BACKGROUND AND OVERVIEW OF MILESTONES IN THE LOW-LEVEL WASTE POLICY AMENDMENTS ACT OF 1985

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ABSTRACT

The Low-Level Radioactive Waste Policy Amendments Act of 1985 extended by six years the date after which regions could exclude waste generated outside their regions. To maintain this grant of interim access to the three operating disposal sites, the Act imposed certain conditions on siteless regions and states, including demonstrations of progress in siting their own disposal facilities. These demonstrations of progress are embodied in four site development milestones. This paper sketches the background of the milestone package; describes each of the milestones; and offers commentary on the interrelatedness of the milestones and the milestone regime.

INTRODUCTION

In 1980, when Congress passed the Low-Level Waste Policy Act, it didn't tell the states how to develop new disposal sites, or even when. It just said that regions with disposal sites might not have to handle others' waste after 1985. "January 1, 1986" became known as a "deadline" or a "target date," depending on whom you asked.

To people in the sited states clearly it was a deadline--a deadline for tolerance. State officials from South Carolina, Washington and Nevada had declared publicly that the '86 date was real. They threatened to shut down the disposal facilities altogether if that was what it would take to make good on the date. To those wrestling with intractable interstate agreements, the date was seen more as a target date. By January of 1985, however, so little had been accomplished that the "target date" no longer spurred progress in coalescing states into low-level waste regions.

Actually, the 1986 date was neither a deadline in law, nor a target date in practice, because the sited regions couldn't ban imports of waste until Congress had ratified their compacts. In the end after going to the brink, the sited regions agreed to extend the 1986 date by six years in exchange for the assurance--explicitly stated in federal law--that they could exclude waste from outside their regions beginning in January of 1993. Wiser than before, this time they insisted that continuing access to their sites be made contingent on periodic demonstrations of progress in developing new disposal facilities.

On July 23, 1984, Governor Riley of South Carolina in a letter to Senator Thurmond offered a strategy to break the ratification impasse. Along with volume reduction plans and site caps, the Governor suggested that "regional compact groups and independent states must have plans, and be implementing these plans, showing the milestones for the development of (new) disposal facilities."

Congressman Udall introduced the first remedial low-level waste legislation in October, 1984. This bill would have required siteless states to submit to sited states a one-time siting and volume reduction plan as a condition for access. The sited regions could assess monetary penalties, but the penalties were tied to the volume reduction goals and not to ongoing progress in siting new facilities. The siting plan concept disappeared altogether from a revised "Staff Discussion Draft" circulated in January of 1985, which later was designated "H.R. 1083."

Concerned that the bill did not require demonstrations of progress toward the development of new sites, sited state officials and their Washington counsel huddled together and developed a structured sequence of milestones. The penalty for failure to meet any of the milestones was simple and straightforward--immediate loss of access to the sites for the region's generators. After winning an endorsement of the idea from many waste generators and even garnishing a measure of support from some siteless regions, sited state representatives worked with Chairman Udall and his staff to write into the first markup version of H.R. 1083 an iteration of the milestones that we would recognize today. Along the way to enactment, various members of Congress and their staffs embellished and expanded the three original milestones.

The House made two significant and interrelated additions to the original milestone concept, the "grace period" and the "rebate" mechanism for transferring a portion of surcharges back to the siteless regions. States or regions that did not accomplish a milestone goal by milestone day could not be denied access right away but would have to pay double, triple or quadruple the standard out-of-region surcharge, and would forfeit to the sited states all the surcharge funds due them that had accumulated in a DOE escrow account since the last milestone. Two major Senate contributions, the products of compromises between the Energy Committee and the Environment Committee, were the addition of

documentation requirements to the second milestone, and the addition of a third milestone option that moved the final D-day for site license applications from January 1, 1990 to January 1, 1992.

As enacted, the Act did not establish a single tribunal to determine the compliance status of each siteless state or compact region. The sited states have taken the position that the authority to assess penalty surcharges lies with each of them independently, as a derivative of their authority to set surcharges in the first place. The authority to deny access after the grace period lies with "each state and compact commission in which a regional disposal facility is located." (Observers disagree on whether this means that both must act to deny access or whether either may exercise the authority on its own.) The authority to transfer surcharge payments back to siteless regions upon compliance with milestones rests with DOE.

There are seven entities, then, with some authority to impose penalties for noncompliance. The Rocky Mountain Compact has indicated it will exercise its authority to rule on milestone compliance and is, at this time, still reviewing the status of states under the first milestone. The Southeast Compact, on the other hand, has not taken an active role in the judging. In practice, there is considerable incentive for the sited states to agree on the compliance status of each siteless region and state. Disagreement might set up a presumption of error against the odd-state-out and would provide the more lenient state or states a "competitive advantage."

Under the Act, the sited states and DOE have different roles in imposing penalties. The sited states impose increased surcharges for a time on regions out of compliance, after which they may deny access to the region's generators until the region comes into compliance. DOE, on the other hand, controls the surcharge escrow account and cannot rebate surcharges to siteless regions or states that are not in compliance with the milestones.

Because of these different roles, the nature and significance of the milestone dates vary between the two. South Carolina law, for example, explicitly requires the state to impose penalties on regions and states that "fall out of compliance" after milestone day. As long as the region or state is not hopelessly off track, the penalties would be uncomfortable, but tolerable for a while. DOE's ruling on compliance provides that a state or region's up or down status on "milestone day"--not the day before or the day after--is all that counts in determining whether a state or region gets a rebate on a portion of all the surcharges that have been paid into the escrow account since the last milestone. After receiving its windfall, a region, for whatever reason, could repeal the action that led to its reward the very next day without having to give back the money.

THE FIRST MILESTONE

The first milestone requires that, by July 1, 1986, states shall have (1) "ratified" compact legislation, or (2) enacted siting legislation, or (3) indicated by certification of the Governor or by enactment of legislation that the state intends to develop its own site.

The sited states originally proposed, and Chairman Udall's Interior Committee reported out, a bill that gave the siteless states the option to either ratify compact legislation, or, for a state such as Texas that planned to "go-it-alone," to enact legislation indicating its intent to develop a site. Congressman Markey, Chairman of the Subcommittee on Energy Conservation and Power of the House Energy and Commerce Committee, insisted on a third option--a governor's certification that the state intended to develop its own site. Massachusetts' concern was that it would have to go to its legislature twice--first for siting-intent legislation and then later for a second-milestone siting plan, a draft of which was already under consideration at the time. The Senate, at the prodding of Senator Kennedy, added this third option which ultimately was enacted into law.

In several meetings held to collaborate on enforcement of the first milestone, the three sited states gravitated toward a "literal" posture in ruling on the compliance status of the regions and states, while DOE took a broader and more interpretive approach. In these collaborative meetings, the ruling entities discussed several troublesome possibilities:

(1) What if the state had ratified more than one set of compact language? Strictly speaking, there may not be anything to prevent a state from being an active member of more than one low-level waste compact (except members of the Southeast and Northeast Compact which bar dual membership).

(2) What if the state had ratified compact language, but the "compact" had not been activated because it had not been ratified by the requisite number of states? In pre-milestone meetings, DOE counsel argued that because the Act defined compact as "a compact entered into by two or more States," a state could not be considered to have ratified compact legislation until a partner state did likewise. The sited states took the position that all the milestone required was ratification of compact legislation, and logically, such legislation is no less "compact legislation" in the first state to pass it than it is in the second or third. Still, the sited states winced at the idea of unilateral--bogus, if you will--compacts ginned up solely for the purpose of getting past the first milestone. With reservations, the sited states held to the philosophy that the regions and states under the milestone regime were free to hang themselves, as long as they furnished their own rope.

(3) What if the Governor's certification or state legislation signalling the state's intent to develop its own site indicated that the state would continue to explore other options? DOE and the sited states did not agree whether a state's pronounced intent to look concurrently at other possibilities showed a lack of commitment or was just truthfulness in advertising. It might have gone without saying that any state would study any opportunity that came its way throughout the transition era and was not bound to remain on the same compliance track. Relatedly, DOE and the sited states did agree that Vermont legislation signalling the state's intent to develop a site, "if necessary," fell short of the standard of commitment required by the Act.

Some of these differences in interpretation took care of themselves when DOE decided not to render negative judgments on three problem states--New Hampshire, North Dakota and Puerto Rico--for which there was no money at stake in the escrow account, anyway. In the end, Rhode Island was the only state on which the sited states and DOE rendered different judgments.

In enforcing the first milestone, the sited states and DOE have demonstrated the principle that no provision of law is cut and dried. One school of thought has it that the sketchiness of the first milestone caused the divergence in approaches to its interpretation. But it is just as likely that the detailed, prescriptive language of the second milestone may simply multiply the potential for contention.

THE SECOND MILESTONE

The second milestone, unlike the first, contains a catalog of minimum requirements. Generally, it provides that by January 1, 1988, (1) compacts identify the host state for a disposal facility; or identify the site and the site developer; and (2) the compact or its host state, and go-it-alone states develop a siting plan; and (3) the entity developing the siting plan delegate the authority to implement the plan.

These general requirements were part of the sited states' original proposal and were accepted by all the House and Senate committees that deliberated on this portion of the bill. Senator Evans of Washington was uncomfortable with the lack of specificity in language requiring a "siting plan." In the days prior to final passage of the bill, he insisted upon including a detailed description of the siting plan. Because this occurred after the bill was reported out of committee, there is no legislative history regarding this provision. Nor are there any floor statements or colloquies to help in its interpretation.

Host State Identification and Site Identification

The Act attempts to provide two separate routes for achieving the second milestone, taking into consideration the two types of site identification strategies that were contemplated at that time. A closer reading, however, shows two different mileposts along the same road. Each siteless compact region must either (a) identify the State in which its disposal facility is to be located, or (b) have identified the "site to be developed" (note the singular) and have selected the site developer. You cannot achieve the latter without, de facto, accomplishing the former. All you need is a map.

It may be fair to assume, then, that Congress considered "identification" to be more ceremonial than simple acknowledgement of some political or geographic fact. Because the Central States Compact at that time was engaged in a siting process that was blind to state borders, Congress allowed that such a process was a valid option. However, when this acknowledgement was translated into law, the words got in the way. Regions siting in this manner became encumbered with a much stiffer test for satisfying the milestone. The high hurdle described by the second option of the second milestone may have resulted from a weakness in the drafting or mediating process, but more likely it is a deliberate reflection of Congress' endorsement of an approach to siting that requires tough decisions to be made early in the process.

Siting Plans

The Act prescribes certain minimum information to be included in the siting plans. That information, separated here for purposes of illustration, includes both (a) an overview and timetable, and (b) details about procedures and processes.

(a) Overview and timetable

(1) A description of the objectives for all entities to take to implement the plan.

(2) A corresponding schedule for establishing a facility location and preparing a license application;

(3) A sequence of task deadlines for all entities required to take action; and

(4) Identification of siting activities whose delay could delay beginning of operation of a facility.

(b) Procedures and processes A description of the procedures and processes for the following activities, including a description of the optimum way for all entities (including subunits of the state or compact) to perform these activities so as to allow a site to become operational "within the time period specified in the Act":

(1) Screening for broad siting areas;

(2) Identifying and evaluating specific candidate sites;

(3) Characterizing the preferred site(s);

(4) Completing environmental assessments;

(5) Preparing a license application.

The plan has to sequence these tasks so as to climax in establishment of a disposal facility "within the time period specified in the Act." There can be little doubt that Congress intended December 31, 1992, as the deadline for the establishment of new, operational disposal facilities. But that date is the date after which sited regions are not obligated to import waste for disposal, and strictly speaking, is not "specified" as the date by which siteless regions must have sites on line. It also is arguable whether the siting plan must schedule application for a disposal license by the third milestone, January 1, 1990, since the third milestone introduces an option that does not require a license to be filed until January 1, 1992. (In a later section, this paper will discuss further the synchronization of milestones.)

The sited states have indicated that they will ask agencies submitting siting plans to demonstrate by specific legal reference their authority for submitting the plan on behalf of the state. The best plan in the world has no validity if its sponsoring agency lacks portfolio.

Each unaffiliated state must develop a siting plan. For compacts, either the host state or the compact itself must develop the plan. A compact-developed plan might not be much different from one drawn up by the host state. The compact, however, would be hard pressed to delegate authorities to implement various parts of the plan to agencies of a constituent state. Instead, the host state would either have to adopt the compact's plan as its own and fill in the blanks, or the compact commission would have to delegate implementation authority to agencies of its own creation. Most compacts do provide that the compact authority "seek to ensure" that needed facilities are established but this is a rather vague charge. Other compact provisions

reserve for the states most of the authority to license and regulate regional facilities. Among other feats, it is hard to imagine how a compact siting plan could require a state agency to take title to the land on which the facility would be built. Anticipating these difficulties, Congress required that the lines of authority--however serpentine they might have to be--be explicitly stated in the siting plan.

Delegation of authority

The Act requires that each "go-it-alone" state delegate authority to implement its siting plan; and that each compact region or its host state delegate authority to implement its siting plan.

In draft guidelines and early discussions of the meaning of delegation of authority, the DOE and the sited states disagreed on the fundamental concept of delegation. The sited states, having announced that they will place more emphasis on delegation of authorities than on specific elements of the siting plan, have indicated that they will require a showing that responsibility for each task identified in the siting plan has been delegated to some agency. DOE, on the other hand, has suggested it will not require that each of the tasks identified in the siting plan be delegated by law to an agency or agencies, as long as the siting plan pledges that the submitting state or region intends to pursue each such specific delegation as part of its plan.

Both DOE and the sited states agree that the siting plan must also be a "plan," and not just a list of tasks and corresponding citations of authorities. Many agencies of government may be involved in activities leading to establishment of a disposal site. Under the ideal arrangement, one agency would be given the responsibility to get things done within the time frame put forth in the siting plan. This responsibility would be accompanied by whatever authority was necessary to drive sister agencies that also are involved in the plan. In lieu of this, each of the agencies involved could be driven by the mandate of law to perform their part of the plan in some positive fashion.

The legal authority of compact-developed plans is more problematic. In the case of compacts that submit siting plans that are to be implemented by the compact, the compact may need to demonstrate that it has the legal authority to implement each activity in the plan within the state identified as host. In the case of compacts that submit siting plans that are to be implemented in whole or in part by the host state, the compact may need to demonstrate that it has legal authority to assign such responsibilities to the various state agencies. These legal authorities may derive from provisions of the compact, from other existing laws of the state identified as host, and/or from new laws of the host state designed specifically for the purpose of adopting and enabling the siting plan.

THE THIRD MILESTONE, THE FOURTH MILESTONE AND BEYOND

The third milestone (January 1, 1990) requires go-it-alone states and compact host states to submit a complete license application for a disposal site, or if not, then the governor of each go-it-alone state and each compact state must deliver to the NRC a certification that the state will "provide for the storage, disposal, or management of any low-level radioactive waste generated within such state and requiring disposal after December 31, 1992," along with a description of the plan for doing so.

The sited states' original proposal did not include the option of a governor's certification in lieu of a license application by January 1, 1990. In pushing for such a certification option, siteless states, environmentalists and Congressional staff, particularly those of Congressmen Udall and Markey, argued that requiring a license application by January 1, 1990, would limit compact regions and states to shallow land burial by not allowing adequate time to select and develop alternative disposal techniques.

The NRC has promised guidance in separating "pro-forma" type license applications from the truly complete. Because of the complexity of license applications, states can expect these guidelines, and the decisions that follow, to be at least as multi-faceted as the ingredients of the second milestone.

NRC staff have suggested that Congress may have intended that the Commission provide rules or advisory opinions to the sited states and DOE on the adequacy of the governors' certifications. It is difficult to guess whether Congress intended NRC to serve any role beyond "central receiving" for governor's certification letters. Since Congress prescribed a role for the NRC in judging the completeness of license applications, but chose not to prescribe such a role in the companion procedure for state certifications, it may be overly presumptive to assume that Congress intended the NRC to assume obligations additional to those that were outlined in the Act.

The potentially short period of time contemplated in the law for reviewing certifications also weighs against a view that Congress intended for the NRC to establish and administer rules for judging the adequacy of certifications. Certification letters, as well as license applications, may be submitted until December 31, 1989, and DOE and the sited states probably will have to make judgments within a shorter time frame than a formal ruling process would permit. DOE has only 30 days after the milestone day to remit to siteless states in compliance with the 1990 milestone 25% of surcharges collected since the previous milestone. Further, the state-imposed penalty for failure to comply with the 1990 milestone is loss of access, and such a penalty, unlike penalty surcharges, could not be applied retroactively to waste disposed since January 1, 1990, without great trauma to the disposal site.

State certifications will almost certainly be less structured than license applications. As a unique concept of recent vintage, there is no precedent to guide the states and the DOE in making a determination of minimum compliance with the law, and Congress has not delegated the authority to a federal agency to establish binding national standards. A formal NRC rulemaking in this area might even be misleading because it is the sited states and the DOE that are responsible for rendering judgments on milestone compliance, notwithstanding what the NRC might have to say about the adequacy of governors' certifications.

The fate of compact member states hinges to a large degree on the success of their host state filing a license application by January 1, 1990. If the host state comes close, but then misses that date, then other states in the compact might not be in a position to hustle together their governors'

certifications by milestone day, inviting the dreaded penalty of loss of access without a grace period. In describing the accompanying penalty for missing the milestone, the Act speaks of regional application, raising the specter of the whole region being denied access because of the failure of one member state to come forth with a Governor's certification. This suggests that a single region-wide certification duly endorsed and signed by the governors of each of the member states might pass muster, as long as it includes "a description of the actions that will be taken to ensure that such capacity exists."

The forth milestone (January 1, 1992) requires go-it-alone states and compact host states to submit a complete license application for a disposal facility, period. Senator Evans, not satisfied that the siteless states and compact regions would ever take responsibility for the disposal of their waste without a final D-day for license applications, added this milestone during negotiations between the Senate Energy and Environment Committees, a week before final passage of the bill.

Subsequent milestones are laid out in the section of the Act dealing with penalties. By January 1, 1993, each go-it-alone state and each compact is expected to have a disposal facility. If a state or region misses this "deadline" each state can either forfeit its accumulation of escrowed surcharges, or take title to all the waste in the state. If the state chooses to forfeit its surcharges, then it still must take title on January 1, 1996, if it is "unable to provide for the disposal of all such waste generated" in the state or region.

Throughout his committee's deliberations, Senator Johnston, then ranking minority member of the Energy Committee, felt that the states, rather than the waste generators, should pay for a state or compact region's failure to meet milestones. The "take title" proviso was added as a concession to this view during negotiations between the Energy Committee and the Environment Committee.

Strategic Interrelationship among Milestones

The Governor's certification option under the third milestone creates some interesting possibilities for compliance with the preceding milestone and the cluster of milestones that follow. Regions will be forced to consider as early as the second milestone whether they will treat the certification option as a "fallback position" or whether they will build this alternative timetable unabashedly into the siting plan itself.

Looking ahead to the 1992 milestone and beyond, the governor's certification of a management/storage plan under the third milestone could become more than just a "quick fix" to avoid derailing a state or compact region's subsequent efforts to license a disposal facility. The certification option stands out as the only point in the Act in which an alternative to disposal is sanctioned. Congress crafted the option as a temporary measure that would allow a region to buy enough time to file a disposal license by January 1, 1992. But what if a region is hell-bent to store--even at the cost of triple surcharges during the year 1992, forfeiture of surcharges that had accumulated between 1/1/90 and 12/31/92, and assumption of title to the waste in 1996? It is conceivable that once it implements a third-milestone management plan featuring storage of waste (as promised in the governor's certification), a state or region that produces a trivial amount of waste may look upon the arrangement as a workable final solution, or at least a means to hobble into the post-transition era still breathing.

CONCLUSIONS

There was a consensus among all interests that the milestone regime had to be "tough but doable." The governors of the sited states wanted it demonstrably tough so that they could withstand the inevitable barrage of critics back home. It had to be doable if it was to serve as a catalyst for the establishment of new sites.

The milestones themselves, as they evolved in the legislative process, became a reflection of the kinds of compromises among the various interests--sited and siteless states, environmentalists, nuclear utilities and small waste generators--that were necessary to make the Act tough but doable.

Given the alternative of a disposal crisis, all the interests signed on to the transition era regime in spite of misgivings about the social, political and economic costs.