

THE CALIFORNIA AND SOUTHWESTERN COMPACT LOW-LEVEL WASTE DISPOSAL PROGRAM: WASTE GENERATORS' PERSPECTIVE, 1983-1999

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ABSTRACT

The California Radioactive Materials Management Forum is an association of public and private institutions and corporations that use radioactive materials and generate low-level radioactive waste in the four states of the Southwestern Compact region (Arizona, California, North Dakota, and South Dakota). Member organizations include universities, utilities, medical centers, industries, and professional societies. In addition, a number of physicians, engineers, business people, health physicists, and other professionals are individual members of the Forum.

This paper provides a brief history of Cal Rad Forum's role in encouraging and assisting the response of California (host state) and the other Southwestern Compact party states to the requirements of the federal Low-Level Radioactive Waste Policy Act. To date, California is the only state to have licensed a new low-level radioactive waste disposal facility pursuant to the federal Act: the proposed Ward Valley project. Unique features of the California program that may explain this singularity will be described.

California's attempts to acquire federal land in Ward Valley for the site of the Compact's regional disposal facility will be discussed in some detail as the land transfer remains the outstanding uncompleted administrative action.

The history Ward Valley demonstrates that the State of California — by its legislation, its regulations, and its implementation of these laws and regulations — has attempted to play by the rules established by Congress and the U.S. Nuclear Regulatory Commission. The federal government, ironically, has repeatedly changed the rules ("moved the goal posts" in the words of a California Congressman) it applies to the land transfer.

Finally, the impact of the November 1998 elections on users of radioactive materials and implementation of the Act in the Southwestern Compact will be discussed.

INTRODUCTION

Cal Rad Forum has played an important role since 1983 in fashioning and supporting California's low-level radioactive waste (LLRW) disposal program.

The Forum sponsored California's bipartisan siting law which was overwhelmingly adopted as urgency legislation and signed into law by Governor George Deukmejian in 1983. At least three provisions of the California law provide a different approach than that taken by most other states which have attempted to develop LLRW disposal facilities. First, the State law explicitly references the Nuclear Regulatory Commission's regulations for low-level waste disposal at Title

10 Part 61 of the Code of Federal Regulations and requires that the regulations of the California Department of Health Services be “consistent” with the federal regulations. Second, the law calls for development by a private developer at its, not the taxpayer’s, expense. Both the siting law of 1983, and subsequent legislation sponsored by Cal Rad make it explicitly clear that all development costs, including the cost of land acquisition, are to be borne by the developer. Third, in its siting legislation, California’s commitment to develop a disposal facility was made prior to identification of compact partners and formation of a compact.

Cal Rad supported ratification of the Southwestern Compact by the California Legislature in 1987 and Congressional consent to the Compact the following year.

Since 1983, Cal Rad has maintained vigorous legislative, regulatory, and public information programs. We have also gone to court to successfully litigate in defense of the State’s license, against interference with the State’s licensing process by a committee of the Legislature, and against attempts by the host county to adopt its own regulations and to interfere with state and federal law. We have filed an *amicus* with the U.S. District Court in Washington, DC in support of the State’s attempt to obtain a writ of *mandamus* requiring sale of federal land in Ward Valley to the State of California.

Members of Cal Rad are proud of our role in helping to fashion and support the Southwestern Compact’s low-level waste disposal program — the only program in the country to have reached the point of successful licensure, let alone a license which has survived legal challenge. Had California been left free to implement this program, without federal interference, the proposed Ward Valley disposal facility could have begun operation four years ago.

In 1993, culminating a thorough process of license application and environmental review, the California Department of Health Services issued a license to US Ecology, Inc. for the construction and operation of a disposal facility on federal land in a remote utility corridor in the Mojave Desert. The League of Women Voters praised the openness of the State’s licensing process.

In 1992, the California Department of Health Services formally applied to the U.S. Bureau of Land Management to purchase 1,000 acres of federal land in Ward Valley for use as the site of the Southwestern Compact’s regional disposal facility. In 1990 and 1991, the U.S. Bureau of Land Management was a partner with the State of California in the preparation of a joint Draft and Final Environmental Impact Statement and Environmental Impact Report (EIS/EIR). The U.S. Department of the Interior approved the land sale in January 1993, but this action was rescinded by Interior Secretary Bruce Babbitt soon after the Clinton administration took office.

HISTORY OF THE WARD VALLEY LAND SALE: CALIFORNIA PLAYS BY THE RULES, AND THE FEDERAL GOVERNMENT “MOVES THE GOALPOSTS” **Federal Obstruction and Bad Faith**

Since taking office in 1993, the current administration in Washington has employed a series of delaying tactics to block the Ward Valley project. The reason must be politics for the safety of

the proposed facility has been validated by the California Department of Health Services and the project's environmental acceptability has been validated by all the state and federal agencies whose approvals are required by law. In addition, an extra-procedural review by the National Academy of Sciences commissioned by Secretary of the Interior Bruce Babbitt and completed in 1995 led Secretary Babbitt to state, "I've never felt that being an environmentalist means saying 'no' to necessity. The National Academy of Sciences says it's safe, so I'm prepared to go ahead with it." Unfortunately, and not for the first time, Secretary Babbitt and science were overruled by the White House and politics.

Since January, 1993, the Clinton administration and its Department of the Interior (DOI) have prepared a Supplemental Environmental Impact Statement (SEIS) for Ward Valley and then ignored their own favorable conclusions; asked Governor Wilson to hold a special hearing on environmental issues related to the land transfer and then, after the Governor agreed, abruptly canceled the hearing; promised a decision on the land sale by the end of 1993 then allowed that date to pass without action or comment; commissioned a fifteen-month review by the National Academy of Sciences then ignored the favorable results of the Academy's report and distorted its recommendations; and promised a decision on the land sale when California's judicial review of the license was completed and then reneged on that promise when the review was completed in 1996. The Clinton administration's response to the verdict of the California courts upholding the Ward Valley license was to call for more testing and another SEIS. Former Deputy Interior Secretary John Garamendi declared that California could not be trusted! California Governor Pete Wilson questioned, based on this record of delays, whether this administration will ever approve the land sale. Congressman Brian Bilbray (R-San Diego) noted, "Every time we think we've crossed the goal line, the Clinton administration moves the goal posts."

The federal government's bad faith and political motivations are further revealed in the infamous "venal toady" memo sent by Deputy Secretary Garamendi to Secretary Babbitt in February 1996. Mr. Garamendi promised the Secretary he would "...maintain a heavy PR campaign until the issue is firmly won."¹ He did and was severely criticized by the Chairman of the U.S. Nuclear Commission in a letter to Secretary Babbitt for spreading misinformation originating with Ward Valley opponents. (The Garamendi memo was obtained by Senator Frank Murkowski, Chairman of the Senate Energy Committee, and made public on the floor of the Senate in the fall of 1997.)

Another memo demonstrating bad faith was revealed in the discovery process in connection with the State's contract claim suit. This memo, circulated among staff personnel at the Council on Environmental Quality, includes the following:

"Interior Department officials, relying on the NAS analysis and recommendations, believe that the [Ward Valley] site can be operated and used with complete safety. Interior would like very much to move ahead with the transfer and put the Ward Valley conflict behind the Administration. That said, they believe that, as a political matter, the Administration simply cannot of its own volition agree to hand the site over in exchange for a check and an unpopular governor's promise to do the right thing."

This memo is evidence that the Clinton administration views the Ward Valley project as a political, rather than a scientific, issue.

In January 1997, Governor Wilson agreed to undertake additional tests at the Ward Valley site which the Interior Department had demanded be completed prior to the land sale. The National Academy of Sciences panel had recommended that additional tests to obtain baseline data be performed during construction and operation of the disposal facility. Interior at first insisted that the State apply for a new permit and promised that a permit could be issued in a matter of weeks after submission of an application. The State, believing that its existing permits were valid, was reluctant to enter another stalling game. However, in September 1997, the State applied for a permit to perform additional tests. That permit has never been issued! The federal government has refused to allow California to perform the tests it has insisted must be performed before federal land in Ward Valley can be transferred to the State!

FUTURE OF THE LOW-LEVEL WASTE POLICY ACT

In recent months, some have criticized the Low-Level Radioactive Waste Policy Act. They have argued that the Act is not working and urge its repeal. Their suggestion is born of frustration arising from the fact that no new LLRW disposal facilities have been placed in operation since the law was enacted in 1980.

The blame for the failure to develop new disposal facilities should not be placed on the Act but on the lack of political will to implement it. Indeed, the proponents of repeal have yet to even suggest a replacement scheme. They violate the First Law of Wing-Walking: "Never let go of what you have hold of until you have hold of something else."

California may be an exception to the general lack of political will. As discussed, the State has issued a license and certified an Environmental Impact Report, the State's courts have upheld these decisions, and California applied to the Bureau of Land Management to purchase a site for the disposal facility. For six years, the federal government has stalled the land sale. How would repeal of the Policy Act provide the federal administration with the political will it so clearly lacks?

The dispute between California and the federal government is now before two federal courts. Perhaps the courts will provide a remedy. Perhaps a new governor in Sacramento can persuade the federal government to break the political impasse. Both approaches should be vigorously pursued. Now is not the time to scrap the governing law and leave management of low-level waste in limbo.

Some say that since the U.S. Supreme Court struck-down the Act's "take title" provision (New York vs. United States et al), the Act lacks teeth. Not so. As a matter of law, the take title provision probably still applies to any state that has joined a compact. (See Justice Stevens' dissenting opinion.)² Furthermore, states which have joined a compact have really entered a contract which binds the designated host state to perform. For example, Article IV of the Southwestern Compact Consent Act requires the host state (California) to "Cause a regional disposal facility to

be developed on a timely basis." This is a legal and contractual obligation, and we believe that organizations that use radioactive materials in the Southwestern Compact region (Arizona, California, North Dakota, and South Dakota) are third-party beneficiaries of the contract.

Free-market arguments have been offered in support of repeal. However, experience shows that host state politics undermines this approach. Look at South Carolina. After Barnwell had operated for one year with access restricted to the Southeast Compact, Governor Beasley opened the disposal facility to waste from all states (except North Carolina). But Governor-Elect Hodges declared in his successful campaign last year that Beasley had turned South Carolina into the nuclear dumping ground for the nation. He promised to stop this.

Repeal would take us back to 1979 when Washington, South Carolina, and Nevada persuaded the Congress to provide regional equity in LLRW disposal through legislation. The Low-Level Waste Policy Act was largely the work of two Arizona environmentalists, Congressman Morris Udall and Governor Bruce Babbitt. The Act carries an environmental pedigree which would be lost with repeal.

To urge repeal of the Policy Act is to argue the case of opponents of safe disposal. They oppose the Act and have vowed to oppose the construction of new disposal facilities "as long as the waste is generated."

Our message to governments -- both state and federal -- is simple. We need assured, timely access at reasonable costs to safe disposal facilities for low-level waste.

There are three options:

1. Find the political will to make the Act work, or
 2. Force access to the existing disposal facilities, or
 3. Provide generators of commercial LLRW access to government (Department of Energy) sites.
- Option two would simply take us back to 1979 when Washington, Nevada, and South Carolina declared they would no longer provide LLRW disposal for the entire nation. It's hard to believe that a government that lacks the political will to make the first option work has the political will for option three.

The Department of Energy has been unwilling, thus far, to accept waste from the Southwestern Compact region on even an interim basis. Cal Rad has requested such access for a year-and-a-half, but DOE has turned us down. Last fall, the California Department of Health Services asked DOE to reconsider its position. Now the Southwestern Compact Commission has weighed in. On February 5, 1999, the Commission adopted a resolution "...supporting the concept of DOE's accepting low-level waste from those compacts whose waste disposal facility development efforts have been adversely affected by the decisions of other federal agencies."

For a permanent solution for low-level waste disposal, making the Act work still looks like the best bet.

WARD VALLEY AND THE NOVEMBER 1998 ELECTIONS

With respect to low-level waste disposal, perhaps the most significant election result last November was in South Carolina. The election of Jim Hodges foreshadows loss of access to the Barnwell disposal facility for organizations that use radioactive materials in the Southwestern Compact region and throughout the country. During the election campaign, Mr. Hodges made former Governor Beasley's decision to open Barnwell to the entire country a major campaign issue. It now appears likely that South Carolina will rejoin the Southeast Compact and that access to Barnwell will be restricted to waste generators in the Southeast Compact region just as it was from July 1994 to June 1995 when Governor Beasley reversed long-standing state policy. The political change in South Carolina underscores the folly of relying on other states and regions to do the job assigned to each state and region by the federal Act.

At Cal Rad's Annual Fall Conference on November 6, 1999, just a few days following the election, our Chairman David Krueger noted that, for the first time, California's implementation of the provisions of the federal Low-Level Radioactive Waste Policy Act and corresponding state laws will be under the direction of a governor from the Democratic Party, Gray Davis. He noted the irony that under the direction of two Republican governors, George Deukmejian and Pete Wilson, California has made more significant progress than any other state toward implementation of laws formulated and carried by Democrats at both the federal and state levels. The federal law is largely the work of two Arizona environmentalists who also happen to be Democrats: former Governor Bruce Babbitt (an irony in itself given the Interior Department's role in Ward Valley delays) and the late Morris Udall who represented Arizona's 5th District in the Congress and was Chairman of the House Interior Committee. Governor Babbitt was chairman of a National Governors' Association Task Force which recommended to Congress the regional interstate compact approach to LLRW disposal. Representative Udall carried the 1980 Act, the Amendments Act of 1985 and the Southwestern Compact Consent Act in 1988. Governor Babbitt was on record that development of low-level waste facilities is a job for the states, not the federal government.³

Democrats also took the lead in formulating California's low-level waste disposal program in response to the federal Act. Our 1983 siting law was a bipartisan effort. The lead author was former State Senator Alfred E. Alquist, a Democrat from San Jose; former Assemblywoman (later State Senator) Marian Bergeson, a Republican from Newport Beach, was the principal co-author. California's legislation ratifying the Southwestern Compact was authored by Assemblyman (now State Senator) Steve Peace, a Democrat from Chula Vista.

Governor Davis has inherited realities and challenges affecting California's obligations for safe, reliable disposal of low-level waste. These are set forth in Cal Rad's newsletter *Straight Talk About Low-Level Radioactive Waste* for January 1999.⁴ They are, in brief,

- California has a legal and contractual obligation, under the terms of the Southwestern Compact, to provide LLRW disposal for users of radioactive materials in Arizona, California, North Dakota, and South Dakota. The contract is with the other party states. Cal Rad's position is that the waste generators in the contract region are third-party beneficiaries of the contract.

- In 1993, the California Department of Health Services issued a license to US Ecology to build and operate a LLRW disposal facility at Ward Valley. The Department's decisions to issue

the license and certify the Environmental Impact Report have been upheld by California's courts. US Ecology continues to meet the terms of its license; in January it paid its annual license fee to the State.

- A Memorandum of Understanding between the State and US Ecology sets forth their respective responsibilities: US Ecology to obtain the license for the disposal facility and the State to obtain the land needed for the facility. Following issuance of the license, the State refunded US Ecology's \$1 million performance bond. But the State has not yet acquired the land.

- California's legal positions with respect to the federal government's delays have been placed before the United States Court of Federal Claims and the U.S. District Court in Washington, DC.

- As noted, the anticipated loss of access to Barnwell in the near future underscores the urgency of California's obtaining the cooperation of the Clinton administration to complete the sale to the State of federal land in Ward Valley for the site of the Southwestern Compact's regional disposal facility.

CONCLUSIONS

Cal Rad Forum will continue to play an important role representing the interests of users of radioactive materials in the low-level radioactive waste disposal program of the Southwestern Compact and its host state California. The remaining task for completion of the Ward Valley disposal project is clear: transfer of federal land in Ward Valley to the State. We look forward to working with Governor Davis and his administration, just as we have worked with his two predecessors, to make sure that science and safety — not politics — govern and toward the successful, prompt completion of the Ward Valley disposal project.

REFERENCES AND CITATIONS

1. "Attached are the Ward Valley clips. We have taken the high ground. Wilson is the venal toady of special interests (radiation business). I do not think Green Peace will picket you any longer.

"I will maintain a heavy PR campaign until the issue is firmly won."

Memo to Bruce Babbitt from John Garamendi dated February 21, 1996.

2. "Even if § 2021e(d)(2)(C) is 'invalidated' insofar as it applies to the State of New York, it remains enforceable against the 44 States that have joined interstate compacts approved by Congress because the compacting States have, in their agreements, embraced that provision and given it independent effect. Congress' consent to the compacts was 'granted subject to the provisions of the [Act] . . . and only for so long as the [entities] established in the compact comply with all the provisions of [the] Act.' Appalachian States Low Level Radioactive Waste Compact Consent Act, Pub.L. 100-319, 102 Stat. 471. Thus the compacts incorporated the provisions of the Act, including the take title provision. These compacts, the product of voluntary interstate cooperation, unquestionably survive the 'invalidation' of §2021e(d)(2)(C) as it applies to New York. Congress did not 'direct' the States to enter into these compacts and the decision of each compacting State to enter into a compact was not influenced by the existence of the take title provision: Whether a State went its own way or joined a compact, it was still subject to the take title provision."

3. “Congressional passage of the Low-Level Radioactive Waste Policy Act in December, 1980 recognizes that state government is the appropriate level for making decisions about siting disposal facilities.”

Governor Bruce Babbitt, *Arizona Radiation Regulatory Review*, 1981.

4. *Straight Talk About Low-Level Radioactive Waste*, Vol. 8, No. 1, January 1999. Published by the California Radioactive Materials Management Forum. Nicki Hobson, Editor.