LLWnotes

Special Edition

Volume 12, Number 9 December 1997

DOE Use of Commercial LLRW Disposal Facilities

Senators Criticize DOE Use of Envirocare and Molten Metal

DOE Looks to Increase Competition

Energy Secretary Federico Peña wrote to Senators Richard Shelby (R-AL) and Lauch Faircloth (R-NC) on November 7 announcing the department's plans to increase competition among commercial, privately owned facilities for DOE's waste disposal business. Peña had met with the Senators earlier in November to discuss DOE's low-level and mixed low-level radioactive waste disposal activities. His announcement on November 7 was the latest in a long series of correspondence between the department and Faircloth concerning DOE's continued use of the Envirocare of Utah facility for such disposal. (For a brief review of prior correspondence between DOE officials and Faircloth, see related story, this issue.)

The Senators responded in a strongly worded letter, dated November 12, criticizing the department's contracting practices and pledging to seek oversight hearings and corrective legislation.

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Officials Express Concern re Implications of WCS Ruling

State Authority, External Regulation, Cleanup Cited

Several state and federal officials have commented upon the recent decision of the U.S. District Court for the Northern District of Texas in *Waste Control Specialists, LLC v. U.S. Department of Energy*. (See *LLW Notes*, August/September 1997, pp. 15–17.) The following is a brief summary of correspondence from such officials including the National Governors' Association, members of Congress, state legislators, and a citizens' advisory board.

NGA Seeks Congressional Support for State Authority Over DOE

On November 14, Governors E. Benjamin Nelson (D-NE) and Marc Racicot (R-MT)—Chair and Vice-Chair of the National Governors' Association (NGA) Committee on Natural Resources—wrote on behalf of NGA to the congressional leadership.

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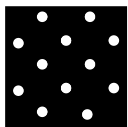

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Key to Abbreviations

U.S. Department of Energy	DOE
U.S. Department of Transportation	DOT
U.S. Environmental Protection Agency	EPA
U.S. General Accounting Office	GAO
U.S. Nuclear Regulatory Commission	NRC
naturally-occurring and accelerator-produced radioactive materials	NARM
naturally-occurring radioactive materials	NORM
Code of Federal Regulations	CFR

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Waste Control Specialists, LLC v. U.S. Department of Energy

DOE Files Notice of Appeal in WCS Suit

On November 25, a notice of appeal was filed in a lawsuit initiated by Waste Control Specialists (WCS) against the U.S. Department of Energy and some of its officials which challenges DOE's actions concerning WCS' proposal to dispose of the department's radioactive waste at its facility in Andrews County, Texas. In October, the U.S. District Court for the Northern District of Texas had denied the defendants' motion to dismiss the suit and had granted the plaintiff's motion for a preliminary injunction against DOE concerning the department's basis for denying WCS the award of contracts. (See *LLW Notes*, August/September 1997, pp. 15–17.) The defendants are now appealing the district court's rulings to the U.S. Court of Appeals for the Fifth Circuit.

Background

On September 20, 1996, WCS submitted a contingent bid to dispose of DOE radioactive waste from the department's Fernald site in response to a Request for Proposals (RFP) issued by DOE's Ohio Field Office. Since WCS takes the position that the disposal of DOE waste can be accomplished through external regulation by a competent oversight group under contract to DOE and that a state license is not required for such oversight, WCS proposed that DOE could either self-regulate the disposal operations or delegate the function by contract to an appropriate oversight body. WCS initially proposed that the Texas Natural Resources Conservation Commission (TNRCC) could perform such oversight functions. However, after TNRCC declined to do so, WCS provided alternative proposals, including the use of an oversight group consisting of Texas Tech University, Texas A&M University, and Integrated Resources Group (a private consulting firm and DOE contractor). WCS acknowledged that the oversight group could include or substitute DOE's Sandia National Laboratories, the U.S. Nuclear Regulatory Commission, or even an arm of DOE itself.

On May 5, 1997, DOE rejected the WCS proposal, citing concerns regarding DOE's use of regulatory authority under the Atomic Energy Act to approve a privately owned facility for DOE waste disposal before the award of a contract. Shortly thereafter, on August 12, 1997, WCS filed suit in the U. S. District Court for the Northern District of Texas against DOE; Alvin Alm, Assistant Secretary for Environmental Management; and Mary Anne Sullivan, Deputy General Counsel for Environment and Civilian Nuclear Defense Programs.

The Lawsuit

WCS contends that DOE senior officials have not carefully or reasonably considered the company's proposal and that DOE's alleged concerns regarding delegation of the department's oversight responsibilities to a third party are not genuine. Instead, WCS alleges that the rejection was the result of political considerations and other factors.

WCS argues that DOE's rejection of the company's proposal causes WCS enormous economic damage, stifles competition, and perpetuates an existing monopoly. The rejection, according to WCS, is unlawful on the grounds that it is arbitrary, capricious, an abuse of discretion, or not in accordance with law.

WCS also contends that DOE's rejection evidences "a fundamental, arbitrary and capricious refusal by DOE to do any of its radioactive waste disposal business with WCS, for no lawful reason, while simultaneously demonstrating a fundamental, arbitrary and capricious eagerness to continue to do business with Envirocare in a manner contrary to law." WCS asserts that the rejection effectively prevents the company from prevailing in any bid for DOE radioactive waste disposal services and is, in legal effect, a de facto debarment.

District Court Action

On October 10, the district court issued a preliminary injunction against DOE concerning the award of new contracts for low-level or mixed radioactive waste disposal services. In a harshly worded order, the court termed as "bogus" DOE's stated reasons for disqualifying a WCS bid to provide waste disposal services for the department's Fernald site in Ohio. The court also found that a "virtual monopoly" exists in the bidding for off-site disposal of DOE low-level and mixed radioactive wastes.

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In conducting its review, the court determined that although the Atomic Energy Act requires "persons" to obtain a license from NRC (or from a state if such authority has been delegated thereto) as a precondition to the disposal of low-level radioactive waste, the act specifically exempts the activities of DOE and its contractors from this requirement. Moreover, the court found that "neither the grant nor the refusal of a state low-level radioactive waste disposal license can constitute the basis for the qualification or the disqualification of a DOE contractor to dispose of DOE low-level or mixed radioactive wastes at a private site."

For additional information, see LLW Notes, August/September 1997, pp. 15–17.

—TDL

Envirocare Withdraws Motion to Intervene

Subsequent to the defendants' filing of a notice of appeal, Envirocare of Utah withdrew its earlier motion to intervene in the Waste Control Specialists case. In a December 9 press release, Envirocare President Charles Judd explained the companies actions as follows:

> The Department of Energy has valid legal defenses against WCS's claims. In particular, the law makes it absolutely clear that agencies of the federal government, including the DOE, can use commercial facilities such as those owned by Envirocare, Inc. for radioactive waste disposal, and, if they do, they must comply with state requirements. Although the Texas decision temporarily delays a procurement from one DOE field office, Envirocare does not believe the district court's decision will have any long-term effects on its business with the federal government.

Officials Express Concern re WCS Ruling
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In their letter, the Governors requested "help in fixing a serious problem with federal law as it applies to the disposal of federal radioactive wastes."

Citing the district court's decision in Waste Control Specialists, the Governors explained that while they support competition for the disposal of DOE waste, they are troubled by the implications of the court's ruling on DOE's obligations to meet state requirements and on DOE's ability to self-regulate.

> The decision runs directly counter to our strongly held view that federal agencies must be bound by state siting and environmental laws just as private parties are. In the furtherance of those views, we fought long and hard to clarify that the Department of Energy is subject to state authority under the Resource Conservation and Recovery Act and to gain passage of the Federal Facility Compliance Act of 1992. The federal government must live under the law in the same way and to the same extent that the law applies to everyone else.
>
> We would also note that the decision in the Waste Control Specialists case would allow DOE to become effectively self-regulating. We do not believe that self-regulation serves the public interest or is compatible with basic notions of fair play. Indeed, DOE self-regulation has been shown over many decades to be unworkable and insufficient. Furthermore, it runs counter to current initiatives to externally regulate DOE facilities.

The Governors are urging Congress to look into the issues raised by the court decision. Such issues, wrote the Governors, go far beyond encouraging competition for the disposal of DOE waste. "It would be a tragedy if the short-term goal of engendering competition caused a long-term erosion of state authority and respect for the rule of law in siting and operating radioactive waste disposal facilities."

Nelson and Racicot sent the letter on behalf of the entire National Governors' Association in accordance with a practice that permits such correspondence by committee officials when the position taken is consistent with current NGA policy.

Members of Congress Concerned About Implications on External Regulation and FUSRAP Disposal

Senator Wyden Seeks Reaffirmation of DOE Commitment to External Regulation On November 19, Senator Ron Wyden (D-OR) wrote a letter to Energy Secretary Federico Peña which also referenced the Waste Control Specialists court decision. In that letter, Wyden applauded DOE's steps toward external regulation and cautioned that the recent court decision could reverse progress on that front.

> Apparently, the court was not briefed on how such offsite, private dumpsites—subject only to self-regulation by U.S. DOE—would breach the Department's policy to move to end self-regulation, and was a disposal option that had never been subjected to environmental and health impact analysis under the National Environmental Policy Act. It is imperative that this decision be appealed and the Department present a strong case for its policy of ending self-regulation, as well as demonstrating that such offsite disposal cannot be considered without public, state and tribal review of the environmental and health impacts.
>
> If the Department does not reaffirm its commitment to external regulation of its waste disposal, it will suffer a serious blow to its improved credibility and trust in the Northwest. The precedent of a private, offsite disposal facility subject to only U.S. DOE self-regulation is a troubling one as other private facility owners may seek equal treatment and open other sites elsewhere in the nation. I am concerned that this could literally expand Hanford on to private property, exempt from state or NRC regulations as to suitability of the site, groundwater protection, disposal practices, closure requirements, financial assurances, etc.

Wyden complimented DOE on its progress in reducing costs at Hanford, which he partly attributes to the introduction of competition. He stressed, however, that while he is supportive of competition, he does not want it to come at the expense of efforts toward ending self-regulation.

NJ Delegation re Cleanup Schedules On December 1, four members of the New Jersey congressional delegation—Senators Robert Torricelli (D) and Frank Lautenberg (D); and Representatives William Pascrell, Jr. (D) and Steven Rothman (D)—sent a letter to DOE suggesting that the court's decision could delay DOE and the Army Corps of Engineers work to clean up contaminated Formerly Utilized Site Remedial Action Program (FUSRAP) properties.

> It is our understanding that the basis of ... issues [raised in the WCS case] rests with DOE regulatory decisions and contract bidding procedures. The safe operation and maintenance of existing disposal facilities in a manner consistent with public health and environmental protections is apparently not an issue. We are concerned that a court decision could leave the country with no licensed disposal facility for low-level radiated waste. The practical effect of a WCS court decision may be to effectively shut down all on-going FUSRAP site cleanups for an indefinite period of time.

The officials urged DOE to seek judicial remedies to clarify its right to continue using NRC-licensed facilities.

State Legislators Urge DOE to Appeal Decision

Texas State Representative Complains About WCS' "Tactics and Motives" In a December 1 letter, Texas State Rep. Robert Talton (R) urged Peña to appeal the decision and "to strongly oppose WCS' attempts to succeed in the marketplace through force and intimidation." Arguing that DOE had previously promised not to establish a new disposal facility in Texas without the state's approval, Talton asked Peña to "respect ... [the state's] right to govern future permanent impacts to the health and safety of the citizens and natural resources."

Talton also discussed what he termed "tactics and motives" employed by WCS.

> WCS tried to pass a law in the 1995 Texas Legislative Session that would have allowed one company—WCS—to license and operate a private mixed waste disposal facility in Texas. That's not competition. And whenever WCS management doesn't get its way, it seems to file a lawsuit. Most recently, WCS sued the Texas Natural Resource Conservation Commission in the Texas District Court in Travis County to try to force the agency to disclose privileged attorney-client communications and internal policy documents.

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Utah State Senator Seeks to Protect State Authority

In a December 2 letter, Utah State Senate Minority Leader Scott Howell (D) complained that the decision in *Waste Control Specialists* "is contrary to the states' strongly held position that federal agencies must be accountable under state siting and environmental laws just as private parties are" and "undercuts the basic concept of federalism upon which this nation is built."

Howell also commented on the implications of the court's decision on other companies, such as Envirocare. While noting that he has no reason to believe that Envirocare has any interest in avoiding independent regulation by the NRC or the state, Howell argues that the decision gives Envirocare and other similar companies a means of doing so.

> Commercial radioactive waste disposal facilities should be subject to strict independent regulatory scrutiny, and states should play an important role in ensuring that scrutiny. DOE should not pursue an expansion of its self-regulatory authority over private facilities especially in light of its inability to protect the environment at its own sites ...
>
> Accordingly, I am asking you to appeal the Texas decision to clarify that NRC and state regulation of DOE waste disposal is appropriate at commercial facilities in my state and in other states. It must be made clear that states may regulate the disposal of DOE waste at commercial facilities under agreement state programs with the NRC.

Howell concluded by urging DOE not to engage in a lengthy National Environmental Policy Act (NEPA) analysis of its use, or proposed use, of commercial disposal facilities. Such use, he cautions, would "be met with strong adverse reactions from state and other stakeholders." Moreover, Howell asserted that a NEPA analysis could result in halting shipments from DOE sites to commercial disposal sites—a result that he finds unacceptable.

Much of this information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates, via facsimile transmission in a News Flash on November 26, 1997.

Hanford Advisory Board Transmits Advice re Disposal of DOE Wastes at Private Facilities

On November 7, the Hanford Advisory Board sent a letter to Peña conveying its apprehensions about the impact of Waste Control Specialists and the potential disposal of department wastes at unregulated private disposal facilities. The letter included the following "advice" which the board has adopted on this issue:

1. US DOE's consideration of unregulated, offsite private facilities for disposal of US DOE wastes is an unacceptable setback to ending US DOE's self-regulation of its waste disposal.

2. The Hanford Advisory Board strongly supports US DOE's announced commitment to end US DOE's self-regulation of its waste disposal practices. In particular, the Board is concerned about US DOE low-level wastes, which have no external regulation by states, NRC or EPA. The Board wishes to encourage progress to ending self-regulation. Entering into new contracts which rely on self-regulation undermines this goal.

3. The Hanford Advisory Board supports lowering of waste disposal costs through meaningful competition and comparison of charges with commercial costs. However, using private disposal sites that have no independent state and/or NRC regulation for US DOE wastes undermines responsible competition and private development of regulated waste minimization and treatment facilities.

4. Adoption of a policy to ship ER or WM wastes to private, unregulated offsite disposal facilities receiving US DOE wastes would violate the public's rights to comment on the environmental and health impacts of such a policy. The Board opposes US DOE entering into contracts, or adopting a policy to accept proposals, for use of such "self-regulated" facilities in violation of NEPA requirements for impact analysis and public comment.

5. US DOE should appeal the injunction in *Waste Control Specialists v. US DOE* and present a vigorous defense, including a clear record of (1) the need for external regulation of any offsite waste disposal and (2) the lack of NEPA review of offsite waste disposal at unregulated facilities.

—TDL

WCS Responds to Critics re Implications of Ruling

In recent weeks, Waste Control Specialists (WCS) has written letters and issued a press release in reaction to state and federal officials' concerns over the implications of the district court's decision.

Press Release

WCS issued a press release on December 5 to counter charges that the district court's ruling undercuts states' rights and impedes the cleanup of DOE wastes. Asserting that such claims are false, WCS argues that the court's decision actually "enhances state regulatory roles by requiring DOE to officially transfer authority to a state if a state chooses to regulate DOE wastes." DOE has the authority to delegate its safety oversight function to states, according to WCS, pursuant to the Department of Energy Organization Act and the Atomic Energy Act.

In its press release, WCS specifically addressed three commonly repeated statements concerning the district court's decision. The statements, and WCS' answers, are as follows:

- **The court ruling encourages DOE to dispose of its wastes at "unregulated" facilities.**

  Any facility used by DOE for the disposal of DOE wastes will be appropriately regulated and supervised. The key issue is the proper legal foundation for that regulation. Under the Atomic Energy Act, DOE has exclusive jurisdiction over DOE wastes. In order for any third party to regulate DOE wastes, it must be formally authorized by DOE to do so. Whether such regulation is by contract or by license, the critical factor is that it be legally authorized by DOE. Without a formal delegation of authority from DOE, no third party can lawfully regulate DOE wastes.

- **The court's ruling encourages DOE to "self regulate" at a time when DOE should be moving toward "external regulation."**

  The court ruling affirms that if DOE engages in external regulation of a private facility, DOE must formally delegate its authority over Atomic Energy Act wastes to that external regulator, and DOE can never completely relinquish its safety responsibilities over such wastes. DOE must continuously monitor such external regulation to ensure strict compliance; DOE cannot simply transfer its wastes and walk away from its cradle-to-grave safety responsibility, leaving a state or private facility liable for long-term problems involving DOE wastes. The court ruling fosters DOE's external regulation; it does not impede it in any way.

- **The court's decision impedes the progress of DOE waste site cleanups.**

  The court's decision affirmatively instructs DOE not to stop its cleanups or its procurement activities, but simply to comply with federal law when conducting such cleanups.

Correspondence

Response to Letter from New Jersey Delegation On December 10, an attorney for the firm representing Waste Control Specialists wrote to four members of the New Jersey congressional delegation to address concerns that they had raised in a December 1 letter to Secretary Peña. Reiterating many of the arguments contained in its December 5 press release, WCS sought to assure the legislators that the court's decision will not interfere with the cleanup of contaminated Formerly Utilized Site Remedial Action Program (FUSRAP) properties in New Jersey.

In so doing, WCS disputed the suggestion that Envirocare of Utah is properly licensed to receive and dispose of DOE wastes, including FUSRAP wastes.

> In fact, such wastes are specifically excluded by law from being addressed by either Envirocare's state or NRC licenses. Since DOE has never formally authorized Envirocare or the State of Utah to manage or regulate its wastes, DOE's use of the Envirocare facility does not comply with the Atomic Energy Act.

Accordingly, WCS asserts that the district court's ruling means that Envirocare is not properly licensed to dispose of waste from DOE cleanups. In fact, no private facility in the United States is currently so authorized according to WCS.

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Peña's Letter

DOE Plans to Increase Competition In his November 7 letter, Peña wrote that although DOE has routinely issued competitive solicitations for the disposal of its waste for several years, there has been limited availability of commercial, privately owned facilities. Acknowledging that the situation is changing, Peña vowed to seek competitive procurements.

> In particular, I will initiate a procurement strategy that would establish complex-wide contracts for various types of waste disposal services. My objective is to issue contracts to multiple bidders, thus ensuring competition continues in the future. However, as we discussed in our meeting, there are serious policy implications in conducting such a path of using private sites that do not have licenses from either the Nuclear Regulatory Commission or an authorized state regulatory body. Accordingly, we are pursuing two approaches to the conduct of such a procurement.

Elements of DOE's Plan Peña's letter was accompanied by a document detailing two separate potential approaches to obtaining disposal services for DOE waste. The plans were set forth as follows:

> OPTION 1. The Department would immediately initiate a complex-wide competitive procurement for waste disposal services, seeking bids from operators of all licensed or permitted facilities. The Department would encourage those companies currently pursuing licensing and permit applications to participate in the procurement and provide for award with performance contingent upon receipt of a license or permit. We anticipate that such a competitive procurement could be accomplished within 14 months. It would require no new policy analysis.
>
> OPTION 2. The Department would immediately initiate a policy analysis, including statutorily required (National Environmental Policy Act) environmental analyses, to evaluate the appropriateness of using commercial, privately-owned radioactive waste disposal facilities generally and unlicensed facilities in particular. We estimate that the analysis would take approximately 6 months. Following the completion of the analysis, we would immediately initiate a competitive procurement for DOE's complex-wide disposal requirements. The eligibility of offerors (i.e., licensed and/or unlicensed) would be determined based on the outcome of the policy analysis. We estimate that the competitive procurement could be awarded within 12 months of the issuance of the competitive request for proposals.

Impact of WCS Lawsuit Peña specifically noted that the department's plans may be delayed by a recent preliminary injunction concerning the award of new contracts for low-level or mixed radioactive waste disposal services. (See related story, this issue.) The injunction was issued by the U.S. District Court for the Northern District of Texas in a lawsuit filed by Waste Control Specialists (WCS), a Texas-based company that specializes in disposal of hazardous and toxic wastes and is seeking authorization to dispose of DOE's radioactive waste. According to Peña, the department is currently exploring several litigation strategies including "discussions with the plaintiff about potential settlement …"

Background In the past several years, DOE has delegated to its Field Operations Offices the authority to select commercial disposal options. This delegation of authority includes a requirement that the offices work with states and compacts prior to utilizing a commercial facility. Several field offices including those in Tennessee, Idaho, and Ohio have shipped wastes to Envirocare through individual field office contracts and under a Corps of Engineer disposal contract. The Ohio office is in the final selection process of a procurement for commercial disposal of cleanup wastes at Fernald.

The Senators' Response

The Senators' November 12 letter complains of what they term "serious ethical problems" at the department, "particularly with respect to the contracting circumstances surrounding Envirocare and Molten Metal Technologies," and of "the Department's failure to encourage competition in the area of mixed waste disposal." Such problems, wrote the Senators, create serious concern about the proposed elevation of Mary Anne Sullivan from her present post as the Deputy General Counsel for Energy Resources. Sullivan was recently nominated by President Clinton to be General Counsel, the chief legal officer for DOE. (See *LLW Notes*, August/ September 1997, p. 29.) Although the Senate Energy Committee approved her nomination, a hold has been put on it, thereby preventing a vote by the full Senate.

The Senators vowed to push for oversight hearings in the Senate and to offer legislation to correct the perceived problems.

> We can assure you ... that even if Ms. Sullivan is confirmed, we will push for oversight hearings on the Energy Department on these matters in the Senate. Further, we can promise you that we will offer legislation next year to the Energy appropriations bill that will specifically bar the Department of Energy from contracting with any person or company that has admitted to bribery of a federal, state or local official.

In closing, the Senators acknowledged that much of what they complain of occurred prior to Peña's taking office and urged Peña to address the issues as quickly as possible.

—TDL

Much of the preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates, via facsimile transmission in a News Flash on November 25, 1997.

Background: Prior Correspondence Between the Senators and DOE re Envirocare

The November 7 letter from Secretary Peña and the November 12 reply from Senators Shelby and Faircloth are the culmination of a series of letters—dating back to August 1, 1997—between Senator Faircloth and DOE officials regarding a consent agreement between the department, Envirocare of Utah, Zhagrus Environmental, and Khosrow Semnani. (See *LLW Notes*, May/June 1997, pp. 24–25.) The consent agreement—which is dated May 1997—was entered as a result of concerns raised by DOE in response to disclosures made in litigation pending before the Third Judicial District Court of Salt Lake County, Utah. Specifically, the suit alleges that Semnani—founder and then-President of Envirocare and Zhagrus—paid a state regulator for site application and consulting services related to the licensing and operation of Envirocare's low-level radioactive waste disposal facility. (See *LLW Notes*, January 1997, pp. 1, 5–12.)

The following is a brief summary of the earlier correspondence between Senator Faircloth and DOE officials. Persons interested in more detail are directed to the correspondence itself.

Initial Correspondence

Senator Faircloth's Inquiry In his initial letter to Secretary Peña—dated August 1, 1997—Senator Faircloth expressed concern about whether the consent agreement adheres to longstanding federal contracting practices and is in the best interests of the federal government. Faircloth raised issues regarding oversight of the agreement and questioned whether Semnani's interest and control in Envirocare have changed as a result thereof.

> This consent agreement makes it appear that the Department needed Mr. Semnani and the services of his companies, and would, therefore, agree to his terms. Even so, it is not clear how this agreement is sufficient.

DOE's Response DOE responded to the Senator's correspondence by letter dated September 5. The letter was signed by Richard Hopf, Deputy Assistant Secretary for Procurement and Assistance Management. It stresses that although the circumstances leading up to the consent agreement are under investigation by federal law enforcement authorities, no other action has been taken, and there is therefore no basis upon which to deny Envirocare contracts or to initiate suspension or debarment proceedings. The letter also points out that, pursuant to the terms of the consent agreement, failure to abide by its terms could subject Semnani and the companies to debarment from federal procurement. Periodic submissions by the companies' current management on implementation status has been required to ensure compliance with the agreement, and DOE plans to conduct an on-site compliance review.

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With respect to the issue of Mr. Semnani's continued ownership of the companies, the Department believes that at this point removal of Mr. Semnani from control of the companies is sufficient to ensure that the best interests of the government are protected. While ownership often carries with it the means of control, under the terms of the consent agreement, that link has been severed.

Specific Questions and Answers The Senator's letter contained four specific questions, which DOE answered in its reply correspondence. The questions and an abbreviated summary of the department's responses are listed below.

- **"What was the compelling reason why the Department needed to continue contracting with Envirocare of Utah or Zhagrus Environmental? Why has the Department not pursued disposal options with other companies?"**

  DOE uses Envirocare for the disposal of a substantial amount of its low-level and mixed radioactive waste and by-product materials and suspension of such use would impede the department's ability to meet its legally enforceable obligations under current cleanup agreements. All contracts between DOE and Envirocare have been competitively procured as DOE is interested in fostering competition and reducing its waste disposal costs.

- **"Was this consent agreement vetted by the Department of Justice, the Federal Bureau of Investigation, or other appropriate agencies prior to its execution?"**

  The Army and EPA were advised of and endorsed the agreement, prior to its execution. But, neither Justice nor the FBI "signed off" on it. DOE had contacted Justice, however, through the United States Attorney for Utah, but was advised that no information could be shared while the investigation was pending.

- **"What information did Mr. Semnani or his companies provide to the Department in response to your February letter questioning his fitness to remain as a contractor to the Department?"**

  (DOE forwarded to the Senator a copy of a report provided by Envirocare in response to the department's questions about Semnani's fitness as a contractor. The report included the results of an internal investigation of Envirocare and discussed steps taken to isolate the company from Semnani.)

- "**Does Envirocare of Texas have any relationship with Envirocare of Utah or Zhagrus Environmental? Do any of the board members of these companies have a relationship with Mr. Semnani? Does the federal government have any direct or indirect relationship with any other company or organization in which Mr. Semnani has an interest?"**

  The three companies—all of which are owned by Semnani—are affiliates. Semnani has been replaced by Charles Judd as President of Envirocare of Utah and Zhagrus. Semnani continues to serve as President and a Director of Envirocare of Texas, and Judd is a board member of that company. The department is not aware of any contractual relationship between any entity in which Semnani has an interest (except for Envirocare of Utah and Zhagrus) and the federal government.

Follow-Up Correspondence

On October 23, Faircloth sent another letter to the department—this time requesting more detailed responses to some of his earlier questions and making some additional inquiries. Peña responded by personal letter, dated November 5, following a conversation with Faircloth about the nomination of Mary Anne Sullivan to be DOE's General Counsel. Sullivan's nomination, though approved by the Senate Energy Committee, has not received a vote by the full Senate to date. Peña's letter states, in part, as follows:

> I want to reiterate to you that we consider it a very positive development that during the last year several companies, including Waste Control Specialists, have indicated an interest in competing for DOE's waste disposal business. Clearly, the greater the number of sources available for low-level radioactive waste disposal, the greater flexibility the Department would have to dispose of wastes and reduce costs. One possible means of facilitating an increase in the number of commercial sites would be for the Department to participate in regulatory arrangements such as the one proposed by WCS.
>
> In short, DOE is interested in encouraging competition for all of its business, including waste disposal, as a way to reduce costs, increase options and meet its goals under its "Accelerated Cleanup: Focus on 2006" Plan. At the same time, in order to accomplish this, DOE must act to ensure that its disposal policies and its decision-making incorporate a technically sound and defensible approach that is open to all who wish to participate. This is what we are trying to do.

Peña's letter was accompanied by another from Hopf, which responded in detail to each of the questions raised in the Senator's October 23 letter. The following is a list of the questions posed by the Senator and an abbreviated summary of the department's responses.

- **"Was and is disposal at a licensed 'commercial facility' the Department's only option?" What other actions could the department have taken to mitigate project delays from the unavailability of Envirocare?**

  Another option is disposal at DOE sites. However, most sites do not have the Resource Conservation and Recovery Act (RCRA) permit that is required to dispose of the hazardous component of low-level mixed waste—so, mixed waste may not be disposed of at those sites. Shipping mixed waste from one site to another is not a viable option because no DOE facility is currently permitted to dispose of mixed waste that was generated off site.

  "Secondly, DOE recently concluded that it could make use of its authority under the Atomic Energy Act of 1954, as amended, to regulate a privately-owned site that would be operated by a DOE contractor. The Department is currently assessing the merits of this alternative ... [T]his would be a major policy decision ... DOE would need to address a number of policy issues, including, to name just a few, what role, if any, State regulators should play at commercial sites operated under DOE regulatory authority; how local community support for particular disposal facilities should affect DOE's decisions with respect to commercial disposal; and how a decision by DOE to assume regulatory responsibility for privately-owned sites might be reconciled with DOE's general move toward external regulation."

" DOE recently concluded that it could make use of its authority under the Atomic Energy Act of 1954, as amended, to regulate a privately-owned site that would be operated by a DOE contractor. The Department is currently assessing the merits of this alternative ..."

  Another possible option would be to attempt to renegotiate existing commitments with regulators—but, this would require lengthy negotiations and interim storage.

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- **What was and is DOE's level of concern about disclosures made as a result of the private lawsuit initiated by Larry Anderson (a former Utah regulator) against Semnani and Envirocare?**

  DOE's "concern was and is for the environmental safety of the Envirocare facility and Envirocare's present responsibility as a Government contractor." This concern has been somewhat alleviated by the results of environmental compliance reviews conducted by various regulatory agencies after the disclosures became public, including the State of Utah, EPA Region 8, and NRC.

- **"Please describe the entire range of options that the Department could have taken to respond to these troubling disclosures."**

  There were four options available to DOE: (1) take no action and await the outcome of ongoing investigations by law enforcement authorities—which was the tack taken by other agencies having a contractual nexus with Envirocare; (2) initiate formal debarment or suspension actions—however, pursuant to regulation and decisions of the U.S. Supreme Court, suspension and debarment may not be imposed to punish contractors; (3) defer action to other agencies having a contracting nexus with Envirocare; or (4) enter into a consent agreement.

  DOE did not believe that it would be appropriate to take no action given the currency of existing contracts with Envirocare and the potential of future contracts. This belief necessarily excluded the option of deferring to other agencies, since no other agency was inclined to take affirmative action. It was the department's judgment, however, that debarment or suspension proceedings "would not support Envirocare's exclusion, given the absence of an indictment, conviction, or independent evidence of wrongdoing sufficient to meet regulatory standards." Accordingly, DOE settled on the consent agreement—an action "typically engaged in by Federal debarment and suspension officials in the absence of a definitive basis for exclusionary action and where debarment or suspension is deemed not in the Government's best interests, but assurances of present responsibility are nonetheless desired."

- **"[D]oes the Department have knowledge of any 'private' facts or have any other bases to initiate ... [debarment or suspension] proceedings.?"**

  No.

- **"Please provide me with examples of cases where Department contractors have engaged in conduct of a nature equal to or more egregious than Mr. Semnani's yet were also spared from debarment or suspension."**

  On January 25, 1997, Lockheed Martin Corporation pled guilty to conspiring to violate federal law by making payments to a foreign official and by knowingly falsifying books and records. The Air Force decided not to debar Lockheed, but rather to enter into a Settlement Agreement, and DOE deferred to this decision. "DOE and the Air Force determined that Lockheed's corrective actions, reflected in the terms and conditions of the Settlement Agreement, provided adequate assurances that Lockheed's future dealings with the Government would be conducted responsibly and that suspension or debarment was not necessary at the time to protect the Government's interests."

- **"To what extent did your perceived need to have the future services of Envirocare enter into your decision not to debar or suspend Envirocare?"**

  This was an important concern, as was the department's awareness that debarment would have precluded use of Envirocare by EPA, the Army Corps of Engineers, and other federal agencies. A second factor, however, was the lack of a firm basis on which to debar. "[D]ebarment requires a conviction or a preponderance of evidence."

- **"[D]o any of the board members of ... companies [with which DOE is still dealing], not just Mr. Judd, have a relationship with Mr. Semnani?"**

  Judd and Nick Braun constitute the Board of Directors of these companies. Braun was added as a condition of the consent agreement. To the best of the department's knowledge, neither individual has any familial relationship to Semnani and "their business relationships, in the context of Envirocare's management, are restricted and strictly controlled by the Consent Agreement."

  For information on provisions contained in the agreement to ensure that Semnani is isolated from management of the companies, see Hopf's September 5 response to the Senator's earlier letter.

- **Is there or was there "any other type of relationship between the federal government and Mr. Semnani, including if anyone at the Department of Energy is aware whether Mr. Semnani has made any political contributions to either national party?"**

  A number of government agencies have contracts with Envirocare or orders placed against contracts with Envirocare, and the Department of Justice may refer to the use of Envirocare in its environmental litigation consent agreements. "With respect to political contributions to political parties, [DOE has] no knowledge of the nature or extent of any political contributions to any political organizations."

- **"Please provide narrative descriptions of the facts and backgrounds on the two following cases and enclose copies of all pertinent associated documentation on: (1) the Department of Energy contractor who was debarred or suspended during the last ten years for the least serious offense or alleged offense, and (2) the Department of Energy contractor who was debarred or suspended during the last ten years for the most serious offense or alleged offense; such that all other cases of debarment or suspension are bounded by these two cases."**

  Using only present cases, in order to provide a timely response, DOE has identified cases that respond to the request. But, it must be noted that each suspension and debarment case should be viewed on its own using a variety of factors, such as the nature of the offense, potential or actual financial harm to the government, and potential or actual physical harm to the public's health and safety.

  The case which may be considered the least serious involves the debarment of several entities based on their affiliation with a debarred contractor who was using an assumed name as an employee of his wife's company to circumvent prior debarment restrictions. The case which is perhaps most serious, due to the potential for human harm, involves the suspension of a government contractor based upon criminal indictment arising out of the submission of false information and test results to Sandia National Laboratory.

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Subsequent Correspondence

On November 6, Faircloth wrote again to Peña regarding his concern over "what appears ... to be unjust special treatment of companies that should have been suspended at a minimum if not debarred altogether." Faircloth identified several deficiencies in the department's earlier responses, which fail to relieve what he termed his "discomfort with ... [the department's] continued dealings with these companies." DOE's response was again provided by Hopf by letter dated November 10.

The following is a list of the questions posed by the Senator and an abbreviated summary of the department's responses.

- **DOE's responses focus on why disposal at most DOE sites is not viable, rather than on the possibility for interim storage. When the department finally discusses interim storage, it merely indicates that site operations "might" be impacted. "How serious is that 'might'? What consideration was given to interim storage at other sites? Does the lack of disposal permits at certain sites preclude temporary storage at those sites, which may have mitigated your need for this questionable consent agreement?"**

  If DOE had suspended shipments to Envirocare, it would have had to store most, if not all, of the 80,000 cubic yards of waste that it shipped to Envirocare during FY '97. This waste would have needed to be stored somewhere other than where it was located in order to meet regulatory requirements and cleanup agreements at 25 sites in 13 states. In many cases, there are substantial legal barriers to interim storage—a practice which would be vigorously resisted by states in which these materials might have been stored—and some sites are not suitable for interim storage.

  Low-level mixed waste storage facilities require RCRA permits, which are usually issued by states, contain volume restrictions, and often only allow storage of waste generated on site. States have made clear to the department that they will oppose storage of low-level mixed wastes from other states. Moreover, some sites—such as those in the Formerly Used Site Remedial Action Program (FUSRAP)—cannot construct interim storage facilities.

  Storage of low-level and 11e.(2) wastes do not require RCRA permits. Although interim storage of these on-site wastes is legally possible, states have indicated that they would vigorously resist the storage or disposal of off-site wastes at these same facilities. Thus thwarting DOE's efforts to establish a more economical regional or national management system. In addition, many Superfund and FUSRAP sites are not suitable for interim storage, and cleanup at such sites would have ceased or slowed down had DOE suspended its use of Envirocare.

- **"Regarding the degree of 'definitive evidence of wrongdoing,' please explain why you do not consider the admission of making payments to a state official to be definitive. Even if Mr. Semnani can convince the court that the payments resulted from extortion and were not bribes, does it concern the Department that he only came forward with that accusation after knowledge of the payments became public?"**

  The late timing of Semnani's allegations is a matter of serious concern. But, there remains a lack of definitive information as to the nature, purpose, consequences, and legality of Semnani's actions. Moreover, none of the payments under investigation were made from corporate accounts, and no company employees other than Semnani were found to have knowledge of these payments. Accordingly, DOE concludes that the controls in the consent agreement, including the removal of Semnani from management and control of the companies, serves to protect the government's interests.

  Other federal agencies, such as EPA and the Army Corps of Engineers, rely on Envirocare. These two agencies sent more than 41,000 cubic yards of waste to Envirocare in calendar year 1997.

Sites that would have been affected by a suspension of shipments to Envirocare in FY '97:

Brookhaven National Laboratories (New York)
Pantex (Texas)
Fernald (Ohio)
Lawrence Livermore National Laboratories (California)
Los Alamos National Laboratories (New Mexico)
Idaho National Laboratories (Idaho)
Pearl Harbor Naval Base (Hawaii)
Battelle Columbus (Ohio)
Aerojet (California)
Tonawanda (New York)
St. Louis (Missouri)
Colonie (New York)
Lindy (New York)
Mound (Ohio)
Oak Ridge National Laboratories (Tennessee)
Rocky Flats (Colorado)
Portsmouth (Ohio)
Nevada Test Site (Nevada)
General Atomics (California)
RMI (Ohio)
ETEC (California)
Sandia National Laboratories (New Mexico)
Maywood (New Jersey)
Wayne (New Jersey)
Ventron (Massachusetts)

Sites that would be affected by a suspension of shipments to Envirocare in FY '98:

Brookhaven National Laboratories (New York)
Pantex (Texas)
Fernald (Ohio)
Lawrence Livermore National Laboratories (California)
Los Alamos National Laboratories (New Mexico)
Idaho National Laboratories (Idaho)
RMI (Ohio)
ETEC (California)
Savannah River (South Carolina)
Argonne National Laboratory-East (Illinois)
Mound (Ohio)
Oak Ridge National Laboratories (Tennessee)
Rocky Flats (Colorado)
Portsmouth (Ohio)
Nevada Test Site (Nevada)
General Atomics (California)
Battelle Columbus (Ohio)
Paducah (Kentucky)
Sandia National Laboratories (New Mexico)

- **DOE provided in earlier correspondence an example of an egregious case where the contractor did not get debarred or suspended. "Did that settlement provide for any punishment—a penalty payment to the government for example?"**

  Suspension or debarment cannot be imposed as punishment. Although a payment was made in the referenced example, it was not imposed as a punishment but rather to cover civil liability pursuant to federal law and common law actions. Also, that case is distinguishable in that the contractor pled guilty to conspiracy to violate federal law, whereas neither Semnani nor his companies have admitted guilt or been indicted.

- **"When I asked about the relationships between members of the Board and Mr. Semnani, I was not limiting them to 'familial.' I would hope that the Department would be concerned if the replacement board members were close friends of Mr. Semnani, even if not related."**

  Of the two board members of Envirocare and Zhagrus, one is a longtime company employee, and DOE has been advised that the other is not a close friend of Semnani's. In any event, the consent agreement strictly limits interactions between board members and Semnani.

- **"I agree that an indictment is sufficient cause for suspension, but I do not understand why an admission of guilt is not at least as powerful as an indictment."**

  There has been no admission of guilt by Semnani. Although he admits to making payments to a former state regulator, he alleges that these payments were extorted and denies any misconduct or wrongdoing. Moreover, there have been no allegations of impropriety by the contractor, Envirocare.

- **"I still have no certainty that this consent agreement is in the best interests of the tax payer because I cannot assess the size of the impacts on the Department and on other agencies such as the EPA or the Corps of Engineers that would come from suspension or debarment."**

  DOE's response to the first question includes information about the impacts to the department of stopping shipments to Envirocare and about the volumes of waste previously shipped to Envirocare by EPA and the Corps of Engineers, —*TDL*

Waste Control Specialists Authorized to Conduct Additional Operations at Texas Site

On November 3, the Texas Department of Health (TDH) issued a license to Waste Control Specialists (WCS) for the treatment, storage, and processing of commercial Class A, B, and C low-level radioactive waste at the company's facility in Andrews County, Texas. In addition, the Texas Natural Resource Conservation Commission (TNRCC) issued to WCS a naturally-occurring radioactive materials (NORM) disposal authorization on September 9 of this year, which allows for the land disposal of those NORM wastes that are exempt from state or federal licensing requirements. TNRCC also recently licensed WCS to perform research, development, and demonstration activities to help commercialize promising technologies for the treatment and management of hazardous and radioactive materials. This brings to five the number of licenses, permits, and authorizations that have been granted to WCS by the State of Texas and federal agencies, allowing the company to receive, treat, store and dispose of a wide variety of wastes.

LLRW Treatment, Storage, and Processing

License Terms The November 3, 1997 license authorizes WCS to treat, store, and process class A, B, and C low-level radioactive waste and byproduct material, uranium ore received as waste, and NORM waste and/or oil and gas NORM waste, subject to certain listed conditions.

Among the listed conditions are the following:

- the license limits the maximum activity allowed for each group of waste as specified under Texas law;
- the license limits the maximum activity authorized for the total volume of waste allowed to be physically present at the WCS site, which may not exceed 302,865 cubic feet; and
- the license restricts waste processing activities to receipt and survey, repackaging, compaction and consolidation, solidification of liquid radioactive waste, and storage.

The license contains several other terms and conditions, such as those relating to waste holding times, commingling, and reporting. Persons interested in a more detailed review are directed to the license itself.

The license expires in the year 2004.

Impact on Mixed Waste Capabilities By combining this license with the company's 1994 permit for the storage, processing, and disposal of industrial solid waste and hazardous waste, WCS is now able to treat, process, and store mixed wastes. This makes WCS one of two commercial facilities in the country—along with Envirocare of Utah—that are authorized to do so.

Background

WCS originally submitted a license application to TDH for the storage, treatment, and processing of low-level radioactive waste on March 3, 1996. After several months of review, TDH published a notice in the *Texas Register* announcing the proposed license issuance. Several persons subsequently requested a hearing.

Under Texas law, TDH is required to hold a hearing on the proposed license if one is requested, in writing, by a "person affected" within 30 days of publication of the notice in the *Texas Register*. A "person affected" is defined as "a person who is a resident of a county, or a county adjacent to a county, in which the radioactive materials are or will be located, including any person who is doing business or who has a legal interest in land in the county or adjacent county, and any local government in the county; and who can demonstrate that he/she has suffered or will suffer actual injury or economic damage."

On August 7, TDH held a preliminary hearing to establish jurisdiction, to take public comment, and to determine party status. As a result of the preliminary hearing, TDH determined that none of the persons present had standing to intervene as a party. Shortly thereafter, TDH issued the license.

Licenses Held by WCS

WCS currently holds the following permits, authorizations, and licenses:

- ***Low-Level Radioactive Waste Treatment, Processing, and Storage License*** Issued by the TDH on November 3, 1997, this license authorizes WCS to treat, process, and store Class A, B, and C low-level radioactive waste from the commercial sector.

- ***Research, Development, and Demonstration Permit*** Issued by the TNRCC on October 24, 1997, this permit authorizes WCS to perform research, development, and demonstration activities, up to pilot-scale level, on promising technologies for the treatment and remediation of contaminated soil and ground water. The permit is limited to the use of wastes already on the WCS site under existing authorizations, permits, or licenses.

- ***Naturally Occurring Radioactive Material (NORM) Disposal Authorization*** Issued by the TNRCC on September 9, 1997, this authorization allows for the land disposal of NORM wastes exempt from state or federal licensing requirements (wastes under 150 picocuries per gram of uranium or thorium and under 30 picocuries per gram of radium, with a radon emanation rate of less than 20 picocuries per square meter per second).

- ***Toxic Substances Control Act Land Disposal Authorization*** Issued by the U.S. Environmental Protection Agency on August 5, 1994, this authorization involves the treatment, storage, and land disposal of all categories of polychlorinatedbiphenyls (PCBs).

- ***Industrial Solid Waste and Hazardous Waste Storage, Processing, and Disposal Permit (Resource Conservation and Recovery Act Wastes)*** Issued by the TNRCC on August 5, 1994, this permit authorizes the treatment, storage, and land disposal of all 2,000 classifications of Resource Conservation Recovery Act (RCRA) wastes by WCS.

—TDL

Much of the preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates, via facsimile transmission in a News Flash on November 10, 1997.

Molten Metal Files For Bankruptcy Protection

On December 3, 1997, Molten Metal Technology—a company specializing in radioactive and mixed waste treatment and processing—filed for bankruptcy protection under Chapter 11 of the Federal Bankruptcy Code. The filing came only one week after the company terminated 33 jobs at its Oak Ridge facility and on the same day that company officials were scheduled to testify before the House Commerce Subcommittee on Oversight and Investigations.

The congressional hearing, which has been postponed, was intended to address charges that Molten Metal improperly influenced the Department of Energy to fund development of the company's waste treatment technology. Specifically, Republicans charge that the Molten Metal has enjoyed great success at winning DOE contracts during the Clinton administration as a result of the company's contributions to Vice President Al Gore's fundraising activities. The value of the company's contracts with DOE increased from $1.2 million during the Bush administration to $33 million during Clinton's.

In addition, last month the company's then-President and founder, William Haney, resigned. Haney, who still retains a seat on Molten Metal's Board of Directors, was succeeded by the company's Chief Financial Officer, Gordon Bitter. Two other board members have stepped down, however.

In its bankruptcy filing, Molten Metal listed $221 million in assets and $202 million in liabilities. This appears to be a sharp departure from the company's financial status last year, when Molten Metal had $129 million in cash on its books.

—TDL

Envirocare of Texas Receives First Approval for Hazardous Waste Permit

Revises Application for Rad Waste License

Hazardous Waste Permit On October 10, 1997, Envirocare of Texas received approval of its Emergency Response Plan from the Texas Natural Resource Conservation Commission (TNRCC)—the first of two stages of approval required in order to receive a permit for hazardous waste storage and treatment at its site in Andrews County, Texas. According to a company press release, Envirocare's application will now be reviewed for administrative, and then for technical, completeness.

Envirocare purchased the 880-acre site last year and began seeking authorization to develop and operate a radioactive and hazardous waste treatment and storage facility. The company has filed license applications with both the Texas Department of Health and the TNRCC in pursuit of this goal.

Radioactive Waste License Envirocare of Texas also recently submitted a revised application to the Texas Department of Health for a commercial radioactive waste processing, treatment, and storage license for the Andrews County site. According to the company's press release, the combination of such a license with the sought-after hazardous waste storage and treatment permit would allow the company "to process, treat, and store low-level radioactive waste and mixed waste generated from both government and private sources." The press release further notes that the company is designing its facility—which is expected to be operational in 1999—to process up to 300,000 cubic feet of waste annually. "Waste will be shipped to licensed disposal facilities, or other licensed facilities, after being managed by Envirocare of Texas."

For additional information, see LLW Notes, October/November 1996, pp. 1, 13.

—TDL

WCS Responds to Critics re Implications of Ruling
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Response to Letter from Texas State Representative WCS' law firm also sent a letter to Texas State Representative Robert Talton, dated December 12, responding to statements made in Talton's earlier letter to Secretary Peña. The law firm's letter reiterates arguments made in WCS' December 5 press release and responds to alleged "factual errors" in Talton's earlier correspondence—such as claims that WCS sued DOE employees in their personal, rather than professional, capacities and that the court did not hear DOE's motion to dismiss the case prior to issuing a preliminary injunction.

> To set the record straight: 1) WCS did not sue any DOE employee personally, but only in their official capacities; 2) DOE's Motion to Dismiss the lawsuit was heard and was rejected by the court after both sides had ample opportunity to present their respective cases; and, 3) In a separate case, WCS did recently sue the Texas Natural Resources and [sic] Conservation Commission ("TNRCC") to force disclosure of documents, and the court agreed that only a small portion of the documents being withheld were actually privileged; therefore, TNRCC was ordered to disclose the majority of the documents.

The letter concludes by recommending that Talton "inform DOE as to ... [his] own long-standing personal animosity toward WCS and its officers, and ... [his] own personal dealings in support of Envirocare."

—TDL

Envirocare of Utah Applies to NRC for SNM License

On December 5, Envirocare of Utah filed an application with the NRC for a license to increase the quantity of special nuclear material (SNM) that it can possess on site. SNM includes plutonium, uranium 233, and uranium 235. Under federal regulations, private companies are not allowed to possess and process more than 350 grams of SNM prior to burial in a disposal cell without an NRC-issued license.

Basis for Application According to a December 9 company press release, Envirocare needs an SNM possession limit increase in order to comply with federal regulations and efficiently manage the large volumes of soil and bulk waste received at its facility. The company asserts that its license application demonstrates that the increased quantities will not pose any credible risk of harm or criticality. In explanation of the company's need to increase its SNM possession limit, Envirocare's press release states:

> Envirocare was compelled to file its SNM license application due to a lack of action on a petition for rulemaking Envirocare submitted to the NRC in 1992. The petition would clarify the NRC's definition of "special nuclear material in quantities not sufficient to form critical mass" to include a concentration value. Envirocare continues to believe that the NRC should grant its petition for low concentration SNM waste material, but has filed its license application since no decision has been made on the petition.

Background On June 26, 1997, the NRC issued a confirmatory order directing Envirocare of Utah to stop receiving shipments of waste containing uranium 235, except for those shipments that were en route on or before June 11. (See *LLW Notes*, July 1997, p. 35.) The action was taken in response to the results of a June 10 inspection of the facility, during which NRC staff determined that more than 2,400 grams of uranium 235 were being held in temporary storage at Envirocare.

Under NRC's order, Envirocare was required to submit a plan to the commission by July 7 explaining how the company would comply with federal regulatory limitations regarding SNM. Envirocare submitted a compliance plan on July 7 outlining their compliance strategy for deliveries of SNM by rail and for deliveries of mixed waste for treatment and/or disposal. The NRC subsequently approved the compliance plan.

In addition to NRC's actions, Utah's Division of Radiation Control issued a separate enforcement action against Envirocare for violation of its state license. A $100,000 penalty has been proposed by Utah. Envirocare has filed a request for a hearing on the issue.

The excess uranium 235 at Envirocare's facility was dispersed throughout contaminated soil and other waste received from government and industrial cleanup projects. Federal and state officials have determined that no health or safety risk was posed by excess uranium.

—*TDL*

NRDC Alleges Death Threats and Financial Intimidation by Envirocare

On December 12, the Natural Resources Defense Council (NRDC) filed a formal petition with the NRC requesting that NRC "take appropriate enforcement action to avert death threats and other retaliatory actions against employees of Envirocare of Utah, Inc." The petition was filed under section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR 2.206), which permits anyone to petition NRC to take enforcement action related to NRC licenses or licensed activities. (For background information, see *LLW Notes*, January 1997, p. 8.)

In its letter, NRDC alleges (1) that persons who have provided information that is adverse to Envirocare's interests "fear for their very lives and for the lives of their families" and (2) that Envirocare is threatening to financially destroy any employee who provides operational or radiological safety information to the NRC or other proper authorities. As a result, NRDC is requesting that Envirocare's NRC-issued license be suspended and that an investigation (including a review of possible criminal violations under the Atomic Energy Act) be initiated. NRDC is also asking NRC to order the immediate suspension of Envirocare's state license and to investigate the adequacy of the Utah agreement state program to protect whistleblowers. In addition, NRDC wants NRC to contact each Envirocare employee personally to advise them of their rights and of the protections available to them and to seek additional information.

DOE and NRC Sign Off on External Regulation Pilot Program

DOE and NRC recently entered into a memorandum of understanding (MOU) concerning a pilot program on external regulation of DOE facilities by NRC. The purpose of the agreement, which was signed by Energy Secretary Federico Peña on October 20 and NRC Chairman Shirley Ann Jackson on November 21, is "to establish the framework for a pilot program to support a joint recommendation by DOE and NRC to Congress on whether NRC should be given statutory authority to regulate nuclear safety at DOE nuclear facilities."

Elements of the Pilot Program

Under the terms of the agreement, NRC will simulate regulation at between six and ten DOE facilities over a two-year period. At the end of the two years, DOE and NRC will decide whether or not to seek legislation granting NRC regulatory authority over individual DOE nuclear facilities or classes of such facilities. Lawrence Berkeley National Laboratory in California will be the first to participate in the pilot program, to be followed by DOE's Radiochemical Engineering Development Center in Tennessee.

Simulated regulation, as defined in the MOU, means "that NRC will test regulatory concepts and evaluate a facility and its standards, requirements, procedures, practices, and activities against standards that NRC believes would be appropriate to ensure safety in view of the nature of the work and hazards at that pilot facility." It will include NRC inspections of each pilot facility and will involve interactions between DOE, its contractors, and NRC.

The MOU provides that, following simulated regulation at each of the pilot facilities, DOE and NRC personnel will prepare a report—and briefings where appropriate—on the advantages and disadvantages of NRC regulation of the pilot facility, as well as of other similar DOE facilities. Within three months of completion of the entire two-year pilot program, staff will prepare a report which will include a recommendation on which DOE nuclear facilities or classes of facilities should be regulated by NRC. After consideration of the report, DOE and NRC may prepare draft legislation to provide the recommended regulatory authority.

Background

In 1994, legislation was introduced in the U.S. House of Representatives to make new DOE facilities subject to external regulation by NRC and to create a congressional commission to study the benefits and disadvantages of external regulation of existing facilities. The legislation was not acted upon, but in January 1995, then-Secretary of Energy Hazel O'Leary created the Advisory Committee on External Regulation of DOE Nuclear Safety to provide advice on the issue. (See *LLW Notes*, January/February 1995, p. 25.)

The Advisory Committee released a report in December 1995 recommending, among other things, that essentially all aspects of safety at DOE's nuclear facilities should be externally regulated. O'Leary accepted the recommendations and created the DOE Working Group on External Regulation to provide guidance on implementing the report's findings. The working group issued a report in December 1996 recommending that NRC serve as the regulating body and that the move toward external regulation be phased in over a period of several years. (See *LLW Notes*, February 1997, p. 30.)

In September 1996, NRC published for comment a series of Direction Setting Issue Papers under the Strategic Assessment and Rebaselining Initiative, including one that addressed options for external regulation of DOE facilities. In March 1997, after considering public comments and the DOE working group's recommendations, NRC endorsed the concept of providing regulatory oversight, contingent upon the receipt of adequate funding, staffing, and a clear delineation of NRC's authority. The NRC then created a task force to work with DOE to identify policy and regulatory issues needing analysis and resolution.

The decision to pursue NRC regulation of DOE nuclear facilities through a pilot program was made at a meeting between Secretary Peña and Chairman Jackson in June of 1997.

—TDL

NRDC Requests Inspector General Probe re Envirocare

In a December 2 letter to the NRC Office of the Inspector General, the Natural Resources Defense Council (NRDC) requested an independent investigation into NRC staff's conduct with respect to Envirocare of Utah. NRDC claims that the staff's reaction to safety and regulatory issues at the Envirocare facility which NRDC has raised during the past year has been "appalling," and states that the DOE Inspector General may be conducting a similar investigation. (According to a DOE official, the DOE Inspector General investigation is not specific to Envirocare and concerns methods that should be used by the department in conducting procurements in order to get the best rate for the government.) NRDC also suggests that one or more congressional committees may initiate hearings concerning Envirocare when Congress returns next year.

Background

On January 8, 1997, NRDC filed a petition with NRC asking that it (1) revoke Envirocare's three major radioactive waste permits, (2) prohibit the granting of future licenses to Envirocare's founder, Khosrow Semnani, and to any company with which he has a "significant relationship," and (3) suspend Utah's status as an NRC Agreement State. (See *LLW Notes*, January 1997, p. 8.) NRDC based its request on recent disclosures about payments from Semnani to a Utah state regulator that surfaced after the initiation of a private lawsuit. (See *LLW Notes*, January 1997, pp. 1, 5–12.)

NRC subsequently denied the petition, however, concluding that specific information did not exist at the time to justify taking the requested action. (See *LLW Notes*, March 1997, p. 12.) NRDC appealed the decision to the NRC Commissioners, but they chose not to review the staff's decision.

Allegations

NRDC alleges that NRC staff did not adequately review the petition and that at least one Commissioner never saw the letter of appeal. Instead, NRDC asserts that the staff merely cited previous reviews of Envirocare and "adopt[ed] the view that apparent bribery or extortion at the highest management levels is of no immediate safety concern." Such action, claims NRDC, is contrary to established NRC policy that a licensee's character is fundamental to the protection of the public health and safety.

> The NRC staff and the Commission apparently believe that if a licensee obtains his/her license fraudulently, and this is not discovered until much later, there is no obligation on the part of the licensee to repeat the licensing process in a lawful manner. This form of cheating would not be considered appropriate or acceptable behavior by other Federal or State licensing authorities, or by universities with regard to their own degrees or licenses ... We request that you investigate whether this in and of itself is sufficient grounds for revocation of the license, or whether either a) the licensee must be indicted and convicted of a criminal act, or b) a significant violation of a health and safety regulation must be uncovered to justify license revocation.

NRDC also requests that the Inspector General investigate whether Semnani and the state regulator to whom he made payments, or anyone on their respective staffs, falsified environment, health, or safety records associated with any of Envirocare's licenses and the extent to which such falsifications could have been overlooked during NRC staff audits of the facility. NRDC argues that this is important because NRC staff may have compromised ongoing federal criminal investigations of the issue by finding that none of Utah's licensing actions were inappropriately influenced by the state regulator or resulted in biased regulation of the facility.

In support of its position, NRDC cites its request, made earlier this year, that DOE cease making further radioactive waste shipments to Envirocare pending a full National Environmental Policy Act (NEPA) review. (See *LLW Notes*, July 1997, p. 31.) Such a review is necessary in part, according to NRDC, because of the shortcomings in the environmental impact statement (EIS) prepared by NRC staff in support of its issuance of an 11e.(2) disposal license to Envirocare.

> [T]he NRC staff did little independent review [in preparing the EIS] (most references in critical areas are to Envirocare's own Environmental Report), groundwater resources beneath the site have not been characterized adequately, minimal groundwater monitoring programs already indicate potential contamination, the clay liner relied on to protect groundwater is deficient, and the analysis of flooding at the site was improper.

—TDL

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Correspondence re Envirocare of Utah

Letter from Senator Launch Faircloth (R-NC) to Federico Peña, Secretary, U.S. Department of Energy (DOE), noting his concerns with the May 1997 consent agreement between DOE and Envirocare of Utah; Zhagrus Environmental; and the companies' founder and former-President, Khosrow Semnani. August 1, 1997.

Letter from Richard Hopf, Deputy Assistant Secretary for Procurement and Assistance Management, DOE, to Senator Faircloth responding to questions and concerns raised by Senator Faircloth in his August 1 letter. September 5, 1997.

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Letter from Senator Faircloth to Secretary Peña requesting more detailed responses to some of his earlier questions (contained in the Senator's letter of August 1, 1997) and making some additional inquiries. October 23, 1997.

Letter from Secretary Peña to Senator Faircloth reiterating DOE's interest in promoting competition for its waste disposal business. November 5, 1997. (Includes, as an attachment, a November 5 letter from Richard Hopf responding to questions contained in Senator Faircloth's October 23 letter.)

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Letter from Senator Faircloth to Secretary Peña following up on earlier correspondence regarding his concern over "what appears ... to be unjust special treatment of companies that should have been suspended [from government contracting] at a minimum if not debarred altogether." November 6, 1997.

Letter from Richard Hopf to Senator Faircloth responding to questions and concerns raised in Senator Faircloth's November 6 letter. November 10, 1997.

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Letters from Secretary Peña to Senator Faircloth and Senator Richard Shelby (R-AL) announcing the department's plans to increase competition among commercial, privately owned facilities for DOE's waste disposal business. November 7, 1997.

Letter from Senators Faircloth and Shelby to Secretary Peña criticizing the department's contracting practices and pledging to seek oversight hearings and corrective legislation. November 12, 1997.

Letter from Thomas Cochran, Director, Nuclear Program, Natural Resources Defense Council (NRDC), to Hubert Bell, Inspector General, U.S. Nuclear Regulatory Commission, requesting that the NRC's Office of the Inspector General perform an independent investigation of NRC staff conduct with respect to NRC-licensee Envirocare of Utah, Inc. December 2, 1997.

Letter from Thomas Cochran to Joseph Callan, Executive Director for Operations, U.S. Nuclear Regulatory Commission, requesting that NRC "take appropriate enforcement action to avert death threats and other retaliatory actions against employees of Envirocare of Utah, Inc." December 12, 1997.

Correspondence re Waste Control Specialists (WCS)

Letter from Merilyn Reeves, Chair, Hanford Advisory Board, to Federico Peña, Secretary, U.S. Department of Energy, conveying the board's apprehensions about the impact of the *Waste Control Specialists* decision and the potential disposal of DOE wastes at unregulated private disposal facilities. November 7, 1997.

Letter from Governors Benjamin Nelson (D-NE) and Marc Racicot (R-MT), on behalf of the National Governors' Association, to Senate Majority Leader Trent Lott (R-MS) expressing concerns about the implications of the Waste Control Specialists decision on DOE's obligations to meet state requirements and on DOE's ability to self-regulate. November 14, 1997.

Letter from Senator Ron Wyden (D-OR) to Secretary Peña, regarding the recent court decision in *Waste Control Specialists, LLC. v. United States Department of Energy*, and its potential to reverse DOE's progress in increasing public trust and environmental protection through external regulation. November 19, 1997.

Letter from Senators Robert Torricelli (D-NJ) and Frank Lautenberg (D-NJ) and Representatives William Pascrell, Jr. (D-NJ) and Steve Rothman (D-NJ) to Secretary Peña regarding their concerns that the continued cleanup of low-level radioactive thorium at New Jersey's Formerly Utilized Site Remedial Action Program (FUSRAP) properties may be delayed due to issues relating to the civil suit filed against DOE by WCS. December 1, 1997.

Letter from State Representative Robert Talton (R-TX) to Secretary Peña requesting DOE to appeal the preliminary injunction decision in the *Waste Control Specialists* case and complaining about what he terms the "tactics and motives" employed by WCS. December 1, 1997.

Letter from State of Utah Senate Minority Leader Scott Howell (D-UT) to Secretary Peña expressing concern about the impact of the decision in *Waste Control Specialists* on the federal government's compliance with state siting and environmental laws. December 2, 1997.

Letter from John Kyte, Egan and Associates, to New Jersey Senators Torricelli and Lautenberg and Representatives Pascrell, Jr. and Rothman, responding (on behalf of WCS) to issues raised in the Congressmen's December 1 letter to Secretary Peña. December 10, 1997.

Letter from John Kyte to State Representative Talton responding (on behalf of WCS) to issues raised in Talton's December 1 letter to Secretary Peña. December 12, 1997.

Correspondence re External Regulation of DOE Nuclear Facilities

Memorandum of Understanding Between the U.S. Department of Energy and the U.S. Nuclear Regulatory Commission–Pilot Program on External Regulation of DOE Facilities by the NRC. Establishes a pilot program in order to determine whether NRC should be given authority to regulate safety at DOE nuclear facilities. Signed by Federico Peña, Secretary, U.S. Department of Energy, October 20, 1997, and Shirley Jackson, Chairman, U.S. Nuclear Regulatory Commission, November 21, 1997. To obtain a copy of this Memorandum of Understanding, visit the NRC website at http://www.nrc.gov/NRC/NMSS/MOU.html.

—RTG

Low-Level Radioactive Waste Disposal Compact Membership

Appalachian Compact
Delaware
Maryland
Pennsylvania *
West Virginia

Central Compact
Arkansas
Kansas
Louisiana
Nebraska *
Oklahoma

Central Midwest Compact
Illinois *
Kentucky

Midwest Compact
Indiana
Iowa
Minnesota
Missouri
Ohio
Wisconsin

Northwest Compact
Alaska
Hawaii
Idaho
Montana
Oregon
Utah
Washington * •
Wyoming

Rocky Mountain Compact
Colorado
Nevada
New Mexico

Northwest accepts Rocky Mountain waste as agreed between compacts.

Northeast Compact
Connecticut *
New Jersey *

Southeast Compact
Alabama
Florida
Georgia
Mississippi
North Carolina *
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
Vermont

The compact has been passed by all three states and awaits consent by the U.S. Congress.

Unaffiliated States
District of Columbia
Massachusetts
Michigan
New Hampshire
New York
Puerto Rico
Rhode Island
South Carolina •

The Low-Level Radioactive Waste Forum includes a representative from each regional compact, each designated future host state of a compact *, each state with a currently operating facility •, and each unaffiliated state.

Graphic by Afton Associates, Inc. for the LLW Forum. July 1997.