

CASE LAW AND ADMINISTRATIVE DECISIONS

CASE LAW

France

Council of State Judgement on the transfer of the capacity of nuclear operator from La Manche radioactive waste storage facility to the National Radioactive Waste Management Agency (ANDRA) (1998)

The Council of State, in its judgement of 6 February 1998, refused CRILAN's (Anti-Nuclear Committee on Strategy and Information) application to declare that the Decree of 24 March 1995 authorising ANDRA to operate the Channel storage facility for radioactive waste was ultra vires.

The Council of State ruled that it was not necessary to append the counter-signature of the Minister for Research to the authorising Decree, beside those of the Ministers for Industry and the Environment; although he is responsible along with the latter for the supervision of ANDRA, he was not required to adopt any implementing or individual measures for the application of this Decree.

Furthermore, Article 6 of the Decree of 11 December 1963 on major nuclear installations did not provide for a compulsory public enquiry before proceeding with a request to transfer the capacity of nuclear operator from one entity to another; this request should be distinguished from the application, submitted shortly afterwards, for a licence to move from the storage phase to the surveillance phase, which is subject to a separate procedure and decision.

Council of State Decision concerning the procedure governing the underground storage of radioactive waste (1998)

An application was submitted to the Council of State by three private individuals to have declared ultra vires the decision made public by a communiqué dated 6 January 1994, issued by the Ministers of the Interior and Planning, of Industry and of the Environment, authorising ANDRA to carry out geological prospecting work in certain areas of four departments, with a view to installing an underground research laboratory.

Under Article 6 of the Law No. 91-1381 of 30 December 1991 on research into the management of radioactive waste, every project for the construction of an installation gives rise to consultations with the elected representatives and the population of the site under consideration. According to the terms of its implementing Decree of 17 December 1992, these prior consultations on

the choice of site take place amongst the elected representatives of the region, associations and the public in general.

Discussions were organised with elected representatives, consular representatives, socio-professional and trade union representatives and the presidents of environmental protection associations, in each department where it was planned to carry out preliminary research. Prior notification of these consultations was given through the press, radio and television, in order to clarify the location, conditions and purpose of the consultations and to ensure the participation of the public. At a later stage, the public were informed of the results of these discussions.

The Council of State expressed the opinion on 28 November 1997 that, the applications by these three persons to declare the decision which was made public by the communiqué of 6 January 1994 null and void, was not justified.

Sweden

Supreme Administrative Court Decision on the Closure of Barsebäck No.1 Reactor (1998)

The Swedish Government decided on 5 February 1998 that the nuclear power reactor Barsebäck No.1 was to close down by 1 July 1998. The decision was based on the Act on the Phasing-out of Nuclear Power [SFS 1997:1320] (See *Nuclear Law Bulletin* No.61). The owner, *Barsebäck Kraft Aktieföretag* (BKAG), a subsidiary of Sydkraft AB, appealed to the Swedish Supreme Administrative Court (Regeringsrätten), and to the Court of Justice of the European Communities. In its appeal to the Supreme Administrative Court, BKAG demanded that the decision should not be carried into effect until the court had reached a final decision. The main grounds for appeal presented by BKAG are the following: that the decision is in conflict with the Swedish Constitution, with national administrative law and with Community Law. Furthermore, it claims that the enforcement of the decision would lead to severe problems for BKAB as concerns retaining qualified staff, maintaining safety at the second reactor at Barsebäck, and ensuring the company's competitiveness on the market. On May 14 the Court granted a temporary injunction in favour of BKAB, referring to the uncertainty of the outcome of the case.

As a result of this injunction, the Barsebäck nuclear power plant continues to operate both reactors as before. In the meantime, the Government is negotiating an out-of-court settlement with Sydkraft AB. For the time being, it is not known when the Supreme Administrative Court may reach a decision or whether the Court will stay proceedings while awaiting a decision from the Court of Justice of the European Communities. Nor is it known whether a settlement between the government and Sydkraft AB will be reached independently of the outcome of court procedures. So far the Court has held verbal hearings on 8-10 September 1998.

United Kingdom

Court of Appeal Decision concerning the definition of damage to property for the purposes of Section 7(1)(a) of the Nuclear Installations Act 1965 (1998)

The Court of Appeal in its judgement of 10 June 1998 in *Blue Circle Industries plc. v. Ministry of Defence* declared that contamination of the plaintiff's land by radioactive material from an overflowing pond on the defendant's land was a breach of the duty imposed by section 7(1)(a) of the Nuclear Installations Act 1965 not to damage property by an "occurrence involving nuclear matter".

A storm had caused ponds on land belonging to the Ministry of Defence (hereinafter "MOD") to overflow down a stream through marshland belonging to Blue Circle Industries plc. ("Blue Circle") which led to the contamination of the marshland with nuclear material. As a result, the topsoil of the marshland had to be excavated and removed, and the value of the land was affected.

At the court of first instance, it was held that the MOD was guilty of breach of statutory duty under section 7(1)(a) of the Nuclear Installations Act 1965, and accordingly damages were awarded to Blue Circle.

Section 7(1)(a) of the Nuclear Installations Act provides that a site licensee has the duty to secure that no "occurrence involving nuclear matter ... causes injury to any person or damage to any property other than the licensee, being injury or damage arising out of or resulting from the radioactive properties, or a combination of those and any toxic, explosive or other hazardous properties, of that nuclear material".

Counsel for the MOD in the Court of Appeal argued that the damage caused did not constitute physical damage to the property. There had to be physical damage to the property which arose out of or resulted from the physical or chemical properties of the radioactive material deposited in the marshland. The emission of ionising radiation from the plutonium in the soil did not do any physical or chemical damage to the soil and did not pose any risk to health.

The Court held that physical damage to property was not limited to particular types of damage. There had been an alteration in the physical characteristics of the marshland caused by the radioactive properties of plutonium, which had rendered the marshland less useful or valuable. The plutonium had intermingled with the soil and could not be separated from it. The marshland was less valuable because it was unsaleable unless the contaminated soil was removed. The land was therefore physically damaged by the radioactive properties of the plutonium.

The Court also held that the normal rules on assessment of damages applied: Blue Circle was entitled to be compensated under Section 12 of the 1965 Act for all losses which were reasonably foreseeable and not too remote. Blue Circle was therefore entitled to damages not just for the damage to the marshland but also for the resulting diminution in the value and saleability of the whole estate of which it was a part. The damages awarded to the plaintiff amounted to approximately UK£ 6 million inclusive of interest.

U.S.A.

*Waste Isolation Pilot Plant (WIPP)**

Background

Transuranic or “TRU” waste began accumulating in the 1940s as a result of the United States’ nuclear weapons program. Most TRU waste is in metal drums at sites¹ owned by the Department of Energy. The term TRU waste refers to radioactive waste containing more than 100 nanocuries of alpha-emitting transuranic isotopes with atomic numbers greater than 92 and half-lives greater than 20 years.² In the United States, TRU waste results primarily from fuel processing and from fabrication of plutonium weapons and plutonium-bearing reactor fuel.³ Most of the TRU waste proposed for disposal at WIPP consists of items contaminated as a result of activities associated with the production of nuclear weapons, such as rags, equipment, tools, protective gear, and organic and inorganic sludge.

Following the National Academy of Sciences’ recommendation in 1957 that salt domes be investigated as a disposal medium for high-level and transuranic radioactive wastes, scientists with the US Geological Survey identified in the mid-1970’s a salt formation east of Carlsbad, New Mexico as a possible site for disposal of transuranic wastes. In 1980, the United States Congress authorised construction of the Waste Isolation Pilot Plant (WIPP) as a research and development facility to demonstrate safe and permanent disposal of transuranic radioactive waste resulting from the defence activities of the United States.

In 1991, the Department completed construction of WIPP, a mine constructed 655 meters below ground surface in an ancient salt formation located on approximately 10 240 acres, 26 miles east

* This note has kindly been prepared by Sophia Angelini, Attorney Adviser in the office of General Counsel for Civilian Nuclear Programmes, US Department of Energy. The facts contained and ideas expressed in this note are the responsibility of the author alone.

1. The majority of TRU waste is stored in 23 sites in 16 states. The major waste-generating sites are in New Mexico, Idaho, Colorado, South Carolina, Washington State, Ohio, Illinois, California, Nevada and Tennessee. Source: WIPP Disposal Phase Draft SEIS-II, DOE/EIS-002-S-2, Chapter 5 (November 1996). Much of the waste will be generated in the future as weapons are disassembled and weapons facilities are decontaminated and decommissioned.
2. The term “transuranic waste” is defined at section 2(18) of the WIPP Act to mean “waste containing more than 100 nanocuries of alpha-emitting transuranic isotopes per gram of waste, with half-lives greater than 20 years,” except for:
 - (a) high-level radioactive waste;
 - (b) waste that the Secretary has determined, with the concurrence of the Administrator [of the EPA], does not need the degree of isolation required by the disposal regulations; or
 - (c) waste that the Nuclear Regulatory Commission has approved for disposal on a case-by-case basis in accordance with part 61 of title 10, Code of Federal Regulations.
3. US Department of Energy, *Integrated Data Base Report-1996: US Spent Nuclear Fuel and Radioactive Waste Inventories, Projections, and Characteristics*, DOE/RW-0006, Rev. 13, Oak Ridge National Laboratory, Oak Ridge, Tennessee (December 1997).

of Carlsbad in Southeastern New Mexico. The facility is designed to take advantage of natural geological and hydrological features of the site along with engineered barriers to block waste movement from the repository. For example, it is expected that the salt at WIPP will gradually encase and isolate the waste deposited in the underground rooms.

In 1991, the Department proposed transporting limited amounts of TRU waste in order to conduct a test phase involving temporary burial of waste in underground alcoves at WIPP for scientific study to be followed by retrieval. However, suits were promptly filed in the US District Court for the District of Columbia by the State of New Mexico and environmental organisations alleging violations of environmental laws, including the Resource Conservation and Recovery Act (RCRA),⁴ pertaining to management of hazardous waste, and the Federal Land Policy and Management Act (FLPMA)⁵ in the context of certain Land Orders. In particular, the plaintiffs argued that WIPP did not have “interim status” under RCRA which would temporarily exempt the facility from RCRA’s permit requirements.⁶ On 31 January 1992, the US District Court granted an injunction barring introduction of waste at WIPP finding, in part, that the Department could not qualify for interim status under RCRA (because WIPP was not in existence before 19 November 1980) and that (absent interim status or a permit) a test phase involving radioactive and hazardous waste would violate RCRA. On appeal, the US Court of Appeals for the District of Columbia Circuit determined that the Department did in fact qualify for interim status under RCRA but nonetheless granted a permanent injunction against the Department’s planned test phase based on the FLPMA Land Order issue.⁷

With this background of litigation, Congress passed the WIPP Land Withdrawal Act⁸ in 1992 which withdrew WIPP from the operation of the Land Orders, previously at issue in the courts, and detailed how the Department of Energy should proceed with developing the facility. The Act prohibits disposal of high-level radioactive waste or spent nuclear fuel at WIPP and only TRU waste resulting

4. 42 USC 6901 *et seq.* RCRA comprehensively regulates, from generation to burial, waste designated as hazardous. States may take primary responsibility for RCRA implementation by installing a hazardous waste management program that is approved by the EPA. New Mexico’s program largely replicates the Federal program.

5. 43 USC 1701 *et seq.*

6. RCRA gives “interim status” to hazardous waste treatment, storage, and disposal facilities that were in existence prior to 19 November 1980 (the effective date of RCRA) or the effective date of a statutory or regulatory change that first subjects the facility to RCRA’s permit requirement, provided the facility has met certain other requirements, 42 USC 6925(e). Interim status allows a facility to operate without a permit during the application process. There is little legislative history regarding this provision; however, presumably Congress sought to allow existing facilities to continue operations, instead of forcing their immediate shutdown upon becoming subject to RCRA’s permit requirements.

7. *State of New Mexico v. Watkins*, 969 F.2d 1122 (DC Cir. 1992). In October 1993, the Department announced that it would perform tests with radioactive waste at existing national laboratories rather than in situ at WIPP. In 1996, Congress passed the WIPP Land Withdrawal Act Amendments which amended the original requirement that the Department conduct underground tests at the WIPP site with TRU waste to determine whether it could be disposed of safely.

8. This Act consists of Pub. Law No. 102-579 enacted on 30 October 1992 and does not appear in the United States Code. For additional laws relating to WIPP, see Section 213 of Pub. Law. No. 96-164 enacted 29 December 1979, Section 1433 of Pub. Law No. 100-456 enacted on 29 September 1988, subtitle F of title XXXI of Pub. Law No. 104-201 enacted on 23 September 1996.

from defence activities is planned for disposal at the facility.⁹ The total capacity of WIPP by volume is set at 6.2 million cubic feet of TRU waste.¹⁰

The WIPP Act established the Environmental Protection Agency (EPA) as the regulator of many of the Department's activities. To illustrate, EPA is responsible under the Act for both issuing disposal regulations¹¹ and determining whether the Department of Energy will comply with those regulations. Thus, the Department may dispose of TRU waste at the WIPP only if the EPA first issues its "certification of compliance" showing that WIPP complies with EPA disposal regulations.¹² The EPA is also responsible for ensuring that the Department complies with other federal environmental laws, regulations and permits pertaining to public health and safety or the environment.¹³ Throughout the operation of WIPP, the Department must be re-certified every five years after initial receipt and submit documentation of continued compliance with all laws and regulations applicable to the EPA.

TRU waste containing hazardous constituents regulated under the RCRA¹⁴ in addition to radioactive constituents, is known as "mixed TRU waste" and is regulated by both hazardous waste regulations (e.g. RCRA) and regulations applying only to TRU waste. Some TRU waste may also be contaminated with hazardous materials defined by regulations other than RCRA, such as the Toxic Substances Control Act.¹⁵ Once identified, the Department would continue to manage such wastes in accordance with additional requirements.¹⁶

9. The Low-Level Radioactive Waste Policy Act provides that the Federal Government is responsible for disposal of, *inter alia*, TRU waste that is commercial or utility generated. Such commercially generated waste results from activities subject to licensing by the NRC and must therefore be disposed of in a licensed facility. WIPP is not a facility licensed by the NRC and therefore cannot serve for the disposal of commercial TRU waste. The Low-Level Radioactive Waste Policy Act appears in the United States Code at 42 USC 2021b *et seq.*

10. The Department's "Record of Decision for the Department of Energy's Waste Isolation Pilot Plant Disposal Phase" published in the Federal Register on 23 January 1998, 63 Fed. Reg. 3623 (1998) stated that the Department will dispose of up to 175 600 cubic meters (6.2 million cubic feet) of TRU waste generated by defense activities at WIPP after preparation (i.e. treatment, as necessary, including packaging) to meet WIPP's waste acceptance criteria. This will include TRU waste accumulated since 1970 and to be generated over approximately the next 35 years.

11. The EPA radioactive waste disposal regulations appear at Subparts B and C of 40 CFR Part 191. These regulations limit the amount of radioactive material which may escape from a disposal facility, and protect individuals and ground water resources from dangerous levels of radioactive contamination.

12. The EPA Compliance Criteria at 40 CFR Part 194 interpret the general disposal regulations specifically for WIPP and clarify the basis on which EPA's certification decision is made.

13. Section 9 of the WIPP Act requires that the Department of Energy comply, *inter alia*, with the Clean Air Act, Solid Waste Disposal Act, Safe Drinking Water Act, Toxic Substances Control Act, and Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and all related regulations and permits.

14. Section 6903(5) of RCRA defines "hazardous waste" as:

A solid waste or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may:

(a) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

15. 15 USC 2601 *et seq.*

16. *Integrated Data Base*, see footnote 3.

While the Department's activities at WIPP are not subject to regulation by the Nuclear Regulatory Commission,¹⁷ any TRU waste transported by or for the Department of Energy to or from WIPP must be transported in NRC-certified packages that have been determined to satisfy its quality assurance requirements.

On 18 May 1997, the EPA issued its certification that WIPP will comply with the EPA radioactive waste disposal regulations at 40 C.F.R. Part 191.¹⁸ This certification constituted its final approval under the WIPP Act for emplacement of TRU waste to commence, provided the Department complied with all other applicable health and safety standards. On 22 June 1998, the Defense Nuclear Facilities Safety Board (DNFSB)¹⁹ reported to President Clinton and the Secretary of Energy its conclusion that, based on its review of nuclear safety procedures, WIPP could be operated safely. Thus, TRU waste (non-mixed) from specific waste streams from Los Alamos National Laboratory for disposal at WIPP was planned for shipment by the Department in June 1998.²⁰

However, litigation involving the 1992 permanent injunction (noted above) concerning the Land Orders,²¹ familiar RCRA issues and challenges to the EPA's Certification of Compliance of 18 May 1998 has so far prevented the commencement of waste acceptance. In *State of New Mexico v. Department of Energy*, US District Court for the District of Columbia (case nos. 91-2527 and 91-2929 JGP), filed on 11 June 1998, the State of New Mexico requested a preliminary injunction to prohibit the Department from introducing radioactive waste at WIPP. The New Mexico Environment Department, a State agency regulating WIPP with respect to hazardous waste, argues in part that WIPP does not have a RCRA permit to operate a facility for hazardous or mixed TRU waste, and that the Department cannot establish the actual contents of its containers, and that the Department lacks "interim status" under RCRA which might have allowed operation of a hazardous waste facility without an actual permit. The State of New Mexico argues that shipments should not proceed prior to a ruling on the status of the Court's 1992 injunction and cites the US District Court's order of 30 January 1992 that "... the Department of Energy shall permanently cease all activities relating to the "Test Phase" of transuranic nuclear waste experiments with respect to the WIPP insofar as they involve the introduction or transportation of any such waste into the State of New Mexico." The Department has moved to dismiss on the ground, *inter alia*, that the Court's order does not bar it from shipping non-mixed TRU (i.e. non-hazardous) waste to WIPP for permanent emplacement. The Department also argues that the WIPP Act, enacted after issuance of the 1992 injunction, expressly revoked the Land Orders that were the basis of the Court's injunction and granted a new statutory process "for the construction,

17. As a facility of the Department of Energy, WIPP is not subject to regulation by the Nuclear Regulatory Commission. There are some exceptions to this general rule, specified by statute, such as the Nuclear Waste Policy Act, 42 USC 10101 *et seq.*, which provides that a repository for disposal of high-level radioactive waste and spent nuclear fuel must be licensed, as well as Section 202 of the Energy Reorganization Act of 1974, 42 USC 5801 *et seq.*

18. Subparts B and C of 40 CFR 191 "Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Waste".

19. The DNFSB is an independent federal agency created by Congress in 1988 (42 USC 2286 *et seq.*) to review and evaluate the content and implementation of health and safety standards relating to the design, construction, operation and decommissioning of the defense nuclear facilities of the Department of Energy.

20. The Department anticipates that its sites in Colorado, Idaho and New Mexico will be the first to begin shipping transuranic waste to WIPP. DOENews, *Department of Energy Issues Decisions on Transuranic Waste: Support Opening of the Waste Isolation Pilot Plant*, 22 January 1998.

21. The Department of Energy argues that the WIPP Act of 1992 rendered the Land Order issue moot.

experimentation, operation ... disposal ... and other activities associated with the purposes of WIPP".²² Meanwhile, the Department and State of New Mexico have agreed to a joint technical review of the Department's waste characterisation documentation.²³

While the Department had initially expected to receive a RCRA (Part B) permit for mixed waste at about the same time that the EPA issued its certification, it now appears that the State of New Mexico will not issue this permit before July 1999. The Department's most recent estimate for when it can open WIPP is reportedly January 1999, provided the Court of Appeals for the District of Columbia Circuit lifts the 1992 injunction.²⁴

ADMINISTRATIVE DECISIONS

Finland

Council of State Decisions concerning the licences of IVO and TVO (1998)

On 2 April 1998, the Council of State decided, on application by Imatran Voima Oy (IVO), to extend this electricity company's licence to operate the two nuclear power plant units situated in Loviisa by 10 years, i.e. until 31 December 2007. The maximum output allowed (nominal) for both units is 1500 MW (thermal). The existing facilities and storage units which are required for the management of the nuclear fuel and nuclear waste of these two units may also continue operating until the above-mentioned date, subject eventually to the carrying out of necessary extensions.

Furthermore, on 20 August 1998, the Council of State decided, on application by Teollisuuden Voima Oy (TVO), to extend this second company's licence to operate the two nuclear power plant units situated in Olkiluoto by 20 years, i.e. until 31 December 2018. The maximum output allowed (nominal) for both units is 2500 MW (thermal).

The above-mentioned Decisions also contain provisions concerning radioactive waste management. The Decision of 2 April 1998 grants the applicant (IVO) a licence to operate a permanent disposal facility, in order to dispose of low- and intermediate-level radioactive waste from the operation of the two power plant units situated in Loviisa. The licence for this facility, which is to be constructed on the nuclear power plant site, extends until the end of year 2055.

The Decision of 20 August 1998 extends TVO's licences to operate the existing on-site interim storage facilities for spent fuel, intermediate-level nuclear waste and low-level nuclear waste derived from the operation of the nuclear power plant in Olkiluoto, until 31 December 2018.

22. WIPP Act Section 3(a)(3).

23. Three petitions before the US Court of Appeals for the District of Columbia Circuit, involving the State of New Mexico and private organizations, challenge also the EPA Compliance Criteria and Certification of Compliance of May 1998.

24. Shawn Terry, *DOE Rejects New Call for Delay at WIPP*, Inside Energy, 12 October 1998.

