

THE LOW-LEVEL RADIOACTIVE WASTE POLICY

AMENDMENTS ACT OF 1985:

PRINCIPAL LEGAL ISSUES

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ABSTRACT

The Low-Level Radioactive Waste Policy Amendments Act of 1985 establishes the legal and regulatory framework which will govern the future disposal of low-level radioactive waste in the United States. The Act raises a number of legal issues including: the rights of generators to sue states that have failed to timely develop new disposal facilities, the availability of additional disposal capacity at the existing disposal facilities over and above the allocations provided in the Act, the status of "greater than Class C" waste, waste "below regulatory concern," and "mixed" waste under the Act, and the effect of provisions requiring expedited licensing of new disposal facilities.

INTRODUCTION

With the passage of the Low-Level Radioactive Waste Policy Act of 1980 (Pub. L. 96-573) (1980 Act), Congress provided only the barest outlines of the program it envisioned for the future disposal of low-level radioactive waste in the United States. The 1980 Act codified the policy of the federal government with respect to low-level radioactive waste disposal in its most skeletal terms and provided broad authority to the states to carry out that policy in the manner they deemed most appropriate.

Pursuant to that authority, most of the states entered into interstate compacts, providing for the disposal of their waste on a regional basis and the exclusion of waste generated outside their respective regions after January 1, 1986, subject to Congressional consent to their compacts. As 1986 approached, however, it became apparent that no new disposal facilities would be available and that Congressional consent to those compacts with existing disposal sites would authorize closure of those sites to much of the waste generated in the United States -- a result clearly unacceptable to states and regions without existing disposal facilities.

On the other hand, those states with operating disposal facilities made it clear that if Congressional consent to their compacts was not promptly forthcoming, they would take steps to close their sites. As a result, it became necessary to find a compromise through which Congress could consent to the compacts, while at the same time, assure continued access to the existing disposal sites pending development of new disposal capacity.

On December 19, 1985, Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Title I of Pub. L. 99-240) (Amendments Act or Act), establishing a relatively comprehensive legal and regulatory framework governing the disposal of low-level radioactive waste in the United States, and providing specific terms and conditions for continued access to the existing disposal sites. At the same time, Congress granted its consent to seven regional compacts (Title II of Pub. L. 99-240).

The Amendments Act is a complex piece of legislation containing detailed provisions governing, among other things, the rights and obligations of low-level waste generators and individual states and regions, and the duties of the Department of Energy (DOE) and Nuclear Regulatory Commission (NRC) with respect to low-level waste disposal. The heart of the Act is section 5 which establishes a complex system of milestones, incentives and penalties, all intended to encourage the prompt development of new disposal facilities.

Under section 5, generators in unsited regions and states are guaranteed limited access to the existing disposal sites until 1993, so long as those regions and states achieve adequate progress in developing their own disposal facilities. Specific milestones against which such progress is to be measured are designated, and surcharges are imposed on the waste generators. Failure to meet a milestone may result in increased surcharges or early denial of disposal facility access. Achievement of a milestone requires that a portion of the surcharges received from the generators be paid to the unsited state, as an incentive, to be utilized for purposes associated with development of the new disposal facility. Other major provisions authorize NRC to grant "emergency access" to the existing disposal sites, require expedited licensing of new disposal facilities, address the identification of waste "below regulatory concern," and require the development of guidelines governing non-shallow land burial disposal methods.

In short, the Amendments Act addresses, in a comprehensive fashion, many of the issues left unresolved in the 1980 Act. In promulgating the Amendments Act, Congress appears to have done an admirable job of addressing those issues while, at the same time, paying due deference to the terms of the various interstate compacts negotiated by the states. Given the detailed and comprehensive nature of the Act, however, it is almost certain to generate a number of legal issues as it is implemented over the next several years.

One of the most important of those issues involves the effect of provisions requiring Governors of unsited states, under certain circumstances, to "certify" that their states will be capable of handling their waste after 1992, and mandating that states take title, possession and assume liability for their waste in the event that no state or regional disposal facility is available after 1995. I would like to begin by discussing the rights and obligations of the states and generators under these provisions. Should 1996 find any state without access to disposal capacity, litigation regarding such rights and obligations can be anticipated.

After considering that issue, I will address several other aspects of the legislation which may be the subject of considerable interest in the nearer term. Those include: the extent to which the Act provides "additional" disposal capacity for generators over and above their respective allocations; the availability of disposal capacity for low-level waste with radioactive concentrations exceeding Class C limits under 10 C.F.R. Part 61; the likelihood of prompt licensing reviews for new disposal facilities in light of the provisions requiring expedited licensing of such facilities; the effect of provisions requiring expedited processing of petitions to exempt various waste streams from regulation; and finally, the prospects for resolution of the continuing debate over the regulation of "mixed" hazardous and radioactive waste in light of the last-minute deletion of provisions governing the disposal of such waste from the Act.

While there are a number of legal issues associated with its implementation, the Amendments Act represents a significant step forward in the effort to create and implement an equitable and workable national low-level radioactive waste disposal system.

GOVERNORS' CERTIFICATION AND TRANSFER OF TITLE, POSSESSION AND LIABILITY

Governors' Certification

Section 5(e)(1)(A) of the Act requires each state that is not a member of a compact region to either ratify compact legislation or "indicate its intent to develop" a disposal site within the state by July, 1986. The state's intent to develop such a site may be manifested by "legislation or [through] the certification of the Governor."

Similarly, section 5(e)(1)(C) provides that if by 1990 a complete disposal facility license application has not been filed by an unsited state or region, the Governor or chief executive officer of each affected state shall provide a written certification to the NRC that his state "will provide for, the storage, disposal, or management of . . . [its low-level waste requiring disposal after 1992 and shall] include a description of the actions that will be taken to ensure that such capacity exists." Such certification will, under section 5(e)(1)(E), be transmitted to Congress and published in the Federal Register.

The Act, however, does not prescribe the manner in which the Governors must certify their states' intent, and it is not clear that such certifications would have any binding effect on the certifying Governor or subsequent Governors. Under the Act, the issuance of an executive order, policy statement or letter of intent by a Governor might be sufficient

"certification" of a state's intent to develop a site or otherwise manage its waste. Such actions, even with their transmittal to Congress and publication in the Federal Register, may not bind the state to meet its commitment. Furthermore, even legislation may not bind the state unless carefully crafted to mandate specific state action. Passage of such legislation is unlikely and would, in any event, be subject to amendment as the time for state action drew nearer. Thus, it is not at all clear that the provisions of the Act requiring unsited states to manifest their intent to handle their own waste bind the states to carry out that intent.

Transfer of Title, Possession and Liability

While the Governors' certifications may not, in practice, be enforceable, the Act does contain a significant, if belated, enforcement mechanism. Section 5(d)(2)(C) provides that if by 1993 a state is unable to provide for the disposal of all of its waste, such state, at the request of its generators, shall take title and possession of the waste, and shall be liable for damages incurred by the generators resulting from the state's failure to promptly take possession of the waste. However, if such a state opts not to accept title and possession, it may, under the Act, allow its generators to receive the surcharge rebate which would otherwise have been the state's had it opened a new site for operation.

Given such a choice, it is difficult to imagine those states or regions which, by 1993, still have not developed their own disposal capacity accepting title, possession and liability for their waste when they may, instead, simply forego receipt of a fixed sum, however substantial. Since the surcharges will be paid by the generators, this provision appears to permit the states to avoid liability. While by 1993 some new disposal capacity should be available, generators in states opting not to accept title, possession and liability may be forced to store their waste on-site, despite the fact that such a result would be contrary to Congress' intent. As Senator Hart (D. Colorado) stated in floor debate on the Act:

We were concerned . . . that a State may choose to "manage" its waste [after 1992] by telling the waste generators that they had to develop a means of storage for their waste. Such a policy would be unacceptable from our perspective and would leave generators with no effective recourse. . . . States cannot continue to rely on other entities to solve the low-level waste disposal problem. . . .

Accordingly, although Congress intended the states, after 1992, to be capable of storing or disposing of their waste without relying on the on-site storage capacity of individual generators, generators with such capacity may be forced to store their waste (and perhaps others') on-site.

However, the Act also unequivocally provides that a state which is unable to provide for the disposal of its waste by 1996 "shall" accept title, possession and liability for its waste. Section

5(d)(2)(C) requires such a state, upon the request of a generator or waste owner, to take title, possession and be liable for:

all damages directly or indirectly incurred by such generator or owner as a consequence of the [state's] failure... to take possession of the waste as soon after January 1, 1996 as the generator or owner notifies the State that the waste is available for shipment.

This provision creates an obligation on the part of the states to accept title and possession of waste which they cannot dispose of as of January 1, 1996. That obligation may be enforced in at least two and perhaps three ways.

First, failure to accept the waste as required creates a right in the generators to obtain damages. The Act creates liability for "all" damages directly or indirectly incurred by the generators resulting from any failure to take possession as soon after January 1, 1996 as a generator notifies the state that the waste is available for shipment. Both actual or "compensatory" damages (such as a generator's costs of storing its waste and any damages resulting from "actions" against a generator due to the state's failure) as well as "punitive" damages appear to be contemplated. In fact, statements in the legislative record make clear that state liability extends to "all" damages directly or indirectly caused by the state's failure, including those resulting from the need of a generator to cease operations due to the presence of the waste.

Although states are generally immune from suit under the Eleventh Amendment to the U.S. Constitution, such immunity may be waived, and under applicable precedents, may be deemed to be waived by the states' "acceptance" of the terms of the Amendments Act. Thus, unless a state promptly chose not to abide by the terms of the Act and to, therefore, relinquish the benefits of continued access to the existing disposal sites through 1992, it may have consented to be sued in accordance with the terms of this provision.

The second enforcement mechanism is implicit in the relationship between the Act and the regional compacts. Failure to take title and possession of the waste would represent non-adherence by the states to the terms of the Amendments Act. Such non-adherence would void Congressional consent to the compact in which the states are members (since the Act requires adherence to its terms as a condition of Congressional consent to the compacts), and would thus eliminate the region's authority to exclude out-of-region waste from its facility once operational. Thus, there is another strong incentive for the states to comply with the terms of the Act and to accept title, possession and liability for their waste. One can only hope that, by 1996, all states will at least be on the threshold of initiating operation of their disposal facilities and will need, at most, a limited amount of storage capacity to "bridge the gap" between January 1, 1996 and facility operation.

The third potential enforcement mechanism is suit for "specific performance" of a state's obligation, by which a generator might force a state to accept its waste in lieu of monetary damages. The language of the Act providing that states "shall" take title and possession suggests that Congress did not intend to foreclose this avenue of relief, though it has not explicitly sanctioned suits for specific performance.

In short, the Act creates a clear state obligation to accept responsibility for its own waste but, unfortunately, not until 1996. Hopefully, the threat of losing access to the existing disposal facilities prior to 1993 (as a result of noncompliance with the designated milestones) will be sufficient to assure prompt development of new disposal facilities.

AVAILABILITY OF "ADDITIONAL" DISPOSAL CAPACITY

The Amendments Act allocates 19.6 million cubic feet of disposal capacity at the existing disposal sites to low-level waste generators between 1986 and January 1, 1993, of which electric utilities are allocated 11.9 million cubic feet. While non-utility generators are subject only to an overall volume limitation of 7.7 million cubic feet, each commercial power reactor is allocated a specific quantity of waste for the seven year transition period. Assuming compliance with the applicable milestones, the existing disposal facilities may not reduce the utilities' allocations.

Although the allocations are generally reasonable, hardships in individual cases are almost certain to occur. Accordingly, generators may find it necessary, in specific circumstances, to obtain access to additional disposal capacity. While the Act permits the existing disposal sites to accept greater quantities of waste, for utility generators, perhaps the most promising vehicle for obtaining additional disposal capacity is the "transferability" provision of the Act (section 5(c)(4)). That provision authorizes utilities to assign disposal capacity allocated to them to other utility generators so long as such assignments are "unconditional." Since the Act leaves most of the details of the assignment process to be negotiated by the participating parties, it is too early to judge how available or costly such assignments will be.

Another vehicle for obtaining additional disposal capacity, which is only available to utility generators, is the provision authorizing such generators to petition the Secretary of Energy (Secretary), pursuant to section 5(c)(5) of the Act, for an additional allocation from the 800,000 cubic feet of capacity set aside for "unusual or unexpected operating, maintenance, or repair activities." Such capacity should be made available for reactors which discharge no radioactively contaminated water ("zero discharge plants"), PWR steam generator tube repairs or replacements, BWR piping replacements, and other similar conditions. Thus, more than mere "consumption" of a utility's basic allocation will be necessary in order to authorize release of additional capacity under this provision, and utilities will have to demonstrate the "unusual or unexpected" nature of the activity creating the need for the additional capacity in order to receive an additional allocation.

Finally, the Amendments Act contains a provision (section 6) permitting the NRC to grant "emergency access" to the existing disposal sites "if necessary to eliminate an immediate and serious threat to the public health and safety or the common defense and security" and detailing a procedure for obtaining such access. This provision (which theoretically applies to all generators) provides access only under limited conditions where the threat to the public health and safety "cannot be mitigated by any alternative consistent with the public health and safety" including storage, agreements with the existing facilities to accept the waste, use of assigned capacity or, most interestingly, "ceasing activities that generate low-level radioactive waste." While utility generators may request emergency access, the provision makes it difficult for any large generator with access to storage capacity to obtain such relief.

Accordingly, absent an unusual condition creating additional, unanticipated waste, utility generators, for the most part, will have to rely on inter-utility assignments for additional capacity. Non-utility generators will have to rely on the strict requirements of the emergency access provision.

GREATER THAN CLASS C WASTE

One of the thorniest problems which faced Congress in promulgating the Amendments Act was the assignment of legal responsibility for the limited amount of low-level waste with radioactive concentrations exceeding those for Class C waste pursuant to 10 C.F.R. Part 61 (Part 61) -- the NRC's regulations governing shallow land burial of low-level waste. Under Part 61, there are no explicit criteria governing disposal of such waste, and generators must obtain disposal authorization on a case by case basis. While many of the states did not wish to be obligated to accept waste exceeding Class C concentrations in their regional facilities, failure to clearly establish responsibility for disposal of such waste would result in the creation of a category of "orphan" waste -- that is, waste for which no appropriate repository would have been designated.

The Amendments Act (section 3(b)), accordingly, makes such waste the responsibility of the federal government. The Secretary, in particular, must dispose of such waste in an NRC licensed facility and must report to Congress regarding DOE's recommendations for how such waste (and other "federal" waste) should be disposed of within one year of the enactment of the Amendments Act. The Secretary is prohibited from disposing of such waste until ninety (90) days after submission of the report to Congress, in other words, not before April 1987.

While the Secretary is obligated to dispose of greater than Class C waste, the Act does not prescribe a time certain for DOE acceptance of such waste. Furthermore, since disposal must be performed in an NRC licensed facility, and the existing DOE low-level waste disposal sites are not licensed by the NRC, there is no currently available disposal facility for greater than Class C waste. While DOE could construct a new disposal facility to meet its obligation under the Act, such a course appears highly unlikely and would, in any event, take several years to accomplish. Furthermore, while a large portion of such waste may be authorized for disposal

in a high-level waste repository (which will be licensed by the NRC), the first such facility is not expected to be operational until 1998 or later.

Accordingly, although greater than Class C waste has been designated a federal responsibility, there will, in fact, be no repository required to accept such waste in the immediate future. Thus, absent agreement with the existing disposal site operators, the low-level waste with the highest activity levels will most likely continue to be stored at the site of generation for the foreseeable future.

EXPEDITED LICENSING OF NEW DISPOSAL FACILITIES

Section 9 of the Amendments Act states that "[i]n order to ensure the timely development of new low-level radioactive waste disposal facilities," the NRC or, as appropriate, Agreement State, shall "establish procedures and develop the technical capability for processing [license] applications," and shall "to the extent practicable," complete the review and processing of such applications within fifteen (15) months of receipt of an application. Public hearings may, however, continue beyond the 15 month deadline. Finally, NRC must "to the extent practicable, consolidate all required technical and environmental reviews and public hearings." While it is clear that Congress intended the NRC to conduct licensing reviews for new disposal facilities in an expeditious manner, section 9 provides little assurance that that intent will be carried out.

Rather than require licensing reviews to be conducted in a prescribed time-frame, the provision merely admonishes the NRC to "do its best" within the bounds of "practicability" to complete its review process in 15 months. Furthermore, there is not even a suggested or targeted deadline for completion of public hearings on disposal facility license applications. While under existing NRC regulations governing the licensing of shallow land burial facilities, such licensing (including public hearings) could, given diligent NRC action, be completed in eighteen (18) months, experience suggests a more extended licensing process.

Of even greater concern is the fact that no existing regulations are in place for the licensing of facilities using alternative disposal technologies, and NRC will need additional time to develop appropriate standards for the processing of such applications. Although section 8 of the Act requires NRC to publish such standards within two years of enactment, processing of new facility license applications (for alternative disposal techniques) may hamper states' efforts to create operational disposal facilities by 1993.

In order to expedite the process, NRC should make full use of "legislative" style hearings (in which participation is typically limited to the presentation of written testimony in the nature of the type of testimony presented to a legislative body), rather than adjudicatory or "trial-type" hearings similar to court proceedings. NRC might also consider authorizing some site-related activities before the licensing process is completed. Given diligent NRC effort, shallow land burial facility licensing activities may be completed in a manner which will not adversely affect state efforts

to site new facilities. Applications for facilities using disposal methods other than shallow land burial, however, can be expected to require extended processing time. Accordingly, regions and states applying for such licenses must understand that doing so will make it more difficult to meet the new facility siting milestones provided in the Act.

DEREGULATION OF WASTE BELOW REGULATORY CONCERN

In an effort to assist generators in reducing the volumes of waste requiring disposal in licensed low-level waste disposal facilities, Congress enacted section 10 of the Amendments Act, which requires the NRC to "establish standards and procedures" and to "develop the technical capability" to act on petitions to exempt specific radioactive waste streams from regulation. Such waste streams are those which contain radionuclides "in sufficiently low concentrations or quantities as to be below regulatory concern." Section 10 requires NRC to rule on such petitions "in an expeditious manner" and, where appropriate, to expeditiously exempt such waste from regulation, but does not define the phrase "below regulatory concern."

Current NRC regulations, 10 C.F.R. § 20.302, in particular, authorize NRC to rule on individual petitions to permit disposal methods alternative to those established in the regulations, and several such petitions have been filed and granted. The Commission's current rulemaking procedures (10 C.F.R. Part 2, Subpart H) also enable it to rule on "generic" petitions for rulemaking. Pending before the Commission at this time is a rulemaking petition filed by the Utility Nuclear Waste Management Group requesting the NRC to establish radionuclide concentrations in waste oil from nuclear power plants for which disposal may be carried out without regard to radioactive material content.

While, under the Act, NRC must act on "petitions" expeditiously, it is not clear whether Congress intended to require expeditious processing of petitions under section 20.302, the Commission's rulemaking procedures, or both. Additionally, no specific deadline is established for ruling on such petitions.

The interpretation most consistent with Congressional intent would require expeditious processing of both section 20.302 and rulemaking petitions so long as such petitions sought to exempt specific radioactive waste streams from regulation. Although NRC's response is far from certain, prior NRC actions suggest that petitions demonstrating that waste disposal activities will not exceed an individual exposure rate of one millirem per year may, perhaps, be deemed below regulatory concern, whether generic in nature or pursuant to section 20.302.

REGULATION OF MIXED WASTE

In the closing hours of Congressional negotiation over the Amendments Act, provisions in the Senate versions of the Act addressing the respective responsibilities of NRC and the Environmental Protection Agency (EPA) over "mixed" radioactive and hazardous waste were deleted by the House in the

absence of an acceptable compromise provision. Accordingly, the Act does not delineate NRC's and EPA's role with respect to the regulation of such waste, permits both agencies to engage in a burdensome and conflicting regulatory scheme, and fails to resolve those agencies' continuing inability to reach agreement on their respective responsibilities.

In deleting the mixed waste provisions from the final bill, the Chairmen of the two House Committees of jurisdiction promised to conduct hearings during the second session of the 99th Congress (which began in January). While waste generators generally favor placing exclusive regulatory authority in one agency, preferably NRC, some "mix" of responsibilities appears likely. Clearly, neither NRC nor EPA wishes to appear to be "abdicating" its functions to the other. The challenge will be to find a means of assuring sufficient involvement by both agencies without creating a dual set of regulations or requiring the promulgation of an extensive set of new regulations.

What appears most likely is that NRC and EPA will, in some manner, be required to "jointly" identify those substances subject to regulation as mixed waste. While this cooperation seems prudent and is relatively uncontroversial, the determination as to where to place the important authority for determining what regulations need be applied to such waste is more problematic. Possibilities range from full joint regulation by both agencies, to "concurrency" or "consultation" by one agency with the other, to exclusive authority in a single agency.

A determination by one agency, with the concurrence of or in consultation with the other, seems the most likely course. The most efficient system would simply require consultation and due consideration of the other agency's views, and permit one agency to implement the regulatory scheme. Such a system should not require the creation of new, unnecessary regulations, but should permit the agencies to rely, to the maximum extent possible, on existing regulations and disposal facilities. Finally, if certain waste is deemed unsuitable for disposal at any existing disposal facility, it is essential that the legislation specifically identify a suitable method of disposal in order to avoid creating additional "orphan" wastes. While the overall statutory duty of each agency to protect the public should be accommodated, it should not be necessary to implement the full gamut of EPA and NRC regulations to achieve that objective.

CONCLUSION

The Amendments Act represents a creative and comprehensive effort by Congress to address the many details of implementation left unresolved by the 1980 Act. The very nature of the Act, however, creates additional questions and issues which must be addressed over the next ten years. While some of those issues will prove difficult to resolve, the Act, nevertheless, represents a significant stride forward in the development and operation of an effective national low-level waste disposal system.