STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

January 29, 2008

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

RE: Certificate of Review
Initiative Relating to Coal and Nuclear Power Plants in Idaho

Dear Secretary of State Ysursa:

An Initiative Petition was filed with your office on December 28, 2007, and received by this Office the same day. Pursuant to Idaho Code § 34-1809, this Office has reviewed the Petition and prepared the following advisory comments. Given the strict statutory timeframe in which this Office must respond and the complexity of the legal issues raised in this Initiative Petition, this Office's review can only address major areas of concern and cannot provide an in-depth analysis of each issue that may present concerns. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioner is free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the Initiative. This Office offers no opinion with regard to the policy issues raised by this proposed Initiative.

BALLOT TITLE

Following the filing of the proposed Initiative, this Office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While this Office prepares the titles, if petitioner would like to propose language with these standards in mind, he may do so. Any proposed language will be considered carefully.

MATTERS OF SUBSTANTIVE IMPORT

Introduction

The proposed Initiative is entitled "Initiative to Protect Idaho Family's Safety in Our Energy Future, and Adopt Laws Other States Use to Protect Themselves from Unwanted Coal and

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Nuclear Plants." The Initiative Petition (or the "Initiative") submitted to our Office for review contains a general preamble or "Statement of Purpose" and three paragraphs of "legal text" to be codified into law.[1] The Statement of Purpose describes the first legal paragraph as intending "to prohibit building any nuclear power plants, until a final waste repository is open, with certified room for the spent nuclear fuel rods and high-level radioactive waste . . . ." The preamble continues that the "banning of new nuclear power plants, until a final waste repository is open, simply adopts the common sense law that Oregon and California use to stop new nuclear power plants." The Statement of Purpose and the first paragraph of legal text indicate that the drafter intends to exempt "research reactors 10 megawatts or under" from the provisions of the Initiative.

The remaining two paragraphs of the Initiative are described in the Statement of Purpose as allowing "the majority of the Statewide citizen vote to determine whether to allow granting the final permit for a coal or nuclear power plant to use Idaho."[2] The petition recites that, although a local county commission would still decide whether to permit a nuclear or coal plant, "a statewide approval of voters will be required to grant the final permit. This allows local county control, but also allows statewide citizen veto of plans that threaten more harm than good to the State of Idaho." The petition states that similar laws in Montana and Oregon have been used "to stop unwanted nuclear power plants."

The preamble maintains that "out-of-state Corporations have plans to build merchant commercial nuclear and coal plants in Idaho" because other states prohibit these polluting plants. "Merchant plants sell to the higher bidder," so Idaho would have to outbid other states to obtain the power from these plants. "That means Idahoans take all the risks to our families and our water, but we have no guarantee that we can use the electricity [produced by these plants], especially at a reasonable rate."

A. The Construction of Coal Plants is Prohibited in Idaho

In 2007, the State of Idaho "opted out" of the federal Cap and Trade Program for Mercury emissions under the Clean Air Mercury Rule. To comply with the State's zero-budget emission standard, the Rules for the Control of Air Pollution in Idaho provide that "no owner or operator shall construct or operate an electric generating unit (EGU), as defined in 40 C.F.R. 60.24, with a potential to emit mercury (Hg) emissions." Rules 199, IDAPA 58.01.01.199. This rule prohibits <u>any</u> coal-fired power plant from being constructed in Idaho because coal power plants cannot capture <u>all</u> mercury emissions. As long as this rule remains in effect and Idaho does not participate in the federal Cap and Trade Program for Mercury, a coal-fired power plant cannot be constructed in Idaho.

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[1] For purposes of our analysis here, we shall refer to the text of the proposed laws as "paragraphs" in their order of appearance.

[2] In 1982, *Idaho Code* § 39-3027 was enacted by initiative. This section provides: "No law shall be enacted by the State of Idaho to prohibit the use of nuclear energy the generation of electricity, unless the proposed measure shall have first been submitted to the electorate at the next earliest general election. The results of such submission of the question to the electorate shall be advisory in nature, and shall not prevent the legislature from acting in any manner on the measure."

B. As Written, the Nuclear Portion of the Initiative May be Preempted by Federal Law

The Supremacy Clause of the United States Constitution declares that the federal Constitution and the law of the United States "shall be the supreme law of the land." Art. VI, cl. 2. Once constitution authority is evident, the inquiry turns to the scope of federal preemption. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1998-99 (1986).

The Atomic Energy Act of 1954 (the "AEA") established the Atomic Energy Commission (now the Nuclear Regulatory Commission (NRC))[3] and authorizes the Commission to regulate the private uses of nuclear materials in power generating facilities. 42 U.S.C. § 2011 *et seq.* In 1959, the AEA was amended to clarify the regulatory responsibilities between the NRC and the States. In pertinent part, subsections 2021(c)(1) and (k) provide that the NRC will retain regulatory authority over "the construction and operation of any [electric generating] facility," while the states or local agencies may "regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(c)(1) and (k). Section 2018 further provides that nothing in the AEA shall affect the authority of the appropriate federal, state, or local agency from regulating the "generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed" by the NRC. 42 U.S.C. § 2018.

The text of the Initiative's first paragraph is similar to a provision in California law that requires the California Energy Commission to determine whether the federal government "has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste." Cal.Pub.Res.Code § 25524.2.[4] In 1983, the United States Supreme Court ruled that this California statute was not preempted by the AEA. *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission* ("*PG&E*"), 461 U.S. 190, 103 S.Ct. 1713 (1983). The Court first determined that the 1959 amendments to the AEA indicated "that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electric utilities for determining questions of need, reliability, cost and other related state concerns." *Id.* at 205, 103 S.Ct. at 1723. The Court accepted California's argument that its waste disposal statute was directed at the economic aspects of nuclear power – not the safety aspects of nuclear power.[5]

California asserted that the lack of a federally approved method of waste disposal might lead to higher costs of interim measures or even shutdowns in reactors, thereby causing utilities to forego the power produced at their own facilities and requiring utilities to purchase

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[3] The Atomic Energy Commission was abolished in 1974 and its regulatory functions were transferred to the Nuclear Regulatory Commission. 42 U.S.C. § 5801 *et seq.*

[4] Oregon has a similar statute at Or.Rev.Stat. § 469.595.

[5] Oregon's similar waste statute is also based on economic concerns. If there is "no permanent repository for high-level radioactive waste . . . the residents of [Oregon] may face the undue financial burden of paying for construction of a repository for such waste." Or.Rev.Stat. § 469.593.

replacement power. *Id.* at 213-14, 103 S.Ct. at 1727. The Court concluded that "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facility to be licensed, land use, ratemaking, and the like." *Id.* at 212, 103 S.Ct. at 1726; Deborah Tussey, Annotation, *State Regulation of Nuclear Power Plants*, 82 A.L.R.3d 751 (Supp. 2008). However, the Court declared that a "state moratorium on nuclear construction grounded in safety concerns" or "a state judgment that nuclear power is not safe enough to be furthered developed would conflict directly" with both the AEA and NRC regulations. *PG&E*, 461 U.S. at 213, 103 S.Ct. at 1727; *English v. General Electric Company*, 496 U.S. 72, 84-85, 110 S.Ct. 2270, 2278 (1990) ("State regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation, 'even if enacted out of nonsafety concerns, would nevertheless infringe upon the NRC's exclusive authority.'").

Although the Supreme Court found language similar to the Initiative's first paragraph was not preempted by the AEA, there are at least three significant differences between the California statute and the proposed Initiative. First, the regulatory scheme pertaining to electric utilities 25 years ago is quite different from the regulation of such utilities today. At the time of the *PG&E* case, California utilities were required to demonstrate a need for the power and the cost of such power to be produced by the nuclear power plants. Today several states (including California) have partially deregulated their electric utility industries. Cal.Pub.Util. Code §§ 330-398.5; *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1009-10 (9th Cir. 2004), *cert. denied*, ___ U.S. ___, 127 S.Ct. 2972, 168 L.Ed.2d 719 (2007); *California ex rel. Lockyer v. Dynegy*, 375 F.3d 831, 836-37 (9th Circ. 2004). Moreover, today's electric power may be produced by alternative power suppliers such as cogenerators, small power producers and independent power producers. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S.Ct. 1012 (2002). Producers selling into the wholesale market are called "exempt wholesale generators" (EWGs),[6] or what are commonly referred to as "merchant" plants. A merchant plant is an entity that directly or indirectly operates facilities that produce electric power for sale in wholesale power markets. The Initiative's Statement of Purpose specifically refers to "merchant nuclear and coal plants" selling power out of state. In Idaho a "merchant" plant is not subject to the traditional public interest need or ratemaking authority of the Idaho Public Utilities Commission. *Idaho Code* §§ 61-129, 61-502, 61-526. Thus, the State does not exercise control over the public need for power, the cost of power, or the reliability for a merchant plant.

Second, the Initiative does not expressly address economic conditions but refers to "Idahoans tak[ing] all the risks to our families and our water" and the "devastating risks to Idaho families" brought by "these polluting coal and nuclear power plants." It could be argued that the Initiative appears to be based upon the health, safety and environmental concerns related to radiological contamination rather than economic or other State-allowed concerns. Third, Idaho's Energy Facility Site Advisory Act prohibits cities and counties from considering the need for the energy, the financial characteristics, alternative generating

[6] 18 C.F.R. § 366.1.

resources, or other sites that were considered by a land use applicant. *Idaho Code* § 67-2355(2). Thus, our Legislature has restricted local governments from considering the need for power or economic characteristics when issuing local permits. In summary, a court might find these distinctions to be significant and rule the Initiative preempted by the AEA.

C. The Proposed Initiative May Impede Interstate Commerce

Construction of a merchant nuclear plant in Idaho that intends to transmit all of its power outside Idaho may raise interstate commerce issues under the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. The AEA provides that every nuclear power plant that transmits its power in interstate commerce or sells power at wholesale in interstate commerce shall be subject to the regulatory provisions of the Federal Power Act and the Federal Energy Regulatory Commission (FERC). 42 U.S.C. § 2019. Generally, a state may not unreasonably burden interstate commerce. *American Trucking Assoc. v. Michigan Public Service Commission*, 545 U.S. 429, 125 S.Ct. 2419 (2005). The general rule is that where a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, [then] it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 847 (1970).

D. Portions of the Initiative May Conflict with other Constitutional Provisions and Fall Outside the Scope of Actions Allowable by Initiative or Referendum

Article III, § 1 of the Idaho Constitution recognizes that the people of Idaho reserve to themselves the power of the referendum and the power of the initiative. The referendum is "the power to approve or reject at the polls any act or measure passed by the legislature." Idaho Const., Art. III, § 1. The initiative is "the power to propose laws, and enact the same at the polls independent of the legislature." *Id.* It is well settled in Idaho that initiative legislation carries "the same force and effect as legislation enacted by both houses of the legislature and approved by the governor." *State v. Finch*, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957). However, the power to propose or repeal laws by initiative or referendum, respectively, is not without limits.

The second and third paragraphs of the Initiative require a statewide vote on nuclear power plants over 10 megawatts and coal-fired power plants. These paragraphs of the Initiative are nearly identical to Oregon law.[7] The two paragraphs appear to address two "timing" differences. In particular, the second paragraph purportedly requires a statewide election in those instances where "any State or local permit requirements that have been satisfied . . . the proposal shall be submitted to the electors of this state for their approval or rejection at the next available statewide general election."[8] In comparison, the third paragraph purportedly prohibits the issuance of any "State Permit, or any site certificate" for a nuclear or coal power plant "until the electors of this state have approved the issuance of the

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[7] Or.Rev.Stat. § 469.597.

[8] Query whether a DEQ "certificate" finding a "demonstrated technology" for spent fuel and high-level radioactive waste issued under the first paragraph would be subject to voter approval under the provisions of the second paragraph?

certificate at an election held pursuant to subsection (1) of this section."[9] In other words, the second paragraph pertains to state or local permits, which may have already been satisfied, while the third paragraph pertains to permits and site certificates that have not yet been issued.

The second paragraph presents two particular legal issues. First, this paragraph would subject permits issued by local governments to a statewide election. As mentioned above, a referendum is the "power to approve or reject at the polls any act or measure passed by the legislature." Idaho Const., Art. III, § 1(emphasis added). As stated in the second paragraph, the Initiative would require a vote on a permit issued not by the legislature but by local government. By its terms, the Idaho Constitution does not permit a statewide referendum of a local body's decision. Moreover, Article XII, § 2 of the Idaho Constitution allows local governments to make and enforce "all such local police, sanitary, and other regulations as are not in conflict with its charter or with the general laws." In particular, local governments may enact planning and zoning provisions under the Local Land Use Planning Act, *Idaho Code* § 67-6504. *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983).[10] Consequently, the second paragraph presents possible constitutional conflicts.

Second, our Supreme Court has held that "a referendum can only seek to reject an 'act' or 'measure' passed by a legislative body." *City of Boise v. Keep the Commandments Coalition*, 143 Idaho 254, 256, 141 P.3d 1123, 1125 (2006). If the proposed referendum "is administrative in nature, it falls outside the scope of action allowable" by referendum. *Id.* Here, the second and third paragraphs do not seek to reject or propose laws, but address a permitting or certificate process. *Weldon v. Bonner County Tax Coalition*, 124 Idaho 31, 38-39, 855 P.2d 868, 875-76 (1993). In *Gumprecht*, the Supreme Court held that use of the "initiative process for zoning matters is inconsistent with the comprehensive statutory procedures mandated by the Local Planning Act of 1975." 104 Idaho at 616, 661 P.2d at 1215. The Court in *Keep the Commandments* declined to ruled on the legality of the initiative before the election because the matter would not be ripe for judicial review unless and until passage by the voters. *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006), *reh'g denied* (2007). However, if presented with the Initiative as written, there is likelihood that a court would find the referendum/initiative process in the second and third paragraphs improper.

E. Parts of the Initiative are Ambiguous and May Be Unconstitutionally Vague

As written, the Initiative contains terms that are not defined and refers to permitting/certificate procedures that do not exist or are unclear. These shortcomings create ambiguity in the legal text and may expose the Initiative to challenges of unconstitutional vagueness. An enactment may violate constitutional due process requirements if it contains "terms so vague that persons of common intelligence must guess

[9] The third paragraph of the legal text is numbered as No. 2 and refers to the second paragraph of the legal text as subsection (1) of this section. The numbering of the three paragraphs should be corrected.
[10] Article III, § 19 also prohibits the Legislature from passing local or special laws regulating county business.

at its meaning and differ as to its application." *Lindstrom v. District Bd. of Health Panhandle Dist. 1*, 109 Idaho 956, 960, 712 P.2d 657, 661 (Ct. App. 1985). In particular, the first and third paragraphs of the legal text refer to a state "site certificate." While California and Oregon have state agencies that issue "site certificates" for both nuclear and coal power plants, Idaho has no such state agency.[11] Consequently, it is unclear exactly what "certificate" electors must approve in the third paragraph of the legal text. The drafter of the Initiative apparently recognizes this distinction because the Statement of Purpose declares that the initiative "law will be used in conjunction with any form of State Siting Board established in the future." (Emphasis added.)

Next, the text of the first and third paragraphs refer to "any State permit or [any] site certificate" for the construction of any new nuclear plant or coal plant. However, this Office is unaware of any State statute that requires the issuance of a state permit for the construction of a nuclear or coal plant. In addition, the phrase "high-level radioactive waste from these [nuclear] facilities" in the first paragraph may not be applicable. The Nuclear Waste Policy Act defines high-level waste as "the highly radioactive material resulting from the reprocessing of spent nuclear fuel . . . ." 42 U.S.C. § 10101(12). However, nuclear power plants do not typically "reprocess" spent nuclear fuel and commercial reprocessing is currently not practiced in the United States. NRC: www.nrc.gov/waste/high-level-waste.html. Thus, the proposed Initiative uses terms and phrases that are not defined, are ambiguous, and address procedures that do not exist in Idaho law.

MATTERS OF FORM

The general style and format of the Initiative's legal text does not conform to the Idaho statutes. For example, is the legal text one statute or more than one? The second and third paragraphs are numbered (1) and (2), respectively. There are several grammatical errors in the proposed Initiative that should be corrected.

The petitioner may wish to review Idaho Code § 34-1801A and use it to draft the Initiative Petition so that it is substantially in the form prescribed by law. This statute prescribes the form that an initiative petition must substantially follow. The signature sheet should contain a "WARNING" at the top of the page that it is a felony for anyone to sign the petition who is not a qualified elector or for anyone to knowingly sign a petition more than once. After the "WARNING" language, there should be a section entitled "INITIATIVE PETITION" that includes a demand from the signing petitioners that the proposed initiative law be submitted to voters at a regular general election and a certification of the petitioners' status as qualified electors. The petitioner has not included these items in the Initiative Petition.

Other statutes also address requirements for an initiative petition and signature sheet. *Idaho Code* § 34-1804 requires that each "signature sheet shall contain signatures of

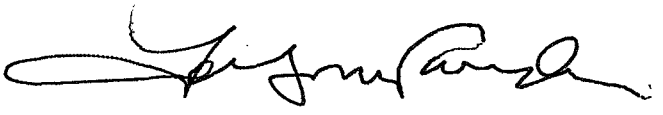
[11] In Oregon, the Energy Facility Siting Council is the state agency responsible for the siting of nuclear and coal-fired power plants. Or.Rev.Stat. §§ 469.310 and 469.320. A "site certificate" is the binding agreement between the State of Oregon and the applicant, authorizing the applicant to construct and operate a facility on an approved site, incorporating all conditions imposed by the Council on the applicant. Or.Rev.Stat. § 469.300(26).

qualified electors from only one (1) county." Idaho Code § 34-1807 requires that each page of signatures contain a sworn affidavit from the person circulating the petition. The affidavit requires that the person circulating the petition be 18 years old, a resident of Idaho, and sign and disclose his or her post office address. *Idaho Coalition United for Bears v. Cenarrusa*, 234 F. Supp.2d 1159 (Idaho 2001), *aff'd*, 342 F.3d 1073 (9th Cir. 2003).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Peter Rickards, 440 Fairfield St. N., Ste. 2, Twin Falls, ID 83301.

Sincerely,



LAWRENCE G. WASDEN
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Analysis by: Donald L. Howell, II
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