

# The Radioactive Exchange

*To promote the exchange of views and information on radioactive waste management*

INSIDE: Levin Leaves EG&G .....	pg. 3	Wrap-Up—Northeast, Midwest, Texas, NRC .....	pg. 10
WESTPO LLW GRANT .....	pg. 3	Perspective—EPA Rulemaking .....	pg. 13
Incineration MTG .....	pg. 3	Reports of Note .....	pg. 14
Update—Transportation .....	pg. 4	Legis Status Chart .....	pg. 15
Update—HLW .....	pg. 6	Calendar .....	pg. 16
Views—States & HLW facilities .....	pg. 7		

Vol. 2, No. 14

September 27, 1983

## CALIF. ADOPTS LLW SITING BILL, COMPACT MEMBERSHIP POSSIBLE

On September 13, the California legislature adopted and forwarded to the Governor -- SB 342 -- a bill that provides for the siting of a LLW facility in the state and opens the door for the state to join a compact. Governor Deukmejian is expected to sign the measure by the end of the week (September 30). The enactment of this legislation could have far reaching effects on regional compact initiatives in the Rocky Mountain West, Central States, and possibly even the Northwest. State Health and Welfare Agency Undersecretary Richard Camilli was in attendance at the last Rocky Mountain Compact session to brief those states on California's activities, and is also expected to discuss regional disposal plans with the Central States and Texas officials.

### State Site Required

Within six months of this bill's enactment, the State Department of Health is required to identify regions within the state which could qualify, under already developed criteria, as the site of a LLW facility. Under legislation adopted in 1982, the Department of Health was required to develop siting criteria for a LLW disposal site and recommendations on temporary storage. The required report was submitted to the Governor and legislature in December 1982. The temporary storage (See Calif., pg. 2)

## HEARINGS ON COMPACT CONSENT BILL PROCEEDING IN CONGRESS

Within the next month and a half, Senate and House committees are planning to hold hearings in LLW compact consent bills and the overall progress of regional compact activities. Senate Judiciary Chairman Strom Thurmond has tentatively scheduled a hearing on the Central States (and the Rocky Mountain) compact bills for October 21. The staff contact is Sally Rogers at (202) 224-8059. Meanwhile, House Energy Conservation and Power Subcommittee Chairman Dick Ottinger is planning to reivev the general status of the regional compacts and consent bills at a session on November 3. The staff contact is Jeannine Hull at (202) 226-2424. House Interior, which also has jurisdiction of the compact bills, is not expected to convene any hearings until after the first of the new year.#

## RULEMAKING WON'T DISRUPT LLW DISPOSAL ACTIONS, SAYS EPA

Glen Sjoblom, Director of the EPA Office of Radiation programs contends that EPA's announced rulemaking (FR Vol. 48, No. 170) to set public exposure standards and guides for low-level radioactive waste disposal will not be the "pacing item" with regard to low-level radioactive activities. In an interview with Exchange staff, the ORP Director termed the problem that some people seem to have with the proposed rulemaking as "not a real issue, just a (See Rulemaking, pg. 2)



## THE STATES' ROLE IN HLW DECISIONMAKING: WHO IS THE "STATE" IN THE FEDERAL/STATE REPOSITORY SITING PROCESS?

Gary Downey, Ph.D.

### Introduction

In its design of a federal/state siting mechanism for HLW repositories, the Nuclear Waste Policy Act of 1982 provides authority for a potential host state to halt an individual siting process through a formal "notice of disapproval", an action that can be overridden only by a majority vote in both houses of Congress. This procedure evolved from the more general concept of "consultation and concurrence", which, for the past several years, had become the officially accepted but largely unspecified label for joint federal/state decision-making in the siting of HLW geological repositories. Through this process, the states are now provided a substantive role in the siting of a HLW repository while the federal government still retains control over the final decision. In deference to the urgings of state officials, however, Congress did not specify in the Act any framework for the internal decisionmaking process of a potential host state. It also attempted to treat the executive and legislative branches on an equal basis with regard to participation in the consultation process and the final site recommendation, but ended up not doing so. The net result is that substantial uncertainty remains on how a state will participate in the overall decisionmaking process. Such uncertainty could prove to be the Achilles heel of the whole program, unless the executive and legislative branch officials within each state cooperate and establish a cohesive process, including a clear line of decisionmaking

### Who has disapproval authority?

Under the Act, both the governor and the state legislature are granted the authority to approve or disapprove of a HLW facility: "Unless otherwise provided by State law, the Governor or legislature of each State shall have the authority to submit a notice of disapproval to the Congress . . ." [Sec. 116(b)(1)]. This provision has the potential of creating an adversarial rather than a cooperative relationship between the two branches of state government.

One possible consequence is the development of two entirely distinct decisionmaking processes within the state, each with its own data, analyses, and political constituency. Proponents and opponents would rally behind those officials most likely to support their respective causes. To ordinary citizens, an already complex process would appear at least doubly so. As a consequence, DOE may have to negotiate with both the legislative and executive branches of the state government. And Congress could face a notice of disapproval from one and approval from the other. What then would be the next step?

### Notification and Consultation

The Act is not consistent in specifying who should represent the state in the site screening process. The procedure begins with the Secretary of Energy issuing guidelines for the recommendation of sites after "consultation with . . . interested Governors . . ." [Sec. 112(a)]. The legislatures are excluded. The Secretary is then responsible for nominating five sites to be considered for characterization, following consultation with the governors [Sec. 112(b) (A)] and notification of both the governors and the legislatures [Sec. 112(b) (1) (H)]. In addition, the Secretary is to provide both the governor and the legislature of any state considered for nomination complete information regarding DOE plans [Sec. 117(a) (1-2)]. Thus, although the Secretary is not required to consult with the legislature prior to a site being nominated, the Department is required to provide information and notify the legislature upon final site nomination. After the President has selected three sites for characterization, the formal information-sharing process called "consultation and cooperation" is put into action. Both the governor and the legislature are authorized to participate in this process [Sec. 117(b)], and both are permitted to review DOE's site characterization plan every six months [Sec. 113 (b)(3)]. However, in the introduction to the site characterization section, the act only requires that the Secretary consult with the



governor [Sec. 113(a)]. Inexplicably, the legislature has been omitted.

### State Agreement Signatories Undefined

To insure the success of the consultation and cooperation process, the Secretary and some representative or representatives from the state are to enter into a legally binding written agreement. In this case, the Act escapes the problem of designating the state representative by choosing no one. It says only that the Secretary "shall seek to enter into a binding written agreement, and shall begin negotiations, with such State . . ." [Sec. 117(c)]. And in listing the types of procedures that the written agreement will establish, it does not specify whether the governor or the legislature will supervise the state's part in consulting and cooperating [Sec. 117(b)(1-11)]. There is, however, one exception. In the event that no formal agreement is reached, only the governor is included in the process of explaining the state's position to Congress. The Secretary is responsible for reporting to Congress why there has been no agreement, but first "the Secretary shall transmit such report to the Governor of such State . . . for . . . review and comments" [Sec. 117(c)]. Once again the legislature is left out.

Despite the fact that Congress grants consultation and cooperation authority to state legislatures, it apparently assumes that the governor of the host state will conduct the negotiations with DOE and alone sign the formal agreement. Such was the case in New Mexico, where a consultation and cooperation agreement on the WIPP facility was signed by the Secretary of Energy and the Governor. However, if both the governor and the legislature are to have disapproval authority as well as consultation and cooperation authority, as the Act states, then it makes sense for the legislature to also have the authority to participate in all decisions concerning the written agreement. As it now stands, the Act is unclear about who signs the written agreement but omits the legislature from the procedure for notifying Congress if there is an impasse.

### State Role in T&E Facility Siting Unclear

Adding yet another layer of uncertainty, the consultation and cooperation process for a test and evaluation (T&E) facility contrasts with that for a repository by explicitly designating the governor as the state's sole representative. The relevant subsections hold that the "Governor of a State . . . shall have the right to participate in a process of consultation and cooperation . . ." [Sec. 215(a)], and that the "Secretary shall enter into written agreements with the Governor of the State . . ." [Sec. 215(b)]. A state has no disapproval authority over a T&E facility, but it is not unlikely that a T&E facility will eventually become a permanent repository. Why should the legislature be excluded from the earlier process only to be brought back in with disapproval authority at a later point?

Taken as a whole, the Nuclear Waste Policy Act offers inconsistent direction for state participation in federal decisionmaking. It provides the legislatures with formal authority equal to that of the governors, but appears to expect that legislatures will not care to exercise it. It has the potential of creating an adverse atmosphere in relations between the Governor's office and the legislature.

### An Approach to the Dilemma

One change in the Act that would have made it internally consistent while providing well-focused lines of communication and authority would have been to grant disapproval authority over a proposed site solely to the governor. Then if the state legislature desired to participate in that decision, it could pass legislation forbidding the governor to sign a notice of disapproval without the legislature's consent. Such a change is impractical now, however, for opening the Act to amendment would certainly also open it to further manipulation.

The only available solution is for affected states to define for themselves decision-making mechanisms that will enable them to exercise their federally-granted authority with a single voice and in a manner acceptable to their citizens. This is not