COMMENTARY

A RESPONSE TO *LOW-LEVEL RADIOACTIVE WASTE DISPOSAL POLICY IN VERMONT: AN ASSESSMENT OF ACT 296*

The two main points of Craig Prescott Wilson's note, *Low-Level Radioactive Waste Disposal Policy in Vermont: An Assessment of Act 296*[1] (the "Note"), are both misleading.

In the first place, while the Note repeatedly states that "the Act *requires* separation,"[2] this is simply not the case. Moreover, since separation is not required, it does not follow that "the Act could potentially result in the state incurring substantial cost to separate the wastes, but fail to realize any benefit from such separation."[3]

In fact, the law requires the Vermont Low-Level Radioactive Waste Authority (the "Authority") to undertake a study, which is to result in a determination of "the maximum *appropriate* separation of long-lived waste."[4] At the very same time, the Authority must undertake engineering studies for the possible disposal of long-lived waste.[5]

Afterwards, the Authority will (1) make recommendations about separation to the Agency on Natural Resources (the "Agency") and (2) report to the legislature and the Public Service Board concerning disposal technologies.[6] The Agency will then define long-lived waste,[7] and in doing so, "shall consider the costs of separation and all risks from separating and disposing of the sepa-

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1. Craig Prescott Wilson, Note, *Low-Level Radioactive Waste Disposal Policy in Vermont: An Assessment of Act 296*, 16 VT. L. REV. 639 (1992).
2. *Id.* at 650 (emphasis added).
3. *Id.* at 640.
4. VT. STAT. ANN. tit. 10, § 7002(a)(2) (Supp. 1991) (emphasis added).
5. *Id.* §§ 7002(a)(2), 7002(a)(12), 7012(d), 7012(j).
6. *Id.* § 7002(a)(12)(A), (C).
7. *Id.* § 7023(a)(2).

rated wastes."[8]

The law does not require either the Authority or the Agency to find that separation is necessary if the risks and costs outweigh the benefits. But in fact, the Authority's separation study has now been completed, and has found that ninety-nine percent of the long-lived waste is *already* separate from the short-lived waste, in separate waste streams. Thus, a very high degree of separation is possible at *no* risk and *no* cost.[9]

Doubts still remain as to the ultimate disposition of the wastes—that is, as to facility designs and disposal strategies. But it is pretty certain that any designs applicable to Vermont will involve separate cells or modules, because the annual waste stream is so small. This too was clear prior to passage of Act 296.

There is no difficulty in dedicating one or more cells to the long-lived waste streams, and others to the short-lived wastes. This is a straightforward design item and presents no special technological difficulties. In other words, waste can be kept separate and can remain in a separate cell of a near-surface facility indefinitely at no incremental cost.

If it is decided that the "initial" facility is adequate for permanent disposal, i.e., that there are no benefits to be derived from separate disposal, then the waste will simply be left in place. Vermont's law was carefully written to assure that this situation would represent full compliance with federal law and regulations.[10]

On the other hand, if decision makers should decide that there are benefits from disposing of the long-lived waste in a different

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8. *Id.* § 7023(b).

9. Prior to the passage of the bill, the report by Acres International cited in footnote 5 of Mr. Wilson's note stated on pages 3-4 that "approximately 74% efficiency of separation of long-lived wastes will be achieved *without requiring any further effort*" (emphasis added). It seems likely that the truth lies somewhere between these two estimates. Since there is no accurate estimate of the radioactive inventory of Vermont's low-level radioactive waste, definitive estimates about the degree of potential separation are not yet possible.

10. The Note incorrectly states that "[t]he facility, however, will not be designed to house all types of low-level radioactive waste." Wilson, *supra* note 1, at 650. As finding j makes clear, "it is in the best interests of the state to carry out its responsibilities under the present federal law . . . by siting and constructing a facility which would satisfy the federal requirements for disposal of *all* the waste but would segregate that portion of the waste containing most of the long-lived isotopes." VT. STAT. ANN. tit. 10, ch. 161 (Supp. 1991) (legislative findings and intent) (emphasis added). To have done otherwise would have violated § 3(a)(1)(A) of the Low Level Radioactive Waste Policy Amendments Act of 1985, something Act 296's drafters took great pains not to do.

facility, then it will be recovered and put elsewhere. Any decision to remove the waste from an initial facility will obviously compare the costs and risks associated with removal to the benefits to be derived from placement in a new facility.

What we know now provides strong confirmation for the hypothesis on which Act 296 was based, which is unsurprising since that hypothesis was based on prior scientific and technical research. In Vermont, long-lived low-level radioactive waste and short-lived low-level radioactive waste are essentially generated separately. Keeping the wastes separate involves no costs, no additional worker risks, and no incremental risks to the public. Since small disposal cells (or modules) will be needed in any case, there are also no additional costs for keeping the waste separate.

In sum, the Note's thesis on waste separation rests on a misinterpretation of the law and a technical hypothesis contrary to known facts of the matter. Indeed, Vermont's Act 296 has, for the first time in the United States, raised this crucial question, and established a reasonable process for reaching an answer. For this, the law should be *com*mended, not *am*ended.

The second main point of the article concerns exclusion of out-of-state wastes. There are clearly constitutional difficulties inherent in affirmative, direct exclusion of out-of-state waste by a go-it-alone state. The Note does a good job of articulating these. Recognizing these problems, Act 296 attempts a variety of exclusionary methods which do not raise Commerce Clause objections. There are a variety of ways in which, it is hoped, generators will separate *themselves* into in-state and out-of-state, without setting off Commerce Clause alarm bells. Such solutions are clearly not fail-safe, but they are novel and sensible attempts to solve the problem. The Note highlights two of these mechanisms: the pre-allocation financing option and the sizing of the facility, but there are others.

In discussing the pre-allocation option, the Note ignores the very real possibility that only in-state generators will seek to purchase access to the Vermont facility. Should that occur, the Commerce Clause would not be relevant, and there would be no further legal complications. If, on the other hand, an out-of-state generator wants to buy disposal capacity, then the law's drafters assumed that the Authority would abandon the pre-allocation scheme and opt for a different financing option.

Similarly, the decision to size the facility according to Vermont's needs[11] is an attempt to limit the probability of out-of-state access, without *excluding* this waste in the Commerce Clause sense of that term. Having more space than necessary would invite out-of-state waste; limiting capacity makes this a less inviting option. The Commerce Clause does not require the State to *seek* out-of-state waste, only to *accept* it if reasonably proffered.

In sum, the question of exclusion of out-of-state waste, like that of waste separation, is an issue which Act 296's drafters considered in careful detail, and concerning which Act 296 takes some creative and intelligent action. In my admittedly biased view, the law does a praiseworthy job on both questions and the Note's attacks are unwarranted.

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11. VT. STAT. ANN. tit. 10, § 7023(a)(15) (Supp. 1991).