LITIGATION IN STATE COURT BY CAL RAD FORUM IN PURSUIT OF TIMELY DEVELOPMENT OF A SAFE LOW-LEVEL WASTE DISPOSAL FACILITY

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ABSTRACT

On three occasions, in 1984, 1992, and 1993, Cal Rad Forum has gone to court in pursuit of the timely development, in California, of a safe and reliable disposal facility for low-level radioactive waste (LLRW). The first two cases involved complaints that California's agreement state agency, the Department of Health Services, was not proceeding in accordance with statutory requirements by which the State is to fulfill its legal obligation to provide for timely development of an LLRW disposal facility. In both of these cases, the Court rulings, while not without some delay, were favorable to Cal Rad's positions and served to avoid what would have become very substantial delays in development of the Southwestern Compact's regional disposal facility. In the third case, now pending in state court, a lawsuit has been brought by opponents of the proposed Ward Valley disposal facility challenging licensing and Environmental Impact Report certification decisions by the Department of Health Services for the Ward Valley disposal project. Cal Rad Forum has intervened to assist the defense of these state decisions. This paper will describe how Cal Rad Forum, an association of organizations that use radioactive materials in the states of the Southwestern Compact, has served the interests of radioactive material licensees in the compact region through litigation in State courts.

1984-1985: CHEM-NUCLEAR SYSTEMS, INC. v. DEPARTMENT OF HEALTH SERVICES

In 1984, the Department of Health Services faltered in its efforts to select a private firm to develop and operate California's low-level waste disposal facility as required by law. The Department received applications from four firms competing for designation as the State's "license designee." Both the California siting legislation (Senate Bill 342 of 1983) and the Department's own regulations required that all applicants found qualified were to be ranked. This was to provide the Department with an automatic option in the event the selected (top ranked) firm withdrew or was, subsequent to the initial selection, disqualified. The Department, after evaluating the four initial applications, selected a firm to be designated license designee but did not rank the remaining firms. Within days, the selected firm withdrew and the Department did not act to select another firm as license designee nor did it proceed to rank the remaining firms despite Cal Rad's entreaties to do so. Following a delay of several months, the Department attempted to reopen the competition allowing all competitors to refile and respond to new requests for "enhanced technology." The Department was sued by one of the competitors who wanted the Department to proceed with the ranking and selection process based on the initial applications.

Cal Rad participated in the 1984 lawsuit (Chem-Nuclear Systems, Inc. v. State Department of Health Services) by filing a brief as amicus. Cal Rad's brief provided the court with a backdrop of federal and state law pertaining to the need to develop a disposal facility for LLRW to meet the requirements of the federal Low-Level Radioactive Waste Policy Act. But for this brief, the Court would have had no reason to know that there was more at stake than a dispute among competing applicants for a franchise or to understand the importance of a prompt resolution. Cal Rad urged the court to require the Department to rank the remaining competitors. Cal Rad also complained that the Department's new requirement for "enhanced technology," offered as the reason for reopening the competition, went beyond the existing regulatory requirements and could not be imposed without a rulemaking to change the regulations.

The Court's ruling was as urged by Cal Rad: a requirement that the Department rank the applicants based on their original filings, that the selection process proceed according to the ranking, and new requirements of the kind proposed by the Department would have to be accomplished through a rulemaking.

Findings by the Court served to outline the standard of review to be used by the Department of Health Services in reaching its decision on the license application. The Court found that the California Legislature, in requiring the Department of Health Services to adopt regulations "consistent" with 10 CFR 61, had indicated it was satisfied that shallow land burial (near surface disposal) was safe and acceptable. The Court found that the governing state and federal regulations are "objective standards" ("not guidelines") which "are either met or they are not met. No balancing of factors is required." The Court further noted: "Part 61.23 sets out the federal standards for issuance of a license. The part states the overseeing agency will issue a license upon finding that issuance of the license will not constitute an unreasonable risk to the health and safety of the public." (Emphasis in Court's citation

to Part 61.23). The Court also upheld the validity of Department staff expertise as opposed to arbitrary, last minute policy changes.

1992-1993: CALIFORNIA RADIOACTIVE MATERIALS MANAGEMENT FORUM, ET AL, v. HEALTH AND WELFARE AGENCY, ET AL

In May, 1993, a ruling by the California Court of Appeal for the Third District (Sacramento) paved the way for issuance of the Ward Valley license and avoided further delay which might have lasted several years. The Court ordered the Department of Health Services to complete its processing of US Ecology's license application without regard to a coerced "agreement" to hold an adjudicatory hearing. An appeal was denied by the State Supreme Court in August, 1993. The Department issued the license on September 16, 1993.

In July, 1993, three petitions were filed with the California Supreme Court by US Ecology, Inc.* along with the American College of Nuclear Physicians and the Society of Nuclear Medicine, Cal Rad Forum, and the National Association of Cancer Patients. The Biomedical Industry Council of San Diego and the American Medical Association filed briefs as amici. The petitions sought to prevent the Department from holding an adjudicatory hearing on the Ward Valley license and to require that a decision be made on US Ecology's license application (pending since September, 1989) based on the lengthy public review process, including hearings, which had already been completed. Cal Rad Forum's petition was accompanied by a number of "Declarations" filed by member organizations that generate LLRW to illustrate the harms they would suffer as a result of loss of access to a licensed LLRW *disposal facility*. As in the earlier litigation in 1984-85, Cal Rad's participation served to provide the Court with an understanding of the broad issues involved and the consequences of delay, and to represent the point of view of users of radioactive materials in the Southwestern Compact region who will be the customers for the proposed disposal facility. The petitions were referred to the Court of Appeal for the Third District where they were consolidated as California Radioactive Materials Management Forum, et al. v. State of California Health and Welfare Agency, et al.

The complaints challenged a coerced "agreement" between two officials of the State Administration and the State Senate Rules Committee. In March and April of 1992, the Secretary of Health and Welfare and the Director of Health Services were required by a three-member majority of the Rules Committee, as a condition of having their names sent to the Senate floor for confirmation in their offices, to promise that the Department of Health Services would hold "adjudicatory hearings" before rendering a decision on the Ward Valley license application. This, despite the fact that the public comment record had closed eight months earlier in August, 1991 and the Department had announced in December 1991 that it had all the information it needed to render a license decision. Petitioners claimed that the Senate Rules Committee had violated the separation of powers provision of the California Constitution and that the Secretary abused his discretion by yielding to the coercive tactics of the Senate Rules Committee.

On May 7, 1993, The Appellate Court agreed with Cal Rad and other petitioners and ruled that California law does not require an adjudicatory hearing before a license can be issued for a LLRW disposal facility, and that by conditioning confirmation on the coerced "agreement" to hold the adjudicatory hearing, the Senate Rules Committee had acted unconstitutionally by usurping the powers of both the administrative and legislative branches. The Appellate Court ruled the "agreement" was void. The Court ordered the Department to complete its consideration of the US Ecology license application "without regard to or further consideration of the void agreement with the Senate Rules Committee." In the Court's view, "The issue is not a close or difficult question."

> Here, the Legislature did not purport to delegate supervisory authority over the Radiation Control Law to the Senate Rules Committee; instead, the committee assumed that power for itself. In doing so the committee acted without legislative authorization and in a manner which would be unconstitutional and void even if the Legislature had purported to delegate such authority.
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> The action of the Senate Rules Committee also usurped the power of the executive in violation of the separation of powers provision of our constitution.

The Court Upheld the Department of Health Services' Discretionary Decision Not to Hold an Adjudicatory Hearing

Ward Valley opponents have tried to mischaracterize the Court's ruling. They claim that the Court said only that an adjudicatory hearing is not required, and that the Department could hold such a hearing at its discretion. This is not correct. As the Court noted, the Department was on record that but for the unconstitutionally coerced "agreement" between the Rules Committee and the State officials seeking confirmation, the Department would not hold such a hearing. The Department had exercised its discretion to not hold an "adjudicatory hearing."

> We conclude that the Senate Rules Committee's interference in the administration of the law was unconstitutional and the purported agreement with the administrative officers is void. Formal adjudicatory hearings are not otherwise required by law and the respondents have conceded that the void agreement is the only basis upon which they intend to conduct further proceedings. Accordingly, we shall issue a peremptory writ of mandate to require the department to consider US Ecology's license application without regard to the void agreement with the Senate Rules Committee.
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> That this agreement is the sole reason for the department's intention to proceed with a formal adjudicatory hearing is beyond question.
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> It is clear that the department has not chosen to require further hearings in a formal adjudicatory mode in the exercise of administrative discretion, but has simply deferred to the agreement forced upon the director and

* As the State's "license designee" pursuant to provisions of Senate Bill 342, US Ecology is the developer/operator of the LLRW disposal project.

secretary by the Senate Rules Committee. An executive or administrative officer can no more abdicate responsibility for executing the laws than the Legislature can be permitted to usurp it. Nominees to public office cannot be permitted to waive their executive independence or consent to legislative supervision because our constitutional provisions serve important public policies beyond the interests of the nominees.

It is clear that the invalid agreement with the Senate Rules Committee is the sole reason the department has ordered further hearings of a formal nature. The department concedes that it does not believe further hearings are needed or legally required and asserts only that it desires to comply with the law. The parties and the public are entitled to have the department exercise its discretion with respect to the application of US Ecology. In short, the law requires the department to execute the provisions of the Radiation Control Act without interference from the Senate Rules Committee and without regard to the invalid agreement imposed upon the director and the secretary. (Emphasis added.)

From the point of view of users of radioactive materials in the Southwestern Compact faced with loss of access to the Richland, Washington and Beatty, Nevada disposal facilities on January 1, 1993, and the Barnwell, South Carolina facility on July 1, 1994, the overriding problems with the eleventh hour demand for an adjudicatory hearing is the unmanageable nature of such a multiparty adjudicatory hearing and the long delay that would result. As the Court noted:

Although time estimates are necessarily speculative, the proposed proceeding is expected to delay construction of the disposal facility from 18 months to several years.

In fact, to grant all interested persons the right to full participation as a party in a formal adjudicatory hearing would likely lead to proceedings which would be unduly time-consuming and, in all probability, unmanageable. As the federal court of appeals noted in a similar context: "To allow others to force the commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay. The sad truth about agency decisionmaking and evidentiary inquiries is that they take time; and time often works to the advantage of one party over another. Although evidentiary hearings and other procedural devices are useful--and sometimes indispensable--they may also be exploited for unworthy purposes..."

With respect to administrative procedures, a leading authority has observed: "The major malady that cuts deeply into efficiency is grossly excessive use of trial procedure..." (3 Davis, Administrative Law Treatise (2d ed. 1980) § 14.1, p.3)

The California Appellate Court on State Determination of Licensing Procedures

Attorneys for the Senate Rules Committee argued that California is compelled by federal law to conduct a formal adjudicatory hearing. The Appellate Court rejected this argument, finding that under both the Southwestern Compact and the Low-Level Radioactive Waste Policy Act licensing procedures are for the state to determine.

However, the issues in this case arise under state rather than federal law by virtue of article 5 of the compact which provides: "A regional disposal facility shall be approved by the host state in accordance with its laws. This compact does not confer any authority on the [Southwestern Low-Level Radioactive Waste] commission regarding the siting, design, development, licensure, or other regulation, or the operation, closure, decommissioning, or long-term care of, any regional disposal facility within a party state." (Health and Saf. Code, § 25878, art. 5) Moreover, except with respect to certain provisions designed to expedite state consideration of license applications, federal law leaves it to the state to establish procedures for processing applications and requires the state to consider an application "in accordance with the laws applicable to such application..." (42 U.S.C. § 2021i.)

Although Congress acted to require states to consider license applications in an expeditious manner, it did not impose particular hearing requirements upon the states and instead provided that states 'shall consider an application for a disposal facility license in accordance with the laws applicable to such application,..." (42 U.S.C. § 2021i) It left it to the states to establish procedures for considering license applications. (42 U.S.C. § 2021i(1).) Accordingly, we find nothing in federal law specific to low-level radioactive waste disposal which would impose particular hearing requirements upon the states.

Our state compatibility provisions do not furnish a basis for implying a formal hearing requirement for licensing decisions.

In title 42, United States Code section 2021i Congress left it to the states to establish procedures and to develop the technical capability for considering license applications, but provided that to the extent practical all licensing activities except public hearings should be completed within 15 months of receipt of the application and all required technical and environmental reviews and public hearings should be consolidated.

1993-1994: FORT MOJAVE INDIAN TRIBE, ET AL v. CALIFORNIA DEPARTMENT OF HEALTH SERVICES AND CITY OF NEEDLES v. CALIFORNIA DEPARTMENT OF HEALTH SERVICES

On September 16, 1993, four months after the Appellate Court decision ordering the Department to make a licensing decision, the California Department of Health Services issued a license to US Ecology, Inc. to construct and operate a low-level radioactive waste disposal facility at *Ward Valley*. On October 15, 1993, two lawsuits were filed in Los Angeles County Superior Court challenging the issuance of the license and certification of the Environmental Impact Report by the Department. One lawsuit was filed by the Fort Mojave Indian Tribe, Los Angeles Physicians for Social Responsibility, Southern California Federation of Scientists, and Committee to Bridge the Gap. Another lawsuit was filed by the City of Needles. Both suits name US Ecology, Inc. as a Real Party in Interest.

On December 8, 1993, Cal Rad Forum was granted status as an Intervenor by Judge Robert H. O'Brien and a hearing date of April 27, 1994 was set.

One of the complaints by the challengers is that state law requires that a full adjudicatory hearing must be held before a license can be issued. However, this was the precise issue already decided by the Appellate Court on May 7, 1993 in California Radioactive Materials Forum v. Department of Health Services. US Ecology, supported by the Department of Health Services and Cal Rad Forum, moved for summary adjudication and dismissal of plaintiff's claim that an adjudicatory hearing is required by California's licensing law. On February 7, 1994, Judge O'Brien ruled that no further hearing is required under California law to license the Ward Valley LLRW disposal facility.

In a second ruling Judge O'Brien denied the plaintiff's discovery request noting:

> Based on the extensiveness of the discovery request it is apparent that petitioners simply want to start the application process all over again with the Superior Court *making* the decision and entirely ignoring the administrative process. The law does not permit that process.

The Ward Valley site is federal land and must be acquired by the State of California before construction of the disposal facility can begin. Judge O'Brien's granting of the motion to dismiss the claim that an adjudicatory hearing is required bears directly on circumstances related to California's application to the federal government to purchase the 1,000 acre Ward Valley site from the U.S. Bureau of Land Management. On November 24, 1993, interior Secretary Bruce Babbitt informed California Governor Pete Wilson that he was delaying action on the land sale because the California Court is being asked to order a comprehensive hearing. Judge O'Brien's decision should resolve the Secretary's concern. The Secretary is, of course, under pressure from project opponents to delay the land sale. Nevertheless, we hopefully note Mr. Babbitt's comments on low-level waste disposal published in the Arizona Radiation Review in 1981 when he was Governor of Arizona:

> 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.

This position of former Governor Babbitt and the findings of the Sacramento Appellate Court on the state role in developing new disposal facilities (reported above) are in accord.

CONCLUSIONS: RESISTING ATTEMPTS TO CHANGE THE RULES

Cal Rad Forum has participated in state litigation to protect the interests of organizations that use radioactive materials in the Southwestern Compact region and to move the process of LLRW disposal facility development toward a favorable conclusion as expeditiously as possible. A consistent theme of Cal Rad's interest and involvement in state litigation has been to encourage government officials to hold to the course established by law to complete the licensing and development of the disposal project, inevitably a controversial facility. Thus our involvement in litigation about deviations from the developer selection process in 1984 and our opposition to attempts by opponents of the Ward Valley disposal project, beginning in late 1991 and continuing to this day, to persuade state and federal officials to delay the project by changing the licensing rules to impose new hearing requirements, not required by state or federal law, on the project licensing and land sale processes.