

WHITE HOUSE INVOLVEMENT IN WARD VALLEY LAND TRANSFER DELAYS

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ABSTRACT

In 1993, California became the first state to license a new Compact disposal facility under the system authorized by the Low-Level Radioactive Waste Policy Act as amended. Construction of the facility has been delayed by the federal government's refusal to transfer the project property to the state. Government documents produced in litigation filed by the state and its licensee to obtain the land and recover monetary damages confirm high-level White House involvement in decisions to delay the project. These documents further reveal that senior federal officials concluded that the project was safe, but that political considerations prevented delivery of the land to California. Combined with siting reverses in other Compact regions, California's inability to proceed casts substantial doubt on the ability of the Policy Act to produce the stable national disposal system envisioned by Congress.

INTRODUCTION

After seven years of cooperative effort, the U.S. Department of Interior contracted to sell 1,000 acres of federal land to the State of California in January 1993 for use as a low-level radioactive waste disposal facility. The site, intended to serve the four member states of the Southwestern Low-Level Radioactive Waste Disposal Compact, was licensed by the California Department of Health Services. The license approval decision was upheld by the California Courts. All appeals of the state's action have been exhausted.

Within weeks of taking office in January 1993, Interior Secretary Bruce Babbitt endeavored to rescind predecessor Manuel Lujan's approval of the land transfer and embarked the federal government on a series of extra-procedural delays that continue to the present. Initially, the State of California and its licensee (US Ecology Inc.) agreed to work with the Department of the Interior and participated in the processes instituted to re-open federal review of the Ward Valley project.

Chief among these review processes was a National Academy of Sciences ("NAS") panel review, commissioned by Secretary Babbitt, that concluded in a May 1995 report that Ward Valley disposal facility construction and operation could proceed. The NAS report led Secretary Babbitt to publicly state that the project was safe and that he intended to proceed with the land transfer. That never happened.

Almost four years later, the land remains in federal hands. The Interior Department's refusal to convey the property is the subject of litigation brought in federal court by the State of California and US Ecology. As explained below, the events leading to the current impasse reflect decisions made at the highest levels of government to choose political expediency over objective science and implementation of a major federal environmental law passed with strong bipartisan support.

WHITE HOUSE INVOLVEMENT

Dismayed that the NAS report indicated project construction need not be further delayed, influential project opponents began an aggressive political campaign seeking further field tests in advance of the land transfer. A message from former White House political advisor Tom Epstein reported:

“The lead opposition group...issued a vicious attack late yesterday. They said the Clinton Administration is “operating without a moral or political compass,” and that “Clinton believes that a winning strategy is capitulating to the Republican Congress and the nuclear power lobby.” They predict this action will lead to a primary challenge.”^a

The opposition coalition’s clout was evidenced by a briefing for Vice President Gore on Ward Valley in preparation for his June 7, 1995 lunch with the President.^b The following day, White House Council on Environmental Quality (“CEQ”) Director Kathleen McGinty breakfasted with a small group at Los Angeles’ exclusive Hillcrest Country Club to discuss Ward Valley. Among the attendees were the Executive Director of the Hollywood Women’s Political Committee, actor Ed Begley, Jr., recording artist Don Henley, and representatives of the Spielberg Foundation and Robert Redford’s Sundance Institute. U.S. Senator Barbara Boxer’s office helped scrub the invited guest list.^c

With political pressure mounting from Senator Boxer and other California political constituencies, land transfer negotiations with State of California officials foundered. The deal-breaker was federal insistence on a continuing Interior Department enforcement role over state implementation of confirmatory studies recommended in the NAS report. California considered this condition an inappropriate intrusion by Interior into regulatory authorities delegated to the state by the U.S. Nuclear Regulatory Commission.

The state responded by terminating the negotiations and requesting Congressional action to legislate the land transfer. Language supported by the state was appended to the 1995 Budget Reconciliation Act following the defeat of a series of parliamentary maneuvers by Senator Boxer to block its inclusion.

Project opponents pressed the issue throughout this period, prompting interchanges involving White House Chief of Staff Leon Pannetta, Political Director Harold Ickes and Deputy Doug Sosnick, California political advisor John Emerson and multiple CEQ representatives. An e-mail message to McGinty noted that Emerson had been forwarding a lot of Ward Valley calls “...to return on behalf of the White House, including calls to some big players in the funding, Demo party circles.”^d

In a detailed memorandum to President Clinton written shortly before he celebrated Thanksgiving with Senator Boxer, McGinty concluded that “We have worked tirelessly to accommodate Senator Boxer’s concerns. She is not completely happy with us because 1) Interior wants to transfer the site; 2) the conditions we have specified are not stringent enough for her; and 3) she thinks we have not consulted with her enough.” A handwritten note concluded “It would be very helpful if she would aim her fire at Pete Wilson instead of us.”^e

An illuminating view of the situation is captured in a December 1995 e-mail message from the CEQ’s Jensen. Noting California’s concern that “low level waste is piling up in university basements, hospital loading docks, and other places unfit for storage,” Jensen noted that “Their argument, which is mostly legitimate, turns the “public safety” claim around, stressing the need to get the waste out of the cities and into a remote and safe location.”^f The Jensen message continued with a stark assessment of the political conundrum the Administration believed it faced:

“Interior Department officials, relying on the NAS analysis and recommendations, believe the site can be operated and used with complete safety (emphasis added). Interior would very much like 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.”^g

Ultimately, President Clinton vetoed the 1995 Budget Reconciliation Act. Objection to the Ward Valley land transfer provision was among the reasons publicly cited in the White House veto message.

In February 1996, the Interior Department formally reversed Secretary Babbitt’s earlier position that the land would be transferred based on the NAS report. Deputy Secretary John Garamendi announced that the Interior Department, rather than California, must perform the studies and that a new Supplemental Environmental Impact Statement (“EIS”) incorporating its study results would be necessary prior to a land transfer decision.

A key reason cited for this federal policy change was purported concern over environmental monitoring data gathered at a formerly operated low-level radioactive waste disposal facility near Beatty, Nevada. The Nevada facility had been deemed properly closed by the responsible state regulatory agency, and its license has since been transferred to the state for long-term institutional control. A revealing message authored by the CEQ’s McGinty one day before the Garamendi announcement evidences the Administration’s concern over justification for the policy change:

“I believe we need to beef up the beatty results as a reason we are delaying here. Otherwise this looks like a flip-flop.”^h

It eventually became clear that the Interior Department lacked the expertise necessary to design and carry out the tests. To assist the effort, a dissenting member of the NAS panel originally recommended to the NAS by a prominent project opposition group was hired to develop testing protocols. The work was never finalized.

Reluctantly concluding that Interior Department had no intention of ever completing the land sale, the State of California and US Ecology brought suit in Federal District Court in January 1997 to compel the transfer. A separate lawsuit was brought in the Court of Federal Claims by the company to recover monetary damages. The state subsequently joined this action to recover its own delay costs. Oral arguments have been conducted in both cases, however, no dispositive rulings had been issued by either court at publication deadline.

The government's bad faith handling of the Ward Valley matter was later underscored by the Department of Interior's 1998 decision to indefinitely suspend the additional studies and Supplemental EIS announced in 1996 while simultaneously denying California entry to the site. The justification offered for suspension of the federal work was a tortured legal analysis developed by project opponents concluding (contrary to the agency's prior EIS) that the California Department of Health Services lacks authority to accept the land.

IMPLICATIONS FOR THE FUTURE

At this writing, incoming California Governor Gray Davis has not directed any change in the State of California's position in the pending litigation.

For its part, the federal government has not altered its stance that a Governor's assurances do not form a sufficient basis to deliver the land patent without federal enforcement provisions. For these and other project-specific reasons, the Ward Valley's future remains uncertain.

Continuing Ward Valley delays have a significant effect on Low-Level Radioactive Waste Policy Act implementation, given California's status as the first and only state to license a new Compact disposal facility since the Act's passage. Concerns raised by California's situation have been amplified by recent siting setbacks in Texas and Nebraska. Initiatives by new South Carolina Governor James Hodges to restrict the number of states with access to its Barnwell disposal site would leave significant quantities of waste with no disposal home. These developments offer growing evidence that the LLRW Policy Act and the Compact system it authorized may never produce the stable, national system envisioned by Congress.

FOOTNOTES

^a June 1, 1995 e-mail text, creator: Thomas S. Epstein

^b June 7, 1995 e-mail text, creator: Thomas E. Jensen

^c June 5, 1998 facsimile message from Karen Olick to Tom Epstein

^d September 20, 1995 e-mail text, creator: Thomas C. Jensen

^e Memo to the President from Katie McGinty, re: Ward Valley and Senator Boxer, November 22, 1995.

^f December 21, 1995 e-mail text, creator: T. Jensen

^g Ibid.

^h February 15, 1996 e-mail text, creator: Kathleen A. McGinty