The court ruled that NWPA supports funding for independent site testing as long as the testing is essential to an informed "statement of reasons" for disqualifying a site under section 116(b) of NWPA, the "disapproval" provision. The court also ruled,

[3]This statute (18 U.S.C. 1913) defines lobbying as any activity intended or designed to influence in any manner a Member of Congress to favor or oppose, by vote or otherwise, any legislation or appropriation by the Congress. This statute applies to federal officers and employees only, not to grantees and their employees.

[4]State of Nevada v. Herrington, 777 F.2nd 529 (9th Cir. 1985).

however, that the state is not entitled to carte blanche access to the Nuclear Waste Fund; rather, the state's testing activities (1) must be scientifically justifiable (reasonable), (2) must be performed by demonstrably competent contractors, and (3) cannot unreasonably interfere with or delay DOE's waste program activities.

The Executive Director also cited an opinion by the Nevada Attorney General's Office that the law firm's activities fell within the scope of the state's review of DOE's waste program activities and Nevada's information-gathering and dissemination role. The Executive Director added that a unique relationship exists between DOE and Nevada in that Nevada must obtain its funding from the agency it is overseeing and described the relationship between DOE and Nevada as "adversarial." In this regard, the Executive Director later told us that DOE has tried to limit, interfere with, and influence Nevada's oversight role through its control of grant funds.

Although the auditors acknowledged the Executive Director's arguments, they concluded that the grantee was lobbying and that NWPA does not authorize lobbying. Furthermore, the final audit report cited an October 1987 memorandum from the Executive Director to the Budget Analyst for the state stating that the law firm's activities were "clearly in the area of lobbying." This memorandum stated:

> With regard to the types of activities this [law] firm is undertaking, in my estimation, they are clearly in the area of lobbying. The firm contacts various congressional representatives at our request, transmits positions, information, materials, etc., as well as attends meetings at my request with various federal agencies on behalf of the State of Nevada, including the Department of Energy, the Nuclear Regulatory Commission and others. (Underscoring supplied.)

Use of 1989 Funds for Lobbying

For the year ended June 30, 1989, we found that the grantee had retained the legal services of an Olympia, Washington, law firm. From June 1987 to July 1988, this firm was a registered lobbyist for the state, under the Federal Regulation of Lobbying Act, on all matters relating to NWPA. The firm's billings included activities such as contacting congressional staff members and drafting legislation. We could not readily determine the actual cost of lobbying activities from the billings for the year ended June 30, 1989, because this firm also provided other legal services to Nevada; however, the total expenditure from grant funds was $213,000.

In response to our finding, the grantee's Executive Director said NWPA requires Nevada to interact with the Congress and that providing information about Nevada's grant activities is not lobbying. He stated that, although his staff and attorneys had numerous congressional contacts, grantee staff and attorneys are not authorized to initiate congressional contacts. Furthermore, Members of Congress and their staffs initiated these contacts and grantee staff and attorneys responded by answering questions, furnishing information, and writing questions.

In a March 14, 1990, letter to us elaborating on his earlier comments, the Executive Director stated that the issue of lobbying, especially before the fiscal year 1989 appropriations act language, is a "grey area." In his view, the Olympia, Washington, law firm did not engage in any lobbying activities. Also, he further claimed that the state had an obligation to inform the Congress of its findings and experiences relative to the nuclear waste program.

We found that each firm was formally registered as a lobbyist for the state during at least a part of the period covered by the appropriation acts for fiscal years 1988-89. Documents we reviewed show numerous congressional contacts, many of which appear to have been initiated by the law firms. Furthermore, the state is not prohibited from spending its own funds for activities in what the Executive Director calls a "grey area."

Nevada Used Grant Funds to Pay Litigation Expenses

Nevada used grant funds to pay expenses incurred in suing DOE. Although specifically prohibited by the grant terms, the state had maintained that such expenses were allowable under NWPA.[5] In a June 1986 report on an audit of the grantee's activities for the years ended in June 1984 and 1985, the auditors said that at least a portion of $22,600 in legal costs incurred by the grantee during the 2-year period was for legal action or claims against the U. S. government—activities that are clearly prohibited by the grant agreement. In commenting on a draft of that audit report, the grantee's Executive Director said that NWPA did not provide DOE with the authority to impose this prohibition and that Nevada intended to sue DOE over this issue. Eventually, Nevada did sue DOE over this issue.

[5]The provision states that any costs incurred by the state of Nevada for litigation against the U.S. government are unallowable under the grant.

In September 1987 the Ninth Circuit Court of Appeals ruled against the state by finding that litigation against DOE is not an activity that the Congress intended to finance from the NuclearWaste Fund.[6] As discussed below, however, DOE has not determined or recovered the portion of the approximately $75,000 that Nevada spent on litigation against DOE prior to the court's decision.

Audits of the grantee performed under the Single Audit Act questioned the following subtotals of the $75,200 in litigation expenses:

- about $22,600 for the years ended June 30, 1984, and 1985;
- about $42,700 for the year ended June 30, 1987; and
- about $9,900 for the year ended June 30, 1988 (expenses incurred prior to the September 1987 court decision).

DOE maintains that these litigation costs were never allowable, and that the court's decision reaffirmed that NWPA does not allow such use of grant funds. The grantee has not reimbursed DOE for these expenditures because, in the opinion of the grantee's Executive Director, the court's decision was not retroactive. We note that, traditionally, judicial decisions are regarded as expressions or interpretations of preexisting law. Therefore, with a few exceptions that do not apply here, they are customarily given retroactive effect.

The Executive Director told us that the grantee has not spent grant funds for litigation against the United States since the court's decision. Our review of expenditures for the grant period ended June 30, 1989, supported his statement. Also, in his March 14, 1990, letter to us, the Executive Director said that Nevada has never refused to pay these costs and has, in fact, proposed alternatives to offsetting the amount that the state is willing to discuss with DOE. One such alternative is to reduce the unexpended portion of Nevada's current grant if such a reduction would not impair accomplishing the objectives of the state's program. According to the Executive Director, Nevada is waiting for DOE's response to the state's proposals.

[6]State of Nevada, et al., v. Herrington, 827 F.2d 1394 (9th Cir. 1987).

Congressional Funding Limitation on Socioeconomic Studies Exceeded

The grantee, without the knowledge of DOE, exceeded the congressional limit on the amount of money that could be spent on socioeconomic studies for the year ended in June 1989.[7] This occurred because the grantee excluded costs of individuals under contract to the grantee who assisted other contractors on the studies. As a result, the $1.5-million limit was exceeded by about $96,000.

DOE's fiscal year 1989 appropriations act limited the amount of money that Nevada could spend on socioeconomic and transportation studies to $1.5 million each. Before the act was passed, Nevada had submitted its grant application for about $23 million, of which $3.4 million was for socioeconomic studies. The $3.4 million included $150,000 for a technical review committee to evaluate the methodology, scientific quality, and direction of the socioeconomic studies. Following enactment of DOE's appropriations act, DOE did not provide Nevada with any guidance on how to ensure that the grantee would not exceed the spending limit. Nevertheless, the grantee scaled down its request for funds to cover the costs of socioeconomic studies to the $1.5-million limit specified in the act. It excluded from this amount, however, the previously included cost of the technical review committee. This cost item was moved to a separate account, totaling $300,192, for "advisory services in socioeconomic and transportation planning." DOE approved the grantee's funding request and amended the grant accordingly.

During the year ended June 30, 1989, the grantee had 80 contracts with 69 contractors. We examined the scope of work for all 80 contracts and identified 15 contractors (and 15 contracts) that were directly or indirectly involved in socioeconomic studies. Three contractors were actually conducting socioeconomic studies. The other 12 contractors include 10 members of the technical review committee and 2 other advisors. According to their contracts, the review committee members and advisors were to assist the grantee in designing, managing, and critiquing the socioeconomic studies. We included the costs of all 15 of these contractors in calculating the amount of grant funds spent on socioeconomic studies (see table 2.2).

[7]Such studies are made for the purpose of determining the social and economic impacts that the repository program will have on the community.

Table 2.2: Costs to Support Socioeconomic Studies

Category	Amount spent
Contractors	$1,438,542
Advisors	
Technical Review Committee	82,200
Others	75,133
Total	**$1,595,875**

Source: Nevada Agency for Nuclear Projects.

We performed a similar analysis of the grantee's expenditures on transportation studies and found that the total amount spent, including advisors, was about $1.1 million.

DOE did not track the grantee's expenditures for socioeconomic and transportation studies, and as a result, it had no way of preventing the grantee from exceeding the legislative limitations on the use of grant funds for these purposes. Although the grantee is required to submit quarterly reports to DOE, the reports do not show the amount of expenditure by budgetary category.

According to the grantee's Executive Director, the legislative limit on socioeconomic studies was not exceeded because only the costs for the three contractors actually performing the studies should be counted toward the limit. In his March 1990 letter, the Executive Director said that the advisors advise the state and help the state administer a variety of programs and activities. He considers these expenses to be administrative overhead and thus not a part of what is meant by "studies" in the appropriations act. Also, he noted that DOE approved the proposed expenditures.

We believe that all costs pertaining to the socioeconomic studies should be counted toward the limitation, including the costs of all contractors that assisted in all aspects of planning, conducting, and reviewing the studies.

Use of Grant Funds to Pay Expenses of State Legislature

For the last 2 years included in our review, the grantee requested, obtained, and used over $150,000 of grant funds to pay expenses of the state's nuclear waste legislative committee. The Single Audit Act audit report for the year ended June 30, 1988, questioned the grantee's use of funds for this purpose because it is contrary to OMB guidance and there is no explicit statutory authority that allows such use of grant funds.

The auditors recommended that the grantee seek OMB's approval to use grant funds for legislative expenses. DOE had approved the grantee's budget requests for legislative expenses without comment. Officials in its Nevada office told us that they had approved the grantee's requests on the basis of OMB's policy allowing funding of "advisory councils." We believe that the OMB guidance is inapplicable to the determination of whether the funding of these expenses is proper. In our view, the relevant criteria for this determination must be found within NWPA itself. Furthermore, under the act and applicable court rulings, DOE has considerable discretion in determining which expenses are properly chargeable to the grant.

The Grantee Requested Funds for Legislative Expenditures

In 1985 the Nevada legislature created the Committee on High-Level Radioactive Waste. This standing committee of the legislature is authorized to

- study and evaluate information and policies regarding a repository in Nevada, as well as any other policies relating to the disposal of high-level radioactive waste;
- identify the potential adverse effects and ways to mitigate the effects of such a repository; and
- recommend legislation to the Nevada legislature.

According to the committee's enabling legislation, per diem allowances, salary, and travel expenses of the committee members are to be paid from the state legislative fund. Whether this provision precludes reimbursement of these expenses with grant funds is a matter of dispute within the state. The state Attorney General's office believes they are a responsibility of the state legislature. The Legislative Counsel Bureau believes they should be paid with NWPA funds.

In 1987 the committee recommended two resolutions urging the federal government to take specific actions regarding the repository and one amendment clarifying its own implementing legislation. In 1987 the Nevada legislature passed the clarifying amendment and one of the resolutions. The resolution urged the Congress and the President to take all measures necessary to mitigate the adverse effects of a repository in Nevada.

The grantee contracted with the Nevada Legislative Counsel Bureau to support the Nevada legislature.[8] For each of the last 2 budget years included in our review, the grantee included an amount for legislative expenditures in the budget requests it submitted to DOE and that agency approved these line items without comment. More than $150,000 was spent for legislative expenses over the 2-year period between July 1, 1987, and June 30, 1989. This amount included about $69,000 for the first year and $82,500 for the second year. Also, the grantee had contracted to support the Nevada legislature in earlier periods. However, because the amounts of these contracts were not separately identified in the DOE-approved grant amendments, we did not take the additional time necessary to identify the actual amounts of grant funds used to pay legislative expenses in the earlier periods.

Auditors Question Use of Grant Funds for Legislative Expenses

In the Single Audit Act audit report for the year ended June 30, 1988, the auditors questioned the grantee's use of about $69,000 of grant funds to pay expenses of Nevada's legislature. The report stated that OMB Circular A-87 provides that legislative expenses, except travel expenses that directly benefit a grant program, are not an allowable charge to federal grants.[9] OMB Circular A-87 sets federal policy on the use of grant funds. Attachment B to this circular states that "salaries and other expenses of the State legislature or similar local governmental bodies . . . whether incurred for purposes of legislative or executive direction, are unallowable."

The auditors also noted that the provisions of the circular may be overridden by statutory authority and that NWPA indicates that state participation in the repository siting decision includes the involvement of the state legislature. However, the auditors also noted, no explicit statutory authority exists that allows legislative expenditures to be charged to the state's grant. Finally, the auditors recognized that DOE had approved funding of legislative expenses by approving the grantee's budget request.

On the basis of these findings, the auditors recommended that the grantee request approval from OMB to expend grant funds for the state legislature.

[8]The Nevada Legislative Counsel Bureau is the staff agency that provides legal, research, and fiscal support to the Nevada legislature, which meets on a biennial basis. It also receives its funding from the state legislative fund.

[9]Cost Principles for State and Local Governments (OMB/A-87, Jan. 28, 1981).

DOE and Nevada Believe Legislative Expenses Are Allowable

DOE has funded expenses of the Nevada legislature's Committee on High-level Radioactive Waste and an earlier subcommittee since the beginning of the state's grant. DOE did not have any documentation in its grant files that showed the basis on which it permitted the grantee to use funds for this purpose. However, a Nevada Operations Office attorney and the program analyst for Nevada's grant told us that, according to DOE's interpretation of the legislation establishing the two committees, they qualify as "advisory councils" under OMB Circular A-87. That circular states that costs incurred by state advisory councils or committees established pursuant to federal requirements to carry out grant programs are allowable. The cost of like organizations is allowable when provided for in the grant agreement. Therefore, these officials said, the expenses incurred by the two committees can be paid with grant funds.

In addition, the program analyst stated that the committees were established as the direct result of the nomination and selection of Yucca Mountain for site characterization. For this reason, any expenses incurred by the committees are a result of this nomination and selection and should not be considered "ordinary expenses" that, according to NWPA, cannot be paid with grant funds.

In responding to the 1988 audit report, the Executive Director wrote that it is DOE's responsibility, not the state's, to ensure that the proposed use of grant funds is allowed by the NWPA and OMB. The grantee's Executive Director believes these DOE-approved legislative expenses are allowable. In his March 1990 letter, the Executive Director said that the NWPA specifies a role for both the state's executive and legislative branches in overseeing DOE's nuclear waste program. He also said that funding of the state's legislative involvement in the program has been recognized and supported by DOE since the beginning of the grant program.

NWPA Provides DOE With Considerable Funding Discretion

In our view, the relevant criteria for determining if grant funds can properly be used to pay expenses of Nevada's legislature must be found within NWPA rather than OMB Circular A-87. This is the same approach adopted by the Ninth Circuit Court of Appeals in its September 1987 decision on the allowability of Nevada's litigation expenses.

On the basis of our analysis of NWPA, the 1987 amendments to the act, and the December 1985 and September 1987 Circuit Court decisions on the use of grant funds, we conclude that DOE has considerable discretion to determine which expenses are properly chargeable to the grant.

Accordingly, it was not improper for DOE to approve funding of the expenses the state legislature committee under the NWPA grant.

Appendix I discussess both why we believe that the circular is not applicable criteria and our analysis of the grant funding discretion DOE has under NWPA, as amended, and the related Circuit Court rulings.

Internal Control Weaknesses Result in Improper Uses of Grant Funds

The grantee has internal control weaknesses that place NWPA funds at risk. The grantee (1) used grant funds received in one period to pay approximately $275,000 in expenses incurred during the prior period, (2) made and allowed advance payments to be used improperly, and (3) did not require audits of subrecipients of grant funds. For some of these weaknesses, the grantee has begun corrective actions.

Use of 1989 Funds for 1988 Expenses

In September 1988 the grantee requested additional funding of $272,067 for the grant period that had ended June 30, 1988. The DOE Nevada Operations Office denied this request in a December 30, 1988, letter saying, among other things, that in accordance with the grant agreement Nevada has sole liability for the costs incurred in excess of the amount authorized for the grant period. In January 1989 the grantee appealed DOE's denial but DOE did not answer this appeal. After DOE had denied the grantee's request for additional 1988 funding, the grantee used about $275,000 in funds provided for the year ended June 30, 1989, to pay for claims from the year ended June 30, 1988.

The grant agreement stipulates that the amounts of funds obligated for the performance of grant activities during the applicable grant period—in this case from July 1, 1988, to June 30, 1989—is the limit of DOE's liability under the grant. It also states that any cost incurred in excess of this amount is the sole responsibility of the state. Thus, since DOE disapproved the grantee's request for additional funding, the $275,000 expenditure of funds provided for the year ended June 30, 1989, to pay claims for a prior year is not an allowable expense.

Advances Improperly Administered

OMB Circular A-102 and DOE regulations require the amount of time between the transfer of funds from the U.S. Treasury and their disbursement be kept to a minimum.[10] Further, DOE regulations prohibit

[10]Grants and Cooperative Agreements With State and Local Governments (OMB/A-102, Mar. 3, 1988).

advances to be used to ensure timely payment of actual cash disbursements.

The Single Audit Act audit for the year ended June 30, 1988, found weaknesses in the grantee's controls over advances. The grantee advanced an entire year's funds of about $85,000 to the Nevada Attorney General's Office in August 1987. In response to the audit, the grantee said it would minimize the time between fund disbursement and use.

Because of this previously identified weakness, we examined all the advances made by the grantee for the year ended June 30, 1989. The grantee made five advances for about $283,000, of which we questioned two that totaled about $226,000. A November 1988 advance of $210,000 to the University of Nevada, Las Vegas, College of Engineering, was not liquidated until August 1989. Moreover, during this period, the university billed, and was paid, for services rendered without drawing down on the advance. Thus, the entire amount of the advance remained outstanding for about 10 months. The university's grants supervisor told us that the university wanted the advance to ensure timely payment and also stated that this advance had been invested to earn interest.

The grantee also advanced the city of Caliente, Nevada, about $16,000 in July 1988. Although the advance was reduced and replenished during the year, the grantee neglected to make a final reconciliation of the advance at the end of the contract period. When we called this to the grantee's attention, it made a final reconciliation to recover the outstanding balance of the advance.

Subrecipients Are Not Being Audited

Annual audits of certain subrecipients, as defined by OMB, are required under the Single Audit Act and OMB Circulars A-110 and A-128.[11] Single Audit Act audits for the years ending in June 1987 and 1988 questioned why the grantee's local government and university subrecipients were not audited each year. The grantee responded that it considered these to be contractors, not subrecipients, and therefore not required to have annual audits. The auditors disagreed with this response because, in their opinion, some of the grantee's contractual agreements constituted a recipient/subrecipient relationship.

[11]Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations (OMB/A-110, July 30, 1976) and Audits of State and Local Governments (OMB/A-128, Apr. 12, 1985).

OMB defines a subrecipient as an entity that receives funds from the grantee to carry out programs that will assist in meeting the grant objectives as opposed to contractors who just provide goods and services. Both subrecipients and contractors may be employed by contracts; thus the existence of a signed agreement does not mean the entity is a contractor.

The 1988 audit also cited the grantee for lack of control over contractor expenditures. To correct this weakness, the grantee hired an accounting firm to develop a contracts management system. In developing the system, the accounting firm found it necessary to accurately differentiate between contractors and subrecipients. In July 1989, the accounting firm asked the DOE Nevada Operations Office to comment on the interpretation it developed on the basis of research performed to differentiate between a contractor and a subrecipient. DOE did not respond, however, until January 1990, after we had questioned why there had been no response until then. At that time, a contract specialist in DOE's Nevada office verbally notified the accounting firm that DOE had no problems with the firm's interpretation.

DOE's Weak Grant Administration Contributed to Improper Uses of Funds

Considering its lax grant administration, DOE must share responsibility for Nevada's improper uses of grant funds. Over the last several years, for example, DOE has released grant funds without first reaching agreement with the state on all grant terms. In addition, DOE has made limited efforts to ensure that the funds were used according to applicable laws, regulations, and grant terms. Finally, DOE has not tracked grantee expenditures to ensure compliance with congressional limitations and has not resolved and, as appropriate, recovered costs questioned in prior audits of the grantee. In part, these administrative weaknesses occurred because of DOE's permissive attitude toward the administration of Nevada's NWPA grants.

DOE Did Not Reach Agreement on All Grant Terms Before Releasing Funds

DOE and the grantee have not formally agreed to all of the terms of the grant amendments award documents under which the grantee is funded. DOE regulations provide that the grant award is valid when it is in writing and signed by a DOE contracting officer. These regulations also require the grant applicant to acknowledge acceptance of a grant, including provisions governing the uses of grant funds, by signing and returning a copy of the grant to DOE. After acknowledgement, the terms and conditions of the grant may be changed unilaterally only by DOE. Over the last several years, however, the grantee has objected to various grant provisions either by marking out specific wording before signing grant documents or by taking written exception. Furthermore, the grantee considers the altered version of the grant amendments to be valid. DOE asserts that the grant amendments stand as initially offered, but agreed that it did not take appropriate actions to convey its position to the grantee. Because the grantee did not accept the grant as offered and did not receive approval of its "amendments," the parties did not reach agreement on the questioned grant terms and conditions. Therefore, DOE should not have provided the grant funds until it had obtained a final agreement on all grant terms.

In a May 1986 letter to DOE's Nevada Operations Office, the grantee's Executive Director took exception to two provisions in the grant amendment for the period from May 1 through December 31, 1986. The first provision disallowed litigation costs while the second withheld grant funds until the grantee provided documentation on its plans for independent tests and studies related to the investigation of the Yucca Mountain site. DOE had requested documentation on the grantee's test and study plans as a result of a December 1985 court decision requiring DOE to fund such tests and studies if certain conditions were met.

Although DOE did not respond to the grantee's letter, it released the funds once the grantee had provided the requested documentation.

In a March 1987 letter to DOE, the grantee again took exception to the same two provisions in the grant amendment for the period from March 1 through December 31, 1987. In the view of DOE's Nevada Operations Office, however, the grant provisions remained in force.

In the grant amendment for the period from March 1, 1987, through June 30, 1988, the grantee's Executive Director crossed out a grant provision prohibiting the use of grant funds for lobbying and restricting grantee/congressional communications. As discussed in chapter 2, DOE had inserted this provision into the grant to caution the grantee against using the funds for lobbying. An attorney in DOE's Nevada Operations Office drafted a letter informing the grantee that DOE could not accept the deletion of the provision. In part, the draft response stated that

> the [provision] was expressed in terms of a separate condition to caution the State that expenditures using grant funds for such 'consulting services' which go beyond those reasonably contemplated by the NWPA should not be made and would be subject to disallowance.

However, the letter was never sent to the grantee. Furthermore, DOE officials in the Nevada Operations Office could not explain to us why the letter had not been sent but said that they should have sent it.

For the July 1, 1989, through June 30, 1990, grant amendment, the grantee changed the ending date to September 30, 1989, and deleted parts of three provisions.[1] The DOE draft response concurred with shortening the grant period but did not agree to delete the three grant provisions. Once again, however, DOE did not send this letter to the grantee and DOE-Nevada officials could not explain why they had not done so.

For the grant amendment covering the period from October 1, 1989, through September 30, 1990, the grantee's Executive Director struck out two grant provisions.[2] The DOE Nevada Operations Office drafted two responses that it did not send. After we questioned why they were not sent, a response was drafted and sent on February 9, 1990. In this letter

[1]These provisions were entitled: Monitoring, Testing, or Evaluation Activities; External Payments or Transfer of Grant Funds; and DOE Implementation of Stevens Amendment, Section 8136, to the Department of Defense Appropriations Act.

[2]These two provisions were: Monitoring, Testing, or Evaluation Activities, and External Payments or Transfer of Grant Funds.

the grantee was told that only the DOE contracting officer could change the award and therefore the existing provisions were in effect.

According to the chief counsel of DOE's Nevada Operations Office, the grant terms remained as submitted to the grantee by DOE regardless of the changes the grantee made. In retrospect, however, DOE officials now believe that they should have sent the response letters to the grantee. In fact, the DOE Yucca Mountain Project Manager was surprised when we informed him that some of DOE's response letters had not been sent. The Project Manager thought the grantee had been notified that it could not change the conditions of the award.

The grantee's Executive Director told us DOE is untimely in issuing the grant amendments for grantee acceptance and little time is left to negotiate terms and conditions. Therefore, unilateral changes to the grant provisions were made to make them acceptable to the grantee. Furthermore, the grantee's position is that the changes constituted amendments of the grant conditions and that DOE agreed to the changes by awarding the funds.

DOE Has Not Enforced Laws, Regulations, and Grant Terms

As discussed earlier, on two occasions the grantee deleted grant provisions prohibiting lobbying, and DOE did not resolve the disagreements over the lobbying provision before releasing grant funds. Also, DOE has not yet determined the best way to recover grant funds used for unallowable purposes.

As discussed in chapter 2, several audits questioned the grantee's use of up to $75,000 in grant funds for litigation expenses, and a court also ruled that litigation expenses were not legitimate expenses to be funded by NWPA. However, DOE has yet to recover these unallowable expenses from the grantee either by requiring direct repayment from the grantee or by withholding the appropriate amounts from subsequent grant awards. The DOE Nevada Operations Office Manager, the contracting officer for this grant, believes the best way to recover these expenses is to deduct them from future payments equal to taxes that it will make to the state of Nevada once DOE begins site characterization of Yucca Mountain. DOE headquarter officials told us, however, that a final decision on how the funds will be recovered has not been made.

NWPA, as amended, requires DOE to pay to the state each fiscal year, and to the local government in which the Yucca Mountain site is located, an amount equal to the amount that these governmental units would

receive if they were authorized to tax site characterization activities. As yet, however, DOE has not determined just how these payment will be made, how much they will be, and when they will begin. On March 7, 1990, DOE published in the Federal Register for public comment a Proposed Notice of Interpretation and Procedures on payments equal to taxes. However, these proposed procedures do not provide for recouping unallowable grant expenses from payments DOE is authorized to make under other provisions of the act.

In addition, DOE did not provide the grantee with guidance on how to ensure that the grantee did not exceed the congressional spending limitations, nor did DOE track the grantee's expenditures to ensure that the limitations were not exceeded. DOE officials told us that their primary tool for reviewing grantee expenditures was the after-the-fact Single Audit Act audits. While this might ordinarily be satisfactory, we found that DOE is not resolving audit findings in accordance with its regulations, which require that such findings be resolved within 6 months from the date that the audit reports are formally presented to DOE for audit resolution.

Informational copies of audit reports are available to the the Nevada Operations Office, which is responsible for resolving any grantee-related audit findings, generally within about 6 months after the audit period; however, the audit reports are not formally presented to the office for resolution until about 9 months later. The 9 months includes the time needed to process the reports through the quality control checks required by the Single Audit Act, including a quality review by DOE's Office of the Inspector General. Thus, the program staff have several months to familiarize themselves with the reported problems before they formally receive the reports for audit resolution.

Finally, DOE has not acted to ensure that the grantee's internal controls over grant funds comply with federal standards. As discussed in chapter 2, we and the independent auditors found several weaknesses in the grantee's internal control system.

Views of Responsible Agency Officials

We discussed the results of our review with (1) DOE officials at the operations and project offices and at DOE headquarters and (2) grantee officials. Subsequent to our discussion with grantee officials, the grantee's Executive Director provided additional comments on the results of our review in a letter of March 14, 1990. In preparing our report, we considered the comments of all of the DOE and Nevada officials, including those

comments made in the grantee's March letter. Also, we included the comments of DOE and Nevada officials in our report, where appropriate.

In his March letter, the grantee's Executive Director said that our report should recognize the uniqueness of the state/federal relationship established by NWPA and the wide-ranging implications of that relationship for the grant program that funds the state's oversight activities. Also, because of this special relationship between DOE and Nevada, the grant program must be viewed as different from other traditional federal assistance programs. Moreover, our report should adequately address the special circumstances surrounding this unique grant program and our findings in the program administration area should be viewed in the context of this special relationship.

The Executive Director also told us that the state's frustration with DOE's attempts to subvert Nevada's oversight activities had led to the legal actions the state took in January 1990 and in earlier years. In the Executive Director's opinion, only NWPA and subsequent court decisions, not DOE, govern how the state can use its grant funds. Accordingly, he said, Nevada does not seek guidance from DOE on how it may use grant funds.

For their part, DOE officials in Nevada said that they adopted a more permissive approach to funding Nevada's proposed grant activities following the December 1985 decision of the Ninth Circuit Court of Appeals, discussed earlier, on Nevada's challenge to DOE's guidelines on nuclear waste program grants. On the basis of this decision, these officials decided not to object to funding any of the state's proposed activities that reasonably relate to the Yucca Mountain project. They also said that less stringent review of Nevada's funding requests was needed once the Congress limited the amount of NWPA funds the state could receive and the amount it could spend on certain activities. In this regard, the Yucca Mountain Project Manager interprets the congressional limitations and restrictions contained in DOE's 1989 and 1990 appropriations acts to mean that the Congress, not DOE, will provide grant program direction to Nevada. Nevada may use the funds made available by the Congress in whatever way it wishes, within the limits of NWPA.

Conclusions

NWPA, as amended, charges DOE with investigating the suitability of Yucca Mountain as a site for a nuclear waste repository and, if the site is found suitable and is selected, to seek authorization from the Nuclear Regulatory Commission to construct a repository at the site. However,

the grantee vigorously opposes DOE's Yucca Mountain project. These opposing points of view toward the project create an environment conducive to disputes over DOE's administration of the grant and the appropriate uses of funds by the grantee.

Regardless of their opposing positions on the Yucca Mountain project, DOE and Nevada are responsible for ensuring that activities funded by the grant are consistent with NWPA and other applicable laws, regulations, court decisions, and grant terms. To do this, DOE needs to improve its administration of the grant by settling disputes over grant terms before releasing funds to the state. In addition, DOE needs to advise the grantee on methods for implementing any legislative restrictions on the use of grant funds, resolve audit findings within 6 months and recover any amounts used for unallowable purposes, and ensure that the grantee's internal controls over grant funds comply with federal standards. Likewise, the state, as the grantee, has the responsibility to ensure that it fully complies with all applicable laws, regulations, and grant provisions.

State and DOE officials have liberally interpreted the uses of grant funds allowed by NWPA. Nevada officials believe that NWPA provides them with considerable latitude in deciding how to use grant funds. Although DOE officials who administer the grant at the local level did not fully agree with this view, they stated that the 1985 court decision on funding Nevada's independent tests and studies and the Congress' recent decisions to impose restrictions on Nevada's grant contributed to their more relaxed approach to administering the grant.

The liberal interpretations by state and DOE officials of how grant funds can be used has, we believe, contributed to the Congress' becoming more restrictive in both the amount of money appropriated for the state's grant and in the activities that may be funded. NWPA, as amended, requires that grant funds shall be used for those purposes stated in the act, and in DOE's last two appropriations acts the Congress has specifically restricted the activities that can be funded with grants paid from the Nuclear Waste Fund. These actions clearly demonstrate that the Congress intends that grant funds be used only for purposes that further the goals of NWPA, as amended. Thus, it is incumbent on both the state and DOE to take all necessary steps to ensure that grant funds are used for appropriate purposes.

Recommendations

To better ensure that grant funds are adequately protected and that recipients of these funds comply with applicable laws, regulations, court decisions, and grant provisions, we recommend that the Secretary of Energy

- obtain properly executed grant agreements and amendments to the agreements before releasing funds to grantees;
- provide timely guidance to the grantee on the methods to be followed in implementing any congressional restrictions placed on the grantee's use of funds;
- resolve all audit findings within 6 months as required by current DOE regulations;
- determine the amount of grant funds expended for unallowable purposes, seek repayment of unallowable expenditures, and, if timely repayment is not forthcoming, recover these expenditures by withholding the amount due from the state's subsequent grant award; and
- ensure that the grantee's internal controls over grant funds comply with federal standards.

NWPA Provides DOE With Considerable Discretion in Approving Uses of Grant Funds

The relevant criteria for determining if grant funds can properly be used to pay expenses of Nevada's legislature must be found within NWPA rather than OMB Circular A-87. This is the same approach, for example, adopted by the Ninth Circuit Court of Appeals in its September 1987 decision on the allowability of Nevada's litigation expenses. Furthermore, on the basis of our analysis of NWPA, the 1987 amendments to the act, and the December 1985 and September 1987 Circuit Court decisions on the use of grant funds, we have concluded that DOE has considerable discretion to determine which expenses are properly chargeable to the grant. Accordingly, it does not appear to be improper for DOE to approve funding of the expenses of the committee of the state legislature under the NWPA grant.

The OMB Circular Is Not Applicable

The cost principles of OMB Circular A-87 state generally that expenses of state legislative bodies are unallowable. Primarily for this reason, the Single Audit Act report questioned this use of NWPA grant funds. However, when DOE attempted to rely on another provision of this circular, concerning states' litigation expenses under NWPA, the Ninth Circuit ruled, in its September 1987 decision, that "[r]eliance on this circular is clearly inappropriate."[1] The Court noted, in part, that the circular itself states that its principles are not intended to dictate the extent of federal participation in a particular grant, and the Court based its decision instead on the provisions of NWPA.

NWPA Provides DOE With Considerable Discretion on the Use of Funds

On the basis of NWPA, subsequent judicial construction of the act, and the 1987 amendments to the act, we believe that DOE has sufficient discretion to determine that expenses of a Nevada state legislative committee are properly chargeable to the grant.

Original Statutory Provisions

Under subsection (c) of section 116 of NWPA as originally enacted, the Congress provided authority and established criteria for various grants to states to be made out of the nuclear waste fund. Paragraph (c)(1)(A) directed the Secretary of Energy to make grants to each state receiving notification that it contained a "potentially acceptable" repository site. The NWPA provided a definition of the term "potential acceptable site," but did not establish a numerical limit on the states that might have

[1]State of Nevada, et al. v. Herrington, 827 F.2d 1399 (9th Cir. 1987).

such sites. At most, the Secretary's notification was required to take place within 180 days after January 7, 1983, the date of enactment of NWPA. States were to receive such grants "for the purpose of participating in activities required by" sections 116 and 117 of the act, or authorized by written agreement entered into pursuant to subsection 117(c).[2] Salary and travel expenses that would ordinarily be incurred by the state were specifically determined to be ineligible for funding. No other statutory guidelines were prescribed for paragraph (c)(1)(A) grants.

Paragraph (c)(1)(B) directed the Secretary to make grants to each state having a "candidate" repository site approved by the President, based on recommendations of the Secretary of Energy. The Secretary's recommendations, based in turn on his nomination of at least five sites pursuant to guidelines to be issued within 180 days of NWPA's enactment, were to be made to the President not later than January 1, 1985. The Secretary was to recommend three sites to the President, whose approval (or disapproval) was required within 60 days of the Secretary's recommendation. Grants made pursuant to paragraph (c)(1)(B) were to be "only" for purposes of enabling a state to undertake five listed categories of activities, which essentially involve independent state oversight and analysis of the impacts of DOE's site characterization activities.

Consideration must also be paid to the state site disapproval process under NWPA. Under subsection 116(b) of the act, once the President has recommended a site for the repository, unless otherwise provided by state law, either the governor or the legislature of the state in which the site is located may submit to the Congress a notice of disapproval. In the bill considered on the House floor in 1982, the text of the subsection as originally drafted required the notice to be submitted jointly by the governor and the legislature. As the result of an amendment offered by Representative Markey, the provision was changed to permit either the governor or the legislature to file a notice of disapproval. Floor debate on the amendment makes it clear that its purpose was to provide the state with the maximum flexibility to determine the means by which to present the state's disapproval:

> Mr. Udall. The gentleman's amendment as I understand it says to the State, You have a veto. We hereby grant you the further power to decide who will exercise that State veto.

[2]There is no section 117 written agreement between DOE and Nevada.

It could be the Governor alone, the legislature alone, it could be a special commission set up under State law or any other formulation or arrangement the State wanted to put into effect.

Mr. Markey. That is the intention of the amendment.[3]

In 1985, in order to be prepared to carry out its statutory authority to submit a notice of disapproval, should it be necessary, the Nevada legislature enacted NRS 459.0085, creating the Committee on High-Level Radioactive Waste to study and evaluate certain issues raised by the potential location of a nuclear waste repository in the state, and to recommend appropriate legislation. In the preamble to NRS 459.0085, the state expressed its determination that both the governor and the legislature would participate in the disapproval process as follows:

The legislature hereby finds, and declares it to be the policy of this state, that the study of the disposal of high-level radioactive waste in the State of Nevada and related activities is essential to the preservation of the public health and welfare. This study must involve the governor, the legislature and local governments as direct participants. (Emphasis added).[4]

It is obvious that the activities of the legislative committee are considered by the state to be an integral part of the state's role under NWPA.

Judicial Construction

In 1984, following DOE's denial of a Nevada request for funding of certain proposed hydrologic and geologic studies of the Yucca Mountain site, Nevada sued DOE for a declaratory judgment that DOE's Internal General Guidelines on Nuclear Waste Repository Program Grants were unlawful, and that the funding request should be approved. The issue arose at a point prior to the Secretary's recommendation and the President's approval of "candidate sites," which would have triggered the authority provided by paragraph (c)(1)(B) of section 116 of NWPA. Thus, only the grant program authorized by paragraph (c)(1)(A) was directly involved in this litigation. The court held that Nevada was entitled to the requested funding and that sections of DOE's Guidelines that sought to "minimize" independent state collection of primary data were unlawful.

On the basis of its analysis of the purposes and structure of the NWPA, the Court concluded that paragraph (c)(1)(A) "must be read as a

[3]128 Cong. Rec. H8598 (daily ed. Nov. 30, 1982).

[4]Ch. 680, Nev. Stats. 1985.

catchall provision that authorizes funding in other circumstances not already specifically 'required by sections 116 or 117 or authorized by written agreement.'" (Emphasis in original).[5] The Court also observed that this paragraph provides a basis for funding the proposed studies, if they would be essential to the informed "statement of reasons" that might be needed later under subsection 116(b) to explain a state's disapproval of a recommended repository site. The Court found that this statement of reasons is "required by section 116," and thus the proposed studies were eligible for funding under paragraph (c)(1)(A). Even though a state may never have to file a statement of reasons, activities in advance of such a statement were held to be eligible for funding under this authority. Finally, in the act's legislative history, the Court found support for its analysis of the act's purpose and structure. And the Court quoted Senate committee report language indicating that a state's rights under NWPA were to be given the broadest possible interpretation.

Nevada, joined by other states, later sued DOE to overturn the Secretary's denial of eligibility for grant funding of litigation expenses incurred to finance judicial review of DOE actions under the NWPA. This matter arose after the President had approved three "candidate" sites for characterization, thus meeting the condition, with respect to two of the petitioners, for grant funding under paragraph (c)(1)(B). However, three of the other petitioning states did not contain "candidate" sites, but only "potentially acceptable" sites. Therefore, the extent of funding eligibility for those states would normally be governed by paragraph (c)(1)(A), for, as the Court noted, "[t]here are specific statutory provisions requiring funding to states at different stages of the site selection process."[6]

The Court considered the principal issue to be whether litigation expenses attendant to judicial review were an activity "required" by sections 116 and 117 of NWPA. However, having thus phrased the issue in terms of paragraph (c)(1)(A), the analysis proceeded on the basis of paragraph (c)(1)(B). The Court held that paragraph (c)(1)(B) "sets forth an exhaustive list of activities for which a state may use grant funds." (Emphasis added.)[7] For this conclusion the Court twice quoted the language of paragraph (c)(1)(B), which still contained the word "only." The

[5]State of Nevada v. Herrington, 777 F.2d 529 at 532.

[6]State of Nevada, et al. v. Herrington, 827 F.2d 1394 at 1398.

[7]State of Nevada, et al. v. Herrington, at 1398, 1399.

Court held that litigation expenses, not being expressly or impliedly covered in paragraph (c)(1)(B), were not to be funded by NWPA grants.

NWPA Amendments

Three months later, the Congress enacted amendments to NWPA. Among the amendments was the deletion of the word "only" from paragraph (c)(1)(B). Paragraphs (c)(1)(A) and (c)(1)(B) were retained as distinct funding authorities, even though the previous phased process of site selection was changed so that site characterization activities were to be focused on Nevada instead of on three states.

The word "only" was deleted at the conference report stage of the 1987 NWPA amendments. While there is no explanation in the report or floor debate for the purpose of this deletion, there clearly must have been some reason for this legislative action. One possible reason for this amendment was to overturn the recent restrictive court interpretation of the NWPA funding provisions, since it is generally presumed that the Congress is knowledgeable about existing law pertinent to the legislation it enacts,[8] and that the Congress has knowledge of the judicial interpretation given to a prior statute, at least insofar as it affects the new statute.[9]

Conclusions

On the basis of this analysis, we conclude that DOE has considerable discretion under NWPA to determine which expenses are properly chargeable to the grant. Specifically, under the authority of paragraph (c)(1)(A) of NWPA, as interpreted by the Ninth Circuit in State of Nevada v. Herrington, DOE could properly determine that funding the state legislative committee from the NWPA grant was proper, inasmuch as state policy, as permitted by the NWPA, was to involve the legislature integrally in the site disapproval process. In addition, the later 1987 NWPA amendments can be viewed as confirming DOE's funding flexibility under the act. Therefore, it does not appear to be improper for DOE to approve funding of the expenses of this committee of the state legislature under the NWPA grant.

[8]Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988), and Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987).

[9]Lorillard v. Pons, 434 U.S. 575 (1978).

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