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LLW Notes *Supplement* May/June 1994

Ward Valley, California: Legal Issues in Summary

The following is a digest of the major issues raised by the petitioners for the superior court's consideration and of the responses to those issues that were supplied by the state respondents. The issues have been extracted from a joint memorandum filed by the petitioners on March 9. The responses are taken from the state respondents' April 6 memorandum. The superior court's decision about the merit of each issue—as reported in the court's May 4 order—is also included.

This information is necessarily summary in nature. Persons interested in a detailed explanation of these lawsuits are directed to the parties' memorandums of March 9 and April 6, as well as to the court's May 4 order.

Claims Under the California Environmental Quality Act

Issue: Project Description—the Expected Waste Stream from Nuclear Power Plants and the Amount of Plutonium 239

Petitioners: Information about the projected waste stream—specifically information concerning the amount of low-level radioactive waste from nuclear power plants destined for the Ward Valley disposal facility—was concealed from the public. Nearly seven thousand times more plutonium 239 may be disposed of at the facility than was disclosed to the public. The higher amount of plutonium 239 was not considered in the environmental analysis.

Respondents: The environmental impact report (EIR), which was publicly available throughout the state, clearly and accurately described the projected waste stream, including the presence of plutonium 239. The higher amount of plutonium 239 cited by the petitioners represents an overestimate developed for safety analysis purposes. All plutonium 239 amounts, including the overestimate, were included in the environmental analysis, and no significant impact was found. (For further information, see *LLW Notes*, May/June 1994.)

Court: Petitioners failed to establish that US Ecology made misrepresentations on its license application.

Issue: Circulation of the EIR for Public Comment

Petitioners: Critical documents were omitted from the EIR circulated to the public, and no data was provided identifying the quantities of individual radionuclides that would be sent to the disposal facility. DHS never adequately addressed public concern about the sources of the waste.

Respondents: Documents which were incorporated into the EIR were described therein, and these documents were available in San Bernardino County libraries and elsewhere, as required by the California Environmental Quality Act (CEQA). Some of the documents cited by the petitioners were merely cited or referenced in the EIR or the license application. "Unlike documents incorporated in an EIR, CEQA requires no distribution of cited documents ... Cited documents were available for inspection as public records, and petitioners knew they could request public documents."

Court: Petitioners' arguments are "without merit" except that the Wilshire Report constitutes "significant new scientific analysis." DHS must consider the report—which was distributed after the Ward Valley license was approved—as though it had been issued prior to the license approval.

LLW Notes Supplement

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A supplement to the May/June 1994 *LLW Notes*.

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Claims Under the California Environmental Quality Act (continued)

Issue: Assessment of Impacts on the Desert Tortoise

Petitioners: DHS' analysis of cumulative impacts of the project to the desert tortoise—a species listed as threatened under the Endangered Species Act—was inadequate. The designation of the Ward Valley site as critical habitat for the desert tortoise represents “significant new information” that requires recirculation of the EIR or preparation of a subsequent EIR.

Respondents: Impacts on the desert tortoise were adequately analyzed, and the EIR concludes that the impacts can be mitigated. Mitigation measures are described in the EIR, such as removing attractions for predators, escorting trucks, and erecting fences. “Such reducing and compensating measures are adequate mitigation under CEQA.” The formal designation of the Ward Valley site as critical habitat is not “significant new information” because the designation was proposed before the EIR was certified and because in making its decision DHS assumed that the Ward Valley site would be designated. Accordingly, neither recirculation of the EIR nor preparation of a subsequent EIR is required.

Court: “The administrative process assumed ‘critical habitat’ status. The environmental impact and mitigation measures were fully evaluated. The license adopts viable mitigation measures.”

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Ward Valley, California: Legal Issues in Summary *continued*

Issue: Recirculation of the EIR or Preparation of a Subsequent EIR Based on "Significant New Scientific Information"

Petitioners: Significant new information became available to DHS after the close of the comment period that required recirculation of the EIR or preparation of a subsequent EIR. This information includes

- reports by scientists from the U.S. Geological Survey indicating that ground water under the site could migrate to the Colorado River,
- a report by the Metropolitan Water District regarding the potential for contamination of ground water,
- a reduction in estimates for tritium disposal, and
- a Safety Report prepared by DHS that evaluates crucial safety issues in far more detail than the EIR does.

Respondents: DHS considered the information contained in these documents, even though they were written after the EIR and were not added to it. There is a detailed response in the record to the issues raised in each of the documents.

- The Safety Evaluation Report presents no new evidence or analysis, and it complements the EIR. "It is appropriate for other documents in the record to support and confirm the EIR analysis."
- DHS concluded no EIR reanalysis was required as a result of the reduction in tritium projections. "Tritium is a highly mobile isotope, so substantial steps were taken in the license to be sure groundwater would be protected with respect to the high volume initially projected ... A reduction in tritium ... only reduces the potential tritium impacts. Because the waste stream analysis projected all waste from all sources, there is no other waste, such as [plutonium 239], to take its place."

- In regard to possible ground water contamination, the EIR concluded that it is unlikely that any radionuclides will reach ground water because there is not enough moisture to carry them. Even assuming sufficient moisture, the EIR concluded that the 650-foot layer of soil is so thick and dry that any released radionuclides would not reach ground water for 1000 years. Low-level radioactive waste, however, decays below safe regulatory levels within 500 years.

Court: Petitioners' arguments are "without merit" except that the Wilshire Report constitutes "significant new scientific analysis." DHS must consider the report—which was distributed after the Ward Valley license was approved—as though it had been issued prior to the license approval. "Whether a new hearing or recirculation of a 'subsequent' EIR is required or desirable is to be considered by respondents."

Issue: Effect of a Hearing on the Federal Land Transfer on DHS' Compliance with CEQA

Petitioners: By certifying the EIR and issuing a license to US Ecology prior to holding a public hearing on the proposed transfer of the Ward Valley site from the federal government to the state of California—as promised in a September 16, 1993 letter from California Governor Pete Wilson to U.S. Interior Secretary Bruce Babbitt—DHS violated CEQA. "[T]he agency cannot defer environmental review of significant affects [*sic*] of a project until after it has committed itself to that very project."

Respondents: The hearing is not required by CEQA. Instead, it is a requirement imposed by Secretary Babbitt before he will decide whether to transfer the site. "The insinuation DHS deferred 'the hearing' is therefore misleading. The federal hearing is not a deferred CEQA hearing. DHS held numerous hearings on the project ... CEQA does not require hearings and DHS has already done more than CEQA requires."

Court: Petitioners' arguments are "without merit" except that the Wilshire Report constitutes "significant new scientific analysis." DHS must consider the report—which was distributed after the Ward Valley license was approved—as though it had been issued prior to the license approval.

Claims Under the Radiation Control Law

Issue: Involvement of the Petitioners as Parties in the Licensing Proceeding

Petitioners: Federal regulations adopted by the state of California require that Native American Indian Tribes be afforded additional and special rights beyond those afforded other parties in radioactive waste site licensing decisions. Nevertheless, the Fort Mojave Indian Tribe (referred to as the "Tribe") was not provided special assistance, even though it informed DHS by letter of its concern over and opposition to the proposed facility. The Tribe was not given notice of the June 1990 hearing regarding the license application, was not made a party to the licensing proceeding, and was not given a complete license application. "Neither the Tribe nor [Committee to Bridge the Gap] were granted the rights of other parties, such as USEcology, to receive routinely correspondence concerning the licensing proceeding, and review drafts of documents and pose questions to other parties."

Respondents: DHS imposed no restrictions regarding who could be named a party. Committee to Bridge the Gap was granted party status, as requested. The Tribe did not request party status to participate in the license review process, but DHS nevertheless met privately with the Tribe, and the Tribe participated in the licensing proceeding. The Tribe was provided copies of the EIR and license application. All interested persons who appeared at the proceeding were treated as parties and allowed to participate, including the opportunity to submit testimony and comments. "Petitioners were treated equally whether or not formally named as parties to the hearing ... DHS lawfully elevated public status, it did not denigrate party status."

Court: "The evidence clearly shows that petitioners were accorded active 'party' participation and status. There was no improper denial of a request for any status from any of the petitioners. Moreover, ... [the Radiation Control Law] was complied with by respondents assisting Fort Mojave and being available to assist upon request."

Issue: Promulgation of Regulations for the Licensing Hearing

Petitioners: DHS is required to follow the Administrative Procedure Act (APA) when it promulgates rules, regulations, or procedures pursuant to the Radiation Control Law. The APA prohibits DHS from utilizing, enforcing or issuing any guideline, instruction, order or standard of general application unless it is first adopted as a regulation and filed with the Secretary of State. DHS failed to comply with the APA when it promulgated procedures for use at the June 1991 hearing on the draft license and final EIR.

Respondents: DHS never promulgated hearing regulations nor does the Radiation Control Law require that rules for licensing hearings be adopted. Moreover, discretion is accorded to an agency to determine when a regulation is "reasonably necessary" under the APA. "Because the procedures for the one-time hearing were not standards of general application, it was not reasonably necessary for DHS to adopt a formal regulation under the APA to implement a procedure for the license hearing."

Court: "The licensing statutes do not require adoption of regulations; they allow the adoption of regulations."

Ward Valley, California: Legal Issues in Summary *continued*

Issue: *DHS Hearings on the Project*

Petitioners: Both the 1990 and 1991 DHS license hearings were conducted unlawfully. DHS failed to follow its own procedures at the 1990 proceeding because the public record does not show that DHS responded to public comments received at the hearing, nor does it show that public notices were issued for the hearing. Moreover, DHS failed to make many portions of US Ecology's license application—a subject of that hearing—available to the public.

Respondents: The appeals court's decision of May 7, 1993, in *California Radioactive Materials Management Forum v. Health and Welfare Agency* and the superior

court's order of February 7, 1994, granting summary adjudication to the respondents in this case, both found that the 1991 hearing was proper under the Radiation Control Law. With regard to the 1990 hearing, the Radiation Control Law does not require a hearing on the license application or a response to comments. Accordingly, it was within DHS' discretion to respond only to significant comments. The record contains public notices for the 1990 hearing. The license application was available at public repositories.

Court: “[P]etitioners fail to present evidence supporting the assertions that respondents failed to follow their own procedures for the hearing.”

Issue: *Findings Made By DHS Prior to Issuing the License*

Petitioners: Prior to issuing a license for the Ward Valley facility, DHS did not make findings required under the Radiation Control Law because of the following problems with US Ecology's license application:

- US Ecology's waste stream tables violate the Radiation Control Law by providing inaccurate descriptions of the type and quantities of radioactive waste to be disposed of at the site.
- US Ecology submitted a “Letter of Commitment for Institutional Control” from the state of California certifying that it is prepared to accept transfer of the license for custodial care and for post-closure observation and maintenance after the site is closed. However, the land is owned by the federal government. Thus, the certification is invalid.
- US Ecology entered into a lease with DHS to acquire the right to possess the property during the facility's operating life. Since DHS does not own the site, the lease is invalid.
- US Ecology improperly used soil data from Rock Valley, rather than from Ward Valley, in its license application and improperly submitted its application prior to completing a 12-month soil monitoring for seasonal variations.

Respondents: DHS made all necessary findings prior to issuing the license.

- US Ecology's waste stream tables and analysis were correct. The use of overestimates for safety analysis purposes is consistent with NRC guidance.
- The regulations only require evidence of “arrangements” for state acquisition of a site before a license is issued, and NRC guidelines permit an applicant to propose “acceptable alternative methods.” The state's “Letter of Commitment for Institutional Control” satisfies the regulations and is an acceptable alternative to state ownership because US Ecology cannot commence construction of the site until the state acquires the land.
- The superior court has held in past cases that a lease conditioned on a prospective landlord's acquisition of title to the land is valid.
- Although initial modeling of water infiltration through Ward Valley soil was based on Rock Valley data, US Ecology's model was subsequently calibrated and compared against the results of a 139-day “pond infiltration test” conducted at the Ward Valley site. The submittal of an application prior to completion of the 12-month soil monitoring was permissible—NRC guidance contemplates that an application may need to be supplemented.

Court: “There was no [regulatory] violation ... by the use of the Rock Valley data for analysis of water infiltration. This data combined with the testing at Ward Valley was sufficient, proper and in compliance with the requirements.”

Claims Regarding Support for DHS' Findings

Issue: *DHS' Findings That Radioactive Contamination Will Not Affect Ground Water or Threaten the Colorado River*

Petitioners: The evidence does not support DHS' finding that radioactive waste will not reach the Colorado River.

- Higher levels of plutonium 239 and other long-lived radionuclides contradict a statement by DHS that estimates of chelated waste consist primarily of short-lived radionuclides. Increased amounts of long-lived radionuclides will result in increased amounts of chelated waste, which will significantly increase the potential for waste to migrate from the site.
- Data from a 1990 report for Ward Valley soil conditions indicates that there is no upward movement of moisture at the site as claimed in the final EIR and that prior testing at the site was incomplete.
- DHS has inadequately analyzed the potential for radionuclides to migrate to ground water, as is demonstrated by the presence of tritium 100 feet beneath the site.
- US Ecology's analysis assumes, without adequate support, that all ground water from the site drains into the Danby dry lake bed and evaporates. However, analyses performed for the Los Angeles Metropolitan Water District estimate that ground water contaminated with radioactive isotopes could reach the Colorado River.

Respondents: The evidence supports DHS' finding that radioactive contamination will not reach the Colorado River.

- The higher levels of plutonium 239 and other long-lived radionuclides referenced by the petitioners represent overestimates of amounts actually expected for disposal, and were used for safety analysis purposes. Radioactive materials with half-lives of 13 years or less account for 95 percent of the radioactivity produced by potentially chelated waste.

Since the most mobile radionuclides would take over 1000 years to reach ground water, chelated low-level radioactive waste with a half-life of 13 years or less would pose no safety risk to the public.

- The 1990 report for Ward Valley soil conditions demonstrates that water would tend to move upward through the soil as claimed in the final EIR.
- A detailed consultant study in the EIR demonstrated that tritium from the site is not a threat to ground water. The analysis showed that any tritium that reaches ground water would be in concentrations far below the state drinking water standard. In addition, as petitioners acknowledge, the amount of tritium projected to be disposed of at the site has been significantly reduced.
- The Los Angeles Metropolitan Water District report theorizes that ground water may reach the Colorado river by flowing to the north or to the south of the site. Neither theory is supported by the evidence. For instance, the theory that ground water may flow in a northerly direction to the Colorado River is "based on admittedly uncertain assumptions that the City of Needles might install wells in Piute Valley to the north of the site and remove sufficient quantities of water to cause a reversal in the direction of groundwater flow at the site, forcing the groundwater to flow upgradient (uphill) to Piute Valley and then easterly to the Colorado River ... To theoretically reverse the direction of flow at the site would require extraction of massive amounts of water ... Needles has not indicated that a project of that magnitude is planned. Such a project would be very unlikely because it would virtually deplete groundwater in the basin and Needles would have to transport the water nearly 20 miles ... A conclusion that groundwater might reverse direction and flow to the north and then east based on such a highly speculative development is inconsistent with NRC guidance ..."

Court: "Respondents found that no contamination will reach groundwater on the Colorado, but even if the most extreme weather conditions occur, and if contamination (radionuclides) reaches groundwater, its danger will be below danger standards."

Ward Valley, California: Legal Issues in Summary *continued*

Issue: DHS' Finding That US Ecology is Qualified to Operate the Site

Petitioners: The record does not support DHS' finding that US Ecology is qualified to operate the site. US Ecology was ranked as the least qualified applicant by DHS' staff. Other sites operated by US Ecology have had serious problems, and US Ecology has been cited on numerous occasions for deficiencies at its facilities.

Respondents: US Ecology was the operator of four of the six low-level radioactive waste disposal facilities established in the United States, collectively representing 75 years of operating experience. This is more than any other entity. In addition, US Ecology's Richland facility is currently operating as the regional disposal facility for several states. Although the facility has experienced "minor" regulatory violations, it has not been cited or fined by the state. "In light of [US Ecology's] response and candor concerning past violations, DHS found its 'environmental compliance record and radiological exposure record' to be acceptable and concluded [US Ecology] was qualified and experienced to operate the disposal site in a manner that protects health and minimized danger to life or property ... DHS has mandated a monitoring program to ensure that [US Ecology] will comply with the safety and environmental standards imposed."

Court: "The decision of respondent [regarding the qualification of US Ecology to operate the site] is supported by the evidence. Respondents had the full record of US Ecology before them, as does the court. The determination of qualification is well founded."

Issue: DHS' Findings Regarding Waste Classification for the Site and Long-Term Risk

Petitioners: DHS' findings regarding waste classification and its findings that the site will not have any long-term significant environmental impacts are not supported by the record.

- US Ecology has indicated that much higher levels of plutonium 239 will be disposed of at the site than is suggested by DHS' findings.
- Waste survey forms completed by nuclear utilities indicate that significantly higher amounts of nuclear reactor waste will be disposed of at the site than is suggested by DHS' findings.
- The amount of tritium to be disposed of at the site has been significantly decreased.

Respondents: DHS' findings that waste classification satisfies regulatory requirements is supported by substantial evidence in the record.

- The estimate of plutonium 239 to be disposed of at the site has not increased. The higher amount represents an overestimate developed for safety analysis purposes.
- Waste survey forms are not an adequate basis on which to challenge DHS' findings.
- The estimated reduction in tritium to be disposed of at the site reduces the health and safety risk posed by tritium and does not require reanalysis.

Court: Petitioners' arguments are "without merit" except that the Wilshire Report constitutes "significant new scientific analysis." DHS must consider the report—which was distributed after the Ward Valley license was approved—as though it had been issued prior to the license approval.

Low-Level Radioactive Waste Disposal Compact Membership

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Northwest accepts Rocky Mountain waste as agreed between compacts

Northeast Compact

- Connecticut
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Southeast Compact

- Alabama
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- Georgia
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- * South Carolina
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Unaffiliated States

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- # Massachusetts
- Michigan
- New Hampshire
- # New York
- Puerto Rico
- Rhode Island

* *current host state*

• *future host state*

contract with the Southeast Compact for LLW disposal until June 30, 1994

Maine, Texas and Vermont are named as members of a compact passed by all three states. The compact is awaiting consent by the U.S. Congress.

The Low-Level Radioactive Waste Forum includes a Participant from each regional compact, current host state, future host state and unaffiliated state. Graphic by Afton Associates, Inc. for the LLW Forum. May 1994.