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September 23, 2003

Via Facsimile @ 301-415-2036
James Lieberman, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

RE: Memorandum on the Scope of § 151(b) of the Nuclear Waste Policy Act of 1982

Dear Mr. Lieberman:

In accordance with our telephone conversation of yesterday, attached for your consideration is a Memorandum on the Scope of § 151(b) of the Nuclear Waste Policy Act of 1982. As indicated, Waste Control Specialists LLC believes strongly that § 151(b) can and should be read to confer power on the Department of Energy to accept title and custody of low-level waste disposal sites licensed by Agreement States.

A narrow reading of § 151(b) will have truly tragic consequences. Texas stands at the threshold of being the first state to develop a new low-level waste disposal site, in accordance with Congressional policy in the Low-Level Radioactive Waste Policy Amendments Act of 1985. A narrow reading could seriously impede this Texas program. It would also send a strong and unfortunate message to all other Agreement States that authority to license low-level waste disposal should be returned to NRC in order for § 151(b) to apply and for the states to avoid an unnecessary, unwanted, and disproportionate burden that NRC is not itself required to bear.

At your convenience, I would welcome the opportunity to discuss this with you further. I can be reached directly at 703-918-4947.

Sincerely,

Martin G. Malsch

MGM/ec
Attachment

c: Karen D. Cyr, Esq. (OGC) (w/ attachment)
Stephen G. Burns, Esq. (OGC) (w/ attachment)
Joseph R. Gray, Esq. (OGC) (w/ attachment)
Stuart A. Treby, Esq. (OGC) (w/ attachment)
Mr. Paul H. Lohaus (STP) (w/ attachment)

ATTACHMENT

MEMORANDUM ON THE SCOPE OF SECTION 151(B) OF THE NUCLEAR WASTE POLICY ACT OF 1982

I. Legislative Background

The Nuclear Waste Policy Act of 1982 ("NWPA") originated in 1981 in the First Session of the 97th Congress, was passed in 1982 in the Second Session, and was signed by the President on January 7, 1983. The House-passed bill, H.R. 3809, was a consolidated bill that reflected the results of negotiations among Members of six or more Committees over three reported bills: H.R. 3809 reported by Interior and Insular Affairs (H. Rep. 97-491 Part I, 97th Cong., 2d Sess., April 27, 1982); H.R. 6598 reported by the Committee on Energy and Commerce (H. Rep. 97-785, 97th Cong., 2d Sess., August 20, 1982); and H.R. 5016, reported by the Committee on Science and Technology (H. Rep. 97-411 Part I, 97th Cong., 1st Sess., December 15, 1981). The Senate passed its own version of the NWPA in the form of S. 1662. However after S. 1662 was passed by the Senate, key Members of the House and Senate, in consultation with NRC and DOE, drafted a compromise version of H.R. 3809 which then passed both the House and the Senate in lieu of the other versions and was signed by the President. Because of the negotiated bill, there was no conference report, and so the committee reports are the most persuasive legislative history.

II. Rules of Statutory Construction

Under the landmark case of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), an agency has substantial latitude in interpreting a statute it administers so long as Congress has not spoken to the precise question at issue or, in other words, so long as the statute will admit of several possible readings. Moreover, in deciding whether Congress has spoken to the precise question, the overall statutory context and the legislative history must be considered carefully. *NRDC v. Browner*, 57 F.3d 1122,1125 (D.C. Cir. 1995). If the statutory language and legislative history create any ambiguity in how the statute should be read, then the agency must interpret the statute in accordance with sound policy. Chevron at 865-866. See also Pierce, "Administrative Law Treatise," Fourth Edition at Vol. I pages 142-144.

III. Statutory Language

Section 151(b) of the NWPA authorizes DOE to take title and custody of low-level radioactive waste and the land on which it is disposed on request of the owner "following termination of the license issued by the Commission for such disposal" if the NRC makes certain findings, including a finding that "the requirements of the Commission for site closure, decommissioning, and decontamination have been met by the licensee involved and that such licensee is in compliance with the provisions of subsection (a) [relating to NRC requirements for financial assurance]." The issue therefore arises whether section 151(b) applies to disposal sites licensed by Agreement States, both because of the quoted reference to termination of the "license issued by the Commission" and because of the requirement for NRC findings about compliance with NRC requirements as opposed to Agreement State findings about compliance with State requirements.

However the statutory language can easily be read to apply to low-level radioactive waste licenses issued by Agreement States. The federal Administrative Procedure Act (which applies to the NRC pursuant to section 181 of the Atomic Energy Act ("AEA") defines "license" as any "form of permission," 5 U.S.C. § 551 (8), and so the reference to a "license issued by the Commission" could easily be read to refer to any license issued after a form of NRC permission. An Agreement State license fits this definition since it can only be issued after NRC permission in the form of an Agreement State agreement under section 274 of the AEA.

Moreover, it would not be unprecedented for the Congress to require an NRC (as opposed to Agreement State) finding with reference to an Agreement State license, especially where (as here) there are implications for federal resources. In fact, Congress required such a finding in a closely analogous part of the AEA. Section 151(b) of the NWPA tracks similar provisions of sections 83 and 274o. of the AEA relating to federal title and custody of uranium mill tailings. Under these sections, and NRC's implementing regulations in 10 CFR § 150.15a, the NRC must make certain findings of compliance with NRC decommissioning requirements before termination of Agreement State licenses.

IV. Legislative History of Section 151(b)

Section 151(b) of the NWPA originated in the House of Representatives and can be traced to the reported versions of both H.R. 3809 and H.R. 6598. The language as reported by both committees was essentially the same and (except for a few minor editorial changes) remained unchanged through passage and enactment into law. Therefore the language of explanation and interpretation in the reports of the two House committees is authoritative.

H. Rep. 97-491 Part I (on H.R. 3809) describes section 151(b) as follows (at page 49):

> Subtitle C of Title II of the Committee amendment to H.R. 3809 provides for permanent care of privately owned and operated disposal facilities for low-level nuclear waste, and for facilities contaminated with low-level nuclear waste resulting from Federal activities under the Atomic Energy Commission (AEC) and Manhattan Engineering District (MED) projects.
>
> This subtitle is particularly necessary as states attempt to develop new low-level waste disposal sites to meet the urgent need for new low-level waste disposal capacity. Low-level nuclear waste is generated by hospitals, research laboratories and universities as well as by nuclear power reactors. The subtitle provides that sites developed in or by states will be fully decommissioned before they can be shut down or abandoned. Properly decommissioned sites can then be turned over to the Federal government to assure permanent care by stable Federal institutions.
>
> Old MED and AEC sites can under the subtitle also be turned over to permanent Federal care if they meet applicable decommissioning requirements.

Two things are clear from this language. First, it is clear that the Congress enacted section 151(b) specifically to encourage and support states in developing new sites for the disposal of low-level radioactive waste. Second, there is no indication that the power to be given DOE to take title and custody was to be confined to NRC-licensed sites. Instead, the

Federal Government's authority to assume title and custody is described as applying without qualification to "[p]roperly decommissioned sites" developed "in or by states."

H.R. Rep. 97-785 Part I (on H.R. 6598) describes section 151(b) as follows (at page 89):

> Subsection 221(b) authorizes the Secretary, following the termination of any license, to assume title and custody of low-level radioactive waste and the land on which such waste is disposed, upon the request of the owner of such waste and land, if the Commission determines that (i) the Commission's requirements for site closure, decommissioning and contamination have been met by the licensee and such licensee is in compliance with the provisions of subsection (a); (ii) such title and custody will be transferred to the Secretary without cost to the Federal Government, and (iii) Federal ownership and management of the site is necessary or desirable in order to protect the public health and safety, and the environment. If the Secretary assumes title and custody, the Secretary is required to maintain such waste and land in a manner that will protect the public health and safety and the environment.

As can be seen, the Energy and Commerce Committee is quite explicit: the authority to be given to DOE to take title and custody applies "following the termination of any license." There is no suggestion that the authority is to be confined to NRC-licensed sites.

V. Analysis

Section 151(b) can easily be read so that DOE may assume title and custody in the case of Agreement State licenses for low-level radioactive waste disposal. As indicated, the reference to a "license issued by the Commission" may be read broadly to refer to any license issued only after a form of NRC permission, and an Agreement State license fits this definition since it can only be issued after NRC permission in the form of an Agreement State agreement. Moreover, also as indicated above, it is not unprecedented for the Congress to require an NRC (as opposed to Agreement State) finding of compliance with NRC requirements with reference to an Agreement State license. Indeed, Congress required such a finding in the case of termination of uranium mill tailings licenses. Authoritative legislative history also strongly supports the proposition that Congress intended section 151(b) to apply to all licenses, not just NRC licenses.

The language of section 151(b) can easily be interpreted so that the authority given to DOE to assume title and custody applies to both NRC and Agreement State licenses for disposal of low-level radioactive waste. The legislative history of section 151(b) compels this interpretation, and so there is no doubt what Congress had in mind.

VI. Conclusion

Even if the legislative history were less clear, and one had to rely solely on the language of the statute, NRC would still have the authority to read section 151(b) broadly to apply to Agreement State licenses as well as NRC licenses. When the statutory language permits more than one reading, the Supreme Court admonishes in *Chevron* that that NRC must adopt the reading that is in accord with sound policy.

Here sound policy is clear. Congress enacted section 151(b) with the express purpose of encouraging and supporting states in the development of new sites for the disposal of low-level radioactive waste. The Commission itself has adopted the clear and explicit policy that states should be encouraged and supported in developing new sites, consistent with public health and safety.[1] A broad reading of section 151(b) will advance this policy. In contrast, a narrow reading of section 151(b), that confines the reach of DOE authority to assume title and custody to NRC licenses, will be counter to explicit Congressional and NRC policy. This is so because a narrow reading will allow States to license low-level waste disposal sites only if they assume a long-term custodial burden that is unnecessary, unwanted, and more than NRC is itself is required to bear. There in no reason why any State should be willing to license low-level radioactive waste disposal under these circumstances. The result will be that States will relinquish power to license low-level radioactive waste disposal back to NRC so that section 151(b) will apply. This would be contrary to the policy underlying section 274 of the AEA.

These policy considerations are especially applicable in the case of Texas. After years of trial and error, Texas has finally enacted a statutory framework whereby, for the first time, a new low-level radioactive waste disposal site may be developed and licensed in fulfillment of Congress' intent in the Low level Radioactive Waste Policy Amendments Act of 1985. Successful implementation of this framework will require that section 151(b) be read broadly so that, after successful operation and decommissioning, long-term control may be passed to the federal government. This is precisely what section 151(b) was enacted to accomplish.

Moreover, Texas' reluctance to assume the burden of long-term custody does not reflect adversely on Texas' ability or willingness to administer an adequate and compatible Agreement State Program because, as the legislative history indicates, section 151(b) was enacted precisely to offer a means whereby States could avoid this burden. If anything, since there is no question that section 151(b) applies to NRC licenses, an Agreement State Program that failed to include any reference to section 151(b) would be incompatible with NRC's program.

[1] In its September 5, 2002 SRM on SECY-02-0127, the Commission expressly adopted the policy (to be stated in a letter to the Bureau of Radiation Protection, Ohio Department of Health) that "[t]he Commission strongly supports State and Compact efforts to develop new LLW disposal capacity in accordance with the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA)."