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FED COURT GIVES GO AHEAD ON MRS PROPOSAL!

On November 25, a three judge panel of the United States Court of Appeals for the Sixth Circuit ruled against the State of Tennessee's petition to halt submission of the DOE proposal to construct a Monitored Retrievable Storage Facility (MRS) to Congress finding that

"... "The NWPA does not require the Secretary to consult with any state before he sends Congress his proposal for the location and construction of one or more MRS facilities."

The opinion of the court, delivered by Circuit Judge Kennedy, was fully concurred in by Judge Brown, with Judge Wellford only concurring in part and dissenting in part.

The litigation involved two separate issues:

- Whether the lower Court (which ruled in favor of Tennessee's MRS study request to have DOE redo the MRS study) had jurisdiction in the matter or was the Appeals Court the proper court of jurisdiction; and,
- Whether the Nuclear Waste Policy Act (NWPA) required DOE to consult with the states prior to submitting the MRS proposal to Congress. (See **Court Decision in the HLW Focus**).

DOE Recommendation on Defense HLW Fee issued...
See story in the **HLW Focus** ... pg. 8

CENTRAL STATES TO CHANGE RFP FOR BIDS FROM POTENTIAL SITE OPERATORS

The Central States Compact Commission, following a very animated discussion on their "draft Request for Proposal" intended to solicit bids to develop a Central States LLRW disposal facility with representatives from LLRW disposal companies, environmental groups, and utilities, is considering extensive changes on their "draft" document. In all likelihood, the final form-- expected to be approved at their next session to be held in early January-- will incorporate several of the recommendations made in written comments and at the public session held on November 12. The initial "draft" received considerable critical comment from current and potential LLRW disposal firms. At least one company in their written comments stated that it would not submit a proposal under the terms of the initial draft RFP.

Potential Site Operator Concerns

As released this summer the draft RFP was viewed as not "presenting an acceptable business opportunity" for any of the firms that could be expected to bid on developing a CS regional facility. In both written comments and at public meetings representatives of Chem Nuclear, US Ecology and Nuclear Waste Technology voiced their concern with the draft document. A particularly troublesome requirement included in the draft RFP was that a bidder was **prohibited** from identifying the state within which a site was proposed to be developed. This would have definitely presented a problem for one potential bidder--Nuclear Waste Technology--which has been openly promoting the use of the salt mine in Lyons, Kansas, once considered for a HLW repository. Other representatives from the potential bidding firms remarked as to how it would be practically impossible not to mention a site location since a key factor in being able to identify a potential site would be gaining local community acceptance prior to submitting a site specific proposal. Under the CS Compact, the operator selection process is specifically mandated.

One of the major concerns of potential site operators was the financial risk that would have to be assumed by a potential developer under the conditions of the draft document. Mike Jump, Chem-Nuclear Vice President, remarked that under the initial requirements the selected site developer was to be responsible for all site development activities with no guarantee that a site license would be granted. He suggested to the Commission that site development activities be covered by generator fees as work progressed -- something patterned after a Cost for Work in Progress system (CWIP) often promoted for financing utility construction. He remarked that such a financing program would limit the inherent financial risks that would have to be assumed by the site developer and in the long run result in lower disposal costs. The Chem-Nuclear Vice President also suggested that the application fee to submit a proposal initially set at \$25,000 should be reduced to nothing.

Mr. Jump and others also expressed concern regarding the proposed requirements for posting a performance bond and the conditions under which a selected site developer would forfeit the bond.

More Public Participation Sought

Representatives of various environmental groups pushed for more participation in the operator selection and site identification and development process. Public involvement in the selection of a disposal technology was also strongly recommended. The development of region-wide siting standards, beyond current NRC Part 61 regulations, was strongly suggested. The environmental groups also supported long-term above-ground storage at the reactor sites as an alternative to proceeding to immediate disposal.

Expected Changes in RFP

Though the Commission gave no firm indication at the session as to specific actions that would be taken in light of the comments received, from what the EXCHANGE has been able to learn thus far, the following changes to the draft RFP are

being discussed and will be incorporated in the final version.

- The requirement that a bidder **not** name a state or site will be changed to allow the bidders to do so at their discretion.
- Bidders will be advised to propose mechanisms to finance site development costs.
- Credit will be given for incorporating stricter than Part 61 regulations into a site proposal.
- The contractor selected to be a site developer would be required to post a performance bond sixty days after selection, not five days as required by the initial proposal.
- The application fee will be reduced from \$25,000 to \$5,000.

Schedule for RFP, Operator Selection

According to Ray Peery, Executive Director for the Central States Compact, the Commission is scheduled to release the final RFP in early January. A "draft" Regional Management Plan is to be released this December. Public hearings on the Plan will be scheduled shortly thereafter.

Strengthened Public Outreach Effort

The Commission recently hired Kathy Smith, formerly with the Louisiana Department of Environmental Quality, as the Commission's Special Assistant for Public Information and Involvement in order to handle the increase public outreach activities associated with the release of the Plan and other upcoming Compact actions. Ms. Smith will be responsible for all upcoming Commission public meetings.**

CONTRACTS TO ACCEPT LLRW KILLED, WITHDRAWAL SANCTIONS OK'd IN SE

At their November 20-21 meeting in St. Petersburg, Florida, the Southeast Compact Commission killed any possibility of accepting out-of-region waste under a contract with a non-party state and directed the Ad-Hoc Sanctions Committee to proceed to finalize language that would impose severe restrictions and sanctions on states considering withdrawing from the

Compact to avoid being designated as a host state (See EXCHANGE, Vol. 5, Nos. 17, 18).

The Commission approved "in concept" the party state withdrawal sanction provisions presented by the Commission's Ad-Hoc Sanctions Committee. According to the Ad-Hoc Committee Chairman, NC Commissioner Captain Bill Briner, the Commission basically directed the Ad-Hoc group to present a final report and recommendations for action that will satisfy North Carolina's desires and keep the State in the Compact. The final recommendations will then be taken up at the next full Commission meeting on January 27 in North Carolina.

The objective of the proposed withdrawal sanction provisions is to make it extremely difficult for a party state to withdraw once it has been selected as a host state, after it has reaped the benefits of other states serving as the host for a disposal facility.

No Contracts for Out-of-Region Waste

The Commission adopted the recommendations of the Ad-Hoc Committee on Party State Eligibility and approved a policy position killing any plans (or thoughts) of any out-of-region state to contract with the Southeast Compact for the disposal of LLRW. As adopted, any non-party state desiring to contract with the SE Compact to dispose of their respective LLRW at Barnwell would be required to "serve as the next host state immediately following South Carolina's period of service in that capacity. This would mean North Carolina would not be the second host state.

Economics, Third Host State Selection

Other items addressed by the Commissioners included: the economics of future LLRW burial site operations in light of the drastic decrease in waste being delivered to the currently operating disposal site; a request from the North Carolina Conservation Council that all future Commission meetings be held in North Carolina; and, a recommendation, made by Commissioner Briner, that the host state selection process be an ongoing activity not stopped, and started up again when it would be

necessary to identify the third host state.

In the discussion regarding site operation economics and a volume based fee structure, concerns over the Compact provisions stipulating that each party state is to develop regulations to require volume reduction were raised. The Commission gave no specific direction on how to address the dilemma but will continue to monitor the situation.

The NC Conservation Council's request was not fully supported by the NC Commissioners. Captain Briner remarked that the Commission should meet frequently in North Carolina, but not exclusively. It was decided to hold the next session in the designated second host state on January 27, 1987.

The Commission endorsed the recommendation to have an ongoing host state selection process and directed the technical committee to begin preparations.

ENVIRONMENTALISTS FILE SUIT TO FORCE DOE TO CONDUCT EIS AT WEST VALLEY

The Coalition on West Valley Nuclear Waste and the Radioactive Waste Campaign (now operating as a group separate from the Sierra Club and headquartered in New York City), have jointly filed suit in the Federal District Court in Buffalo, N.Y., seeking to force the Department of Energy to conduct a complete Environmental Impact Statement on the proposed on-site LLRW burial facility at West Valley, New York. The suit, filed on November 7 in the Federal District Court of the Western District of New York, names the USDOE, the New York State Energy Research and Development Authority and the State of New York as defendants.

Following the completion of an Environmental Assessment, DOE had determined that an Environmental Impact Statement was not necessary. The Finding of No Significant Impact (FONSI) was signed by DOE Assistant Secretary for Environment Mary Walker this past October (See EXCHANGE, Vol. 5, No. 15).

Reasons to complete EIS cited

The complaint filed with the Court lists the following eight specific arguments as to why DOE should have completed an EIS prior to deciding on the design and location of the on-site burial facility.

- (1) The proposed project, as viewed by the petitioners, does "significantly" affect the environment as defined in the National Environmental Policy Act (NEPA).
- (2) DOE failed to adequately consider various erosion processes which threaten to breach the trench and tumulus disposal areas in the foreseeable future;
- (3) DOE "piecemealed" and "segmented" its environmental analysis by deferring formulation and implementation of a much-needed erosion control and mitigation study and plan to an unknown time in the future, despite the scientific uncertainty and large-scale financial impacts of such a plan and the direct bearing such study would have on site suitability and alternatives analysis, both of which are mandated by NEPA to have been completed prior to DOE's project approval;
- (4) DOE has misrepresented that the waste which will be disposed under the project is "low-level radioactive waste" when much of the waste is argued to be "transuranic waste" contaminated by transuranic elements including plutonium, as defined by Congress in the West Valley Demonstration Project Act, P.L. 96-368, 94 Stat. 1347 (1980);
- (5) DOE arbitrarily defined "disposal" to preclude several tested and promising engineered alternatives for radioactive waste disposal which include features such as retrievability of waste, housing of waste in concrete structures and monolithic concrete construction, defeating the meaningful "alternatives" analysis required by NEPA;
- (6) approved project is premised upon ...New York's 10 percent payment of the costs of site preparation, waste

disposal, and minimum one hundred year maintenance and groundwater monitoring, despite there being no such legal obligation unless and until the Legislature of the State of New York appropriates sums of money.

- (7) The DOE's Environmental Assessment (EA) disavowed the applicability of site suitability and selection requirements, and the site DOE selected is at a location 600 feet away from the site upon which the EA focused.
- (8) DOE failed to disclose other relevant and significant impacts including anticipated radiation doses to the general public, the failures of two past radioactive waste disposal sites (which have contaminated surrounding soils and waters) situated adjacent to the proposed sites, the effects of the proposed disposal sites on the existing disposal areas, and other applicable concerns. **

GE PULLS OUT OF LLRW PROCESSING, HLW CONTRACTOR SUPPORT BUSINESS

Within the past two weeks, General Electric has announced that, following fulfillment of current contract commitments, it will no longer be in the business of providing LLRW treatment and processing services or continue to seek to provide contractor support services to the HLW program. The announcement came as somewhat of a shock to many in the LLRW business since it was only two years ago or so that GE started to develop and market LLRW processing services. At Waste Management '86 the company had just begun to aggressively market their mobile supercompaction service.

According to a GE spokesman, the decision to pull out of the waste business grew out of the Company's continual strategic planning activities and was based on changes in the marketplace and the company's decision to concentrate its resources and activities on the servicing and fueling of existing boiling water reactor plants (BWRs) over other activities, including services for pressured water reactors (PWRs).

Unfavorable Business Climate

The decision to cease providing services for PWRs and LLRW waste management was based on "an unfavorable evaluation of the earning potential of the two businesses compared to resource requirements and potential liabilities associated with waste management."

With regard to HLW this means that following completion of current DOE contracts to provide technical support on the HLW Salt Project and the Rod Consolidation Project, the company will not seek any further business in this area.

In the LLRW management business this means an end to providing radwaste solidification (AZTEC) and supercompaction services.

As of November 1986, the Company estimates that the current investment in plant and equipment to support the waste management services business was \$17 million. The staff cutback in this area will directly effect about 30 people in San Jose who are involved in LLRW and HLW support services. It will not effect GE staff currently involved at Shippingport, the personnel at the Morris Spent Fuel Storage Facility, or the operation of the California Nuclear Center. **

IN NEW ENGLAND

Maine State Senator Judy Kany reports that Maine is **not** currently engaged in compact negotiations with any of the neighboring New England States. The Senator, who chairs the State Advisory Commission on Radioactive Waste, made it clear that Maine is proceeding to develop a state-use only LLRW disposal facility. When asked about the economic viability of a small scale site solely for Maine LLRW disposal, Ms. Kany replied that the resulting disposal costs to the state's utility would be small compared to current operating costs.

The Maine Advisory Commission is currently focusing on the establishment of a separate state entity, patterned after the Texas LLRW Authority, to develop and operate a state-use disposal facility. The Advisory Commission Chair informed the EXCHANGE that preliminary geological investigations have been completed and regions with suitable sites for a disposal facility have been identified. Ms. Kany did add that Maine remains interested in contracting with compacts or other states for disposal of Maine's waste in an out-of-state facility, but remarked that, as of yet, none of the compacts with currently operating facilities have expressed any interest in such an arrangement. Maine LLRW site development activities are supported by a \$10.00 per cubic ft. fee levied on the state's generators.

IN THE DOE

The U.S. Department of Energy (DOE) has strengthened the authority of the Office of the **Assistant Secretary for Environment, Safety and Health** in the design, construction and especially the operation of DOE nuclear facilities around the country.

Secretary of Energy John S. Herrington has issued a series of departmental orders which, among other things, gives Assistant Secretary for Environment, Safety and Health Mary Walker the authority to shut down any DOE facility if she finds a "clear and present danger."

The shutdown order stipulates that if the Assistant Secretary for Environment, Safety and Health determined that a clear and present danger exists, the Assistant Secretary is to notify the appropriate senior department officials. "Upon receiving such notification," the order states, "the Head of the Field Element shall take immediate action to curtail or suspend the operation and to mitigate the danger."

Another significant strengthening in the policy is the requirement for concurrence by the Assistant Secretary in decisions to initiate construction and operation of the Department's major new nuclear facilities, as well as significant modifications to existing nuclear facilities that may raise new safety concerns.

MEETING NOTICE

The Department of Energy's Oak Ridge Operations is sponsoring a three-day waste management conference the "**Oak Ridge Model**" Conference in Oak Ridge, Tennessee, February 3-5, 1987. The conference will focus on the "Oak Ridge Model," an approach being used on radioactive, mixed, and hazardous waste problems in Oak Ridge. The "Oak Ridge Model" provides the avenue through which the Department of Energy can join in a partnership with the private sector, universities, and regulatory agencies with the goal of finding solutions to problems at our facilities that may be transferrable to other locations. The conference will enable the Department of Energy to gain a better understanding of the waste management problems to be confronted, be instrumental in generating private industry and university interest in the technical challenges of the waste management program, and encourage participation from federal and state regulatory agencies and the general public.

(Court Decision from pg. 1)

On the former matter the Court ruled that "the federal courts of appeals have original jurisdiction over actions involving the consultation and cooperation requirements applicable to MRS facilities under NWPA."

On both the jurisdictional issue over MRS matters and the question of the necessity of prior consultation with the states on the MRS proposal, the court found the NWPA to be "ambiguous". The basis for the decisions rendered were drawn from the court's determination of Congress' intent from the study of the Act's legislative history and its statutory structure.

Court of Jurisdiction Issue

In support of the determination that it was Congress' intent that the court of appeals be the court of original jurisdiction over MRS issues the opinion refers to the provisions of the Act dealing with the geological repository and finding that "...the overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions." It is this "timely development" concept and intent that is the key element cited in support of the court's decision on the jurisdictional issue. A statement, made in support of the proposed MRS facility, by Senator Bennett Johnston is quoted as evidence that Congress intended that the MRS be developed in a timely manner, as well as the repository.

As expressed in the opinion, it is the court's

view that "Congress clearly intended that the MRS proposal proceed in a timely fashion as the development of the permanent repository." Furthermore, the court found that the "MRS proposal cannot provide the back-up insurance desired by Congress unless it proceeds in the same fashion as the development of the permanent repository program."

Based on these timely development arguments, the court ruled that lengthy repetitive litigation over the MRS was not the intent of Congress and, therefore, the Appeal Court was indeed intended by Congress to be the court of original jurisdiction over MRS issues.

MRS Consultation Requirements

In ruling against Tennessee's claim that the state was not adequately consulted on the development of the MRS proposal, as required by the NWPA, the court supported DOE's contention that consultation and cooperation provisions of the NWPA with regard to the MRS applied "only after Congressional authorization of the proposal."

Again, the basis for the court's decision, as cited in the opinion, is the court's determination of Congress' intent as determined through an examination of the Act's legislative history. However, the court found that that in this matter the legislative history of the NWPA does not reveal the meaning that Congress intended to give the word "authorized." With no guidance from the legislative history to

resolve the definition of "authorized," the court set out to determine whether the Congress had set out specific goals with the enactment of the NWPA. What the court found was that Congress seemingly had two conflicting goals:

- providing the states with a meaningful role in the development of disposal facilities, and
- ensuring the timely development of an MRS proposal.

In examining this conflict inherent in the Act, the court found in favor of DOE citing various findings rendered in the U.S. Supreme Court decision *Chevron v. NRDC*, which included the statement that "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress the challenge must fail."

Impacts Beyond MRS

The Appeals Court decision on the court of jurisdiction issue would seem to end any ambiguity as to where claims should be made regarding provisions of the NWPA and DOE HLW program activities.

The basis upon which the court chose to determine the prior consultation requirement -- The Supreme Court *Chevron v. NRDC* decision -- in the light of the "discovery" that Congress adopted NWPA to meet two conflicting goals could effect ongoing and future legislation regarding the HLW program activities. The MRS consultation provisions are not the only provisions of the NWPA where legislative history is murky and a good case could be made that Congress' intent and goals were again inconsistent or self-conflicting. In all likelihood, a court facing this discovery on another NWPA matter could again base its opinion on the *Chevron v. NRDC* decision.

Dissenting Opinion Offered

Judge Wellford issued a dissenting opinion on the MRS prior consultation issue raised by the State of Tennessee. In his dissent

the Judge argues that under the Act "consultation and cooperation would take place before congressional authorization...." Furthermore, he adds "The Act's legislative history seems to make this the clear intendment of the prescribed procedures in order to give the states a meaningful and timely role in the site selection process.

DOE Should Move Forward

DOE is expected to move forward as quickly as possible on submitting the MRS proposal to Congress. One impediment, however, to moving beyond submission of the proposal to Congress and undertaking design tasks is that, under the Continuing Resolution enacted by the present Congress, DOE is prohibited from undertaking any "site specific studies" which includes such studies for the MRS. **

DOE RECOMMENDS DEFENSE HLW FEE INITIAL ESTIMATE \$2.6 - \$3.4 BILLION

On Tuesday, November 25, Secretary Herrington finally issued for release to the **Federal Register** DOE's recommendation for Defense Program's contribution to the Nuclear Waste Trust Fund.

Based on DOE's preferred option to determine the contribution, Defense would be required to transfer \$2.60 billion and \$3.43 billion into the Fund at this time. As reported earlier, the DOE is recommending a calculational approach that has Defense contributing funds to cover part of the overall costs of the repository in addition to those directly attributable to the disposal of Defense High Level Waste (DHLW) (See EXCHANGE, Vol. 15, Nos. 6, 8 & 14). The cost estimates of the repository used to calculate the contribution are based on estimates used in "Analysis of The Total-System Life-Cycle Cost For The Civilian Radioactive Waste Management Program (DOE/RW-0047)."

The DOE Calculation Approach

As described in the **Federal Register** notice, the DOE recommendation calls for a Defense "fee that equals the total cost of disposing

of DHLW by OCRWM with common costs shared on the basis of areal dispersion, piece count, and share of cannisters processed in a facility." The area dispersion factor takes into account the fraction of the total repository area required for DHLW. The piece count factor is the ratio of the total number of DHLW cannisters to the total number of waste packages.

Credits Could be Given

Included in the DOE preferred option is the possibility that the Defense Program's fee could reflect credit for activities that would reduce the overall cost of OCRWM activities. However, any general research on nuclear waste management carried out by Defense Programs would not receive any credit if it did not directly affect disposal costs.

Other Options Considered

The FR notice describes two other options to set the Defense contribution that were considered but rejected by DOE. The second option considered was to base the

Defense contribution on the "Department's estimates of the electric-generation equivalent for past and future reactor operations that have produced DHLW." This option would have Defense contributing between \$1.75 billion in 1985 dollars.

The third option would have the Defense contribution based on what the costs would be of separate repository systems, one for Defense, one for commercial. The total DHLW fee would then be equal to the estimated cost of a combined disposal system multiplied by the estimated cost of a DHLW-only disposal system divided by the sum of the costs of a DHLW-only system and civilian-waste only system. This option had been recommended by utility representatives. If it were used, the Defense program fee would be about \$5.3 billion, based on 1985 dollars.

The official notice on the recommendation should appear in the December 2 or 3 **Federal Register**. Comments on the proposals must be submitted within sixty day of its release. **

BULLETIN!

On Wednesday, November 26, 1986, the Tennessee State Attorney General filed for a review of the three judge Appeals Court Panel decision regarding the MRS Proposal before the full 12 judge Sixth Court of Appeals. The Court accepted the appeal and requested that the Department of Justice, on behalf of the Department of Energy, respond to the Tennessee request by Friday, November 28th. The Court may issue a "housekeeping stay" of the decision on Friday until it can consider the Tennessee request and DOE's response.

THE SECOND REPOSITORY DECISION: UDALL PUMMELS HERRINGTON

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The participants in the recent Atomic Industrial Forum/American Nuclear Society meeting in Washington, D.C. were treated to a rare public event: back-to-back speeches by the key congressional and Administration players on nuclear waste. Congressman Mo Udall (D-AZ), first up, expressed his "disillusionment" with the nuclear waste program and ridiculed the Administration's decision to suspend the second repository siting process. DOE Secretary John Herrington immediately followed at the podium with a defense of the program in which he essentially referred to Udall's contentions as "unfair and unfounded -- and wrong."

The winner of this rhetorical clash of nuclear waste heavy-weights: Mo Udall, by a devastating knock-out.

Udall, known for his clever and disarming wit, was dead serious on nuclear waste. The Department, he charged, played politics with the Nuclear Waste Policy Act, a statute crafted through "great statesmanship". Udall, the legislative architect of the Act, reminded everyone that the grand political compromise underpinning the NWPA was the notion of two repositories, one in the west and one in the east. When DOE dropped the second repository, Udall accused them of putting the next election ahead of a credible site selection process.

Udall, although suffering the obvious ill effects of Parkinson's disease, was intellectually sharp and unrelenting in his attack on the Energy Department. His arguments were delivered with uncharacteristic emotion, spoken like a man determined to speak his mind.

Secretary Herrington, seemingly undaunted by Udall's assault, plodded through the prepared text of his speech. When he reached the nuclear waste section, he enthusiastically defended his May 28th decision to "defer indefinitely" the second repository. His defense, however, was feeble at best.

The Secretary first argued that the second repository decision was fiscally prudent, given the declining reactor orders and the concomitant reduction in nuclear waste. But so what if the postponement of the second repository siting will save money. The underlying centerpiece of the NWPA -- regional equity with two sites -- has been forever compromised. In essence, DOE decided to sacrifice the spirit of the law in favor of the bottom line.

Herrington further responded that the second repository decision was not political. Well, anyone who has followed nuclear waste, including ongoing congressional investigations, fully recognizes that a fair amount of politics has been involved. Putting this aside, however, the Secretary only compounded the political problem when he asked why a Republican Administration would defer the second repository when the decision would adversely affect three critically-important 1986 Republican races (two Senate races and one gubernatorial race) in Washington, Nevada, and Texas.

The Secretary's rhetorical question only underscores the political ineptitude of the May 28th decision. While abandonment of the second repository probably

