MINUTES OF THE REGULAR MEETING OF THE
ROCKY MOUNTAIN LOW-LEVEL RADIOACTIVE WASTE BOARD

LAS VEGAS MARRIOTT
325 Convention Center Drive
Las Vegas, Nevada 89109

December 14, 2009

ATTENDANTS

Board Members:

Ron Curry, New Mexico, Chair
Gary Baughman, Colorado
Leo Drozdoff, Nevada *(via telephone)*

Barbara Green, Legal Counsel
Leonard Slosky, Executive Director
Sheri Reynolds, Recording Secretary

Others:

John Hacket, Clean Harbors Deer Trail
Tom Porta, Nevada Division of Environmental Protection
Peggy Ruefer, Southern Nevada Water Authority
Scott Wisniewski, U.S. Ecology
Adrian Howe, Nevada State Health Division
Jennifer Wascak, Adams County, Colorado
Ted Buckner, Southeast Compact Commission
Judy Woodson, U.S. Army, Department of Defense
John Miller, International Isotopes, Inc.
Steve Laflin, International Isotopes, Inc.
Mike Pearson, Los Alamos National Laboratory, Offsite Source Recovery Project

REGULAR MEETING

Mr. Curry, Chair, called the meeting to order at 11:33 a.m. Mr. Baughman's flight had been delayed so Mr. Curry explained that with Mr. Drozdoff on the phone there was a quorum to proceed with the meeting.

The first item on the agenda was the approval of the minutes of the June 18, 2009 Regular and Annual Meetings. Mr. Curry moved to approve the minutes as submitted. Mr. Drozdoff seconded; the motion carried.

EXECUTIVE DIRECTOR'S REPORT

Mr. Slosky directed the Board to Tab M and reported that the Board had $209,306 in liquid assets as of November 30, 2009. He explained that there are three investments maturing in January 2010 and that he recommends the Board not reinvest the funds until the cash needs for 2010 are determined. Mr. Slosky added that the permit fee revenue for 2009 through November is a little below normal at $16,168.

BUDGET VS. EXPENDITURE COMPARISON

Mr. Slosky directed the Board to Tab N for the Budget/Expenditure Comparison through November 30, 2009. He explained that Operating Expenses were budgeted at $20,000 for the year; however, when the Board agreed to file the amicus brief for the Southeast Compact litigation in the U.S. Supreme Court he did not anticipate the printing cost would be over $9,000. This consumed nearly half of the annual Operating budget. Mr. Slosky proposed that the Board move $5,000 from Contingency to Operating Expenses. Additionally, he suggested that the Board move $40,000 from Contingency to Legal Expenses to cover costs associated with the Southeast Compact and Energy*Solutions* litigation. He added that the Accounting number appears high because it includes the annual audit and should be within budget at the end of the fiscal year.

Mr. Curry asked if Mr. Slosky anticipates any further expenses relating to the Southeast Compact litigation. Mr. Slosky explained that the amicus brief was a one-time event and that there should be no further expense to the Board on this case. He added that the U.S. Supreme Court has scheduled oral arguments for January 11, 2010. Mr. Slosky further explained that the Energy*Solutions* briefings have already been filed and that there will be no exorbitant printing costs associated with this case. The major remaining item in the near future is the oral argument in the Energy*Solutions* case.

Mr. Slosky continued with the fiscal status by directing the Board to Tab O and explained that there is nothing unusual with the export/disposal for the calendar year. He added that the Rocky Mountain region is well within the disposal capacity allowance at U.S. Ecology in Washington.

Mr. Slosky directed the Board to Tab P for an action item to amend the annual budget. Mr. Drozdoff moved to amend the budget as proposed. Mr. Curry seconded; the motion carried.

STATUS OF NRC DEPLETED URANIUM RULEMAKING

Mr. Slosky directed the Board to Tab J. He wanted to bring this matter to the attention of the Board because he believes that the proper management of depleted uranium (DU) is going to be an ongoing issue for the states and compacts. The issue grew out of the Louisiana Energy Services, L.P. (LES) licensing proceeding when petitions were filed asking the NRC to review the classification of DU arguing that it should not be Class A waste and perhaps not even low-

level waste. NRC commissioners determined that it is Class A waste and then directed staff to undertake a rulemaking to review special performance assessments and conditions that might be appropriate for insuring the safe disposal of DU. He explained that when NRC regulations in 10 CFR 61 were promulgated there were no sizeable commercial waste streams of DU; thus, the 10 CFR 61 performance assessments did not consider large quantities of concentrated DU. The anticipation is that there will be large quantities of highly concentrated DU needing disposal in the coming years with LES, International Isotopes, and future development of similar facilities.

After attending one of the two recent NRC Public Workshops in Salt Lake City, Mr. Slosky is concerned that risks of highly concentrated DU are not being fully assessed. He added that most low-level waste decays in 100-300 years which is reflected in 10 CFR 61 regulations. However, the maximum radiological risk of DU is at one million years which is the opposite from all other low-level waste in that rather than decaying, the radiological risk from the in-growth of the radon precursors actually increases with time rather than decreases. The whole philosophy of 10 CFR 61 is that facilities maintain control and run a performance assessment in the hundreds of years. Mr. Slosky believes that the NRC is not going to look at the true radiological risk and will likely model for a thousand to ten thousand years and may not address the maximum risk period. Additionally, he is concerned that since the NRC designates the compatibility classification and to what extent states have to follow in step with the NRC under the Agreement State Program, the NRC may make this a compatibility requirement that will tie the states' hands from properly assessing the true risk of disposing DU. This is of great concern in Utah since they have been receiving most of the large quantities of DU in recent years and anticipate receiving newly produced DU from the commercial sector. In September, the Utah Radiation Control Board met and reviewed a petition to impose a moratorium on DU. They were threatened by the NRC that their Agreement State Program would be revoked if they chose to pursue the moratorium so they have since been exploring other options for properly regulating the disposal of DU. They are leaning toward a license amendment that will require a performance assessment be completed at the Energy*Solutions* facility before more large quantities are received. This may delay the disposal of significant quantities for a year or so. He added that the DOE currently has a large quantity of DU that is ready to ship at any time. Mr. Slosky does not recommend that the Board take any action at this time.

Mr. Drozdoff asked about the role of Utah Radiation Control Board. Mr. Slosky explained that it is an appointed board that sets policy for the radiation control division in Utah. Mr. Drozdoff asked for further details about the DOE waste. Mr. Slosky explained that there are approximately 15,000 drums of DU sitting at Savannah River ready to ship. He added that the DOE is building two de-conversion facilities; one is expected to come online in 2010.

Mr. Curry asked how the NRC is expected to address this issue. Mr. Slosky commented that the rulemaking will take about two years to finalize. He believes that the agency is going through the motions to say that they have taken public comment, but have already decided what they

want to do. His reiterated his concern that the proposed rule will be released without addressing the real risk and will tie the states' hands from establishing more stringent rules. He further believes that the NRC's objective is to facilitate the disposal of DU at Energy*Solutions*. Mr. Drozdoff asked if the compacts or LLW Forum will be submitting comments on the issue. Mr. Slosky responded that it does not fall within our traditional purview since this is a health and safety issue. However, he has made suggestions to the states that are most concerned (Utah, Texas, and Washington) that they might have more influence if they act together rather than separately. It will likely be six to nine months before we see a proposed rule at which time we should bring this back before the Board.

Mr. Drozdoff added that he recommends that we keep this issue on our agenda and continue to communicate on this matter. He mentioned that we might consider minimizing new endeavors with the DOE until they put their cards on the table. Mr. Slosky agreed that he will monitor the matter and will flag any opportunity for comment and matters that the Board should consider taking action on. Mr. Slosky believes that this will be an ongoing topic for future LLW Forum meetings as the rulemaking and other issues on DU evolve.

STATUS OF CLEAN HARBORS REGIONAL FACILITY

Mr. Baughman arrived, so the Board returned to the top of the agenda. Mr. Slosky began the discussion by directing the Board to Tab F. He explained that the Clean Harbors Deer Trail Facility (CHDTF) waste receipts summary has been modified to abbreviate prior years and will detail current year volumes. He added that the report through November 30, 2009 should complete the volumes for the year since there are no pending import applications at this time.

Ms. Green was asked to summarize the status of two pending lawsuits concerning the facility. She explained that the Board is not involved in either of the cases; however, the State of Colorado is involved in both. One was concluded on October 13, 2009. The Colorado Supreme Court decided that Adams County has standing to challenge the license and permit that were issued to the CHDTF by the state. Adams County initially sued the State of Colorado arguing that the State failed to follow proper procedures in issuing the license for CHDTF. Clean Harbors argued that the State of Colorado could not issue a license for the CHDTF because the County had not issued a valid Certificate of Designation (CD) to cover low-level radioactive waste. The lower court said that Adams County did not have standing to raise this issue because of a line of cases holding that a "subordinate" state agency does not have standing to sue the State. The Colorado Supreme Court disagreed and decided that, in this particular case, the County is not a subordinate agency because under the state Hazardous Waste Siting Act and under the State's Low-Level Radioactive Waste Act, there is a role carved out for counties, and the State cannot seek designation of a facility as a Compact regional disposal facility until the facility obtains a CD from the county for that purpose. In this decision, the Supreme Court did not decide whether or not the County has issued the necessary CD to CHDTF; the Court remanded the case to the district court to determine that issue. Both the State of Colorado and

CHDTF have argued that the County issued a CD in 1983, and again in 1987 for the facility, and that those CDs were transferred appropriately to CHDTF.

Mr. Drozdoff asked if there was any timeframe that must be met to move forward. Ms. Green responded that she has not seen any orders about this and added that at some point the case may go away for failure to move forward. However, when talking to the attorneys involved, all have expressed an interest in resolving the issue as to whether there is a CD that satisfies State law for CHDTF. Ms. Green reiterated that the Supreme Court spelled out that the County must approve a CD for a Compact regional disposal facility, but it did not take a position as to whether or not such a CD had been approved. The Court went further by stating that the State statute requires the County to issue a CD that addresses the material that the regional disposal facility will be accepting. This opens the door for Adams County to continue its argument that the CDs did not address the specific disposal activity at CHDTF.

Ms. Green updated the Board on another case that is working its way through the Colorado Court of Appeals. The case is an enforcement action by Adams County arguing that the CHDTF never received the required approval before it began accepting material, and violated the county's regulatory framework delegated by the State of Colorado. One of the arguments that the State and CHDTF made is that if Adams County were to deny a CD, such a denial would be preempted by State law. After some of the comments made by the Colorado Supreme Court in the standing case, however, it appears that the court might not look favorably on a preemption argument. The Colorado Supreme Court clearly stated that the two acts at issue, one delegating authority to counties, and the other delegating authority to the State, must be read harmoniously to give effect to both. In the end, the primary factual question is whether or not CHDTF has been issued a valid CD from Adams County for the material that it has been licensed by the State to accept. Ms. Green added that Adams County never asked for a stay in the matter, and CHDTF will continue to operate as usual during the course of the litigation unless a stay is issued. The door remains open for the Court of Appeals in this enforcement action to make a decision on all of these matters. She explained that the case was fully briefed as of October 8, 2009 and could take up to six months or longer for a decision. Given the position of each of the parties involved, it is likely that there will be an appeal of the decision to the Colorado Supreme Court unless the parties are able to settle the matter.

Mr. Baughman added that there are settlement discussions going on that he has not participated in and he is unable to provide any information.

Ms. Green explained that for the benefit of public record Mr. Baughman, Colorado-governor-appointed representative to the Board, has recused himself from any legal strategy discussions by the Board about this matter to avoid any appearance of impropriety.

STATUS OF ENERGY*SOLUTIONS*

Mr. Slosky opened the discussion by explaining that this is the case where Energy*Solutions* filed a lawsuit against the Northwest Compact claiming that the Clive, Utah facility is not under the Northwest Compacts' jurisdiction. The State of Utah and this Board both intervened as defendants. The Federal District Court in Utah ruled generally in Energy*Solutions*' favor. The case is on appeal to the 10th Circuit Court of Appeals in Denver. He included the last brief that was filed during September in the briefing book under Tab G. This case is fully briefed and the 10th Circuit will be conducting oral arguments on January 14, 2010. He added that a number of states and compacts have filed a Friends of the Court brief so that in this case there are eight of the ten compacts, the State of New Mexico, and the Counsel State Governments supporting the Northwest Compact's, the State of Utah's, and the Rocky Mountain Compact's position.

Ms. Green summarized the key issues. The Energy*Solutions* facility in Clive, Utah would like to bring in low-level radioactive waste from Italy. Utah is one of the compact states of the Northwest Compact. This case presents a question of statutory construction. The Northwest Compact argued that its compact allows the Northwest Compact Committee to regulate out-of-region low-level radioactive waste for disposal at any facility in the Northwest Compact. Energy*Solutions* replied that the Northwest Compact has no authority over waste from Italy or over the Clive facility. This is how the litigation began.

Ms. Green further explained that the language of the compacts was approved by an act of Congress. Title I of this legislation which is referred to as the "1985 Policy Act." Title II, which contains the specific language of the compacts, is referred to as the "Consent Act." Energy*Solutions*'main argument is that Title I, rather than the language of the compacts approved by Congress, is a grant of authority to compacts that allows compact entities only to exclude out-of-region waste for disposal at a "regional facility" as that term is defined in the 1985 Policy Act. It is the position of the Northwest Compact, the State of Utah, the Rocky Mountain Compact, and the other compacts that Title I is not a grant of authority. Title I clearly provides a *limitation* on compact authority during an interim period of time which expired in 1992. The grant of authority to exclude out-of-region waste, or to otherwise discriminate against out-of-region waste, is through the compact's language as consented to by Congress. Simply, once approved by Congress, a compact becomes federal law, and the compact speaks for itself. Under the language of the Northwest Compact, no waste can be disposed of at a facility in the Northwest Compact Region without the approval of the Compact Committee. There is no factual dispute about whether or not there was compact approval; the Northwest Compact Committee has not approved the import of waste from Italy. Ms. Green added that if the district court's decision is upheld by the 10th Circuit Court of Appeals, it will wreak havoc on the compact system as we know it and will change the way compacts have been doing business for 30 years. Additionally, a decision in support of Energy*Solutions* will have huge implications on the generators of low-level waste because the compact system assures disposal capacity for in-region generators. She added that the only low-level radioactive waste facilities that have been approved in the past 20 years have been facilities located in compact states. This is due

primarily to the fact that private sector investors know that once a facility is established within a compact state, the compact has the authority to direct the waste flow into the facility to protect its economic viability. In the absence of a Congressionally-approved compact, no state or group of states can direct out-of-region waste streams anywhere since it would be a violation of the dormant commerce clause. Also, if Energy*Solutions* were to prevail, the compacts that regulate the import of low-level waste for purposes other than just disposal at a regional facility, such as those that regulate import for management, or those that regulate export of waste, would no longer be able to carry out those functions. She added that Energy*Solutions* has made the issue far more complex than it really is, which is sometimes a winning strategy.

Mr. Baughman asked about the anticipated timeframe. Ms. Green offered that this matter must be extremely important to the court or the oral arguments would not likely to have been scheduled in such a short period of time.

H.R. 515

Mr. Slosky opened the discussion by explaining that H.R. 515 is a piece of legislation that was introduced in the U.S. House of Representatives. There is a companion bill in the Senate. This bill would prohibit the importation of foreign waste except if the waste is Department of Defense (DOD) waste being returned to the states. Another exemption allows the President of the U.S. to allow certain import if he/she believes that this in the national interest. Effectively, this will prohibit the importation of most low-level waste except for the import of DOD waste. Mr. Slosky was invited by the House Energy and Commerce Committee subcommittee on Energy and Environment to testify on this piece of legislation and did so on October 16, 2009. A copy of his testimony is provided in the briefing book under Tab H. There were only three witnesses: 1) the President of Energy*Solutions*, 2) the International Programs Director of the NRC; and 3) himself. This Board has not taken a position on this legislation and Mr. Slosky talked about the policy issues involved and made a couple of comments on the bill itself. The bill has passed out of the subcommittee and the full committee. The bill was passed by the full House two weeks ago with 60 co-sponsors and passed with 60 republic votes. The bill was sent to the Senate, but he does not expect the bill to move as rapidly through the Senate since one of the Utah Senators is very opposed to the legislation. What happens in the Senate is very uncertain. Mr. Slosky will continue to follow this legislation and keep the Board informed.

Ms. Green added that this bill would solve the issue at hand with respect to the Clive facility. However, it would not resolve any of the broader legal questions about compact authority that have been raised in the Energy*Solutions* litigation.

INTERNATIONAL ISOTOPES PROPOSED DEPLETED URANIUM DECONVERSION PLANT – DISCUSSION OF REGULATORY ISSUES CONCERNING THE BOARD

Mr. Slosky opened the discussion by reminding the Board that International Isotopes, Inc. (INIS) previously briefed the Board on their planned facility in New Mexico and posed a couple of questions to the Board which are outlined in Tab I. One of the questions was if the Board will issue annual export permits to INIS for the DU disposed of outside the region. The answer to this question is that it is long-standing Board policy to issue annual export permits at the generator's request. INIS has at least one other issue that is not as straightforward so Mr. Slosky invited Mr. Laflin to provide an update on the status of the facility and refocus any question(s) for the Board. Mr. Slosky explained that his intent is not to reach a resolution today, but to refocus this for the Board and, if the Board so chooses, to talk about what process the Board might take to answer the question(s). He stressed that there is nothing immediately pressing requiring the Board to make a decision at this time and added that there may be legal implications so the Board may want to obtain legal advice before issuing a decision as to what the process might be.

Mr. Laflin began by providing an update since the June Board meeting. They have completed their conceptual design report for the project which was the next necessary step to layout the engineering groundwork and pricing cost of operations. They immediately put the same engineering group to work on the license application and environmental report. The license application is on track and will be turned in to the NRC by the end of this month. In addition, they have furthered the design and have announced a month or so ago the successful completion of an agreement between INIS and the New Mexico Environment Department which stipulated certain waste volumes and inventory limits for the facility. The actual land transfer will be completed next Wednesday after a ten-week public notification period. NRC will announce within about 45 days acceptance of the license. They will then start the review which takes about 18-22 months with an environmental impact statement. Not much will be happening during this period, other applying for some pre-license construction activity such as parking lots, administration buildings, etc.

Mr. Laflin restated that one of their questions was related to obtaining export permits which Mr. Slosky has addressed. He further explained that with a fully operational facility they are estimating between 300-400 export actions per year. The second question is relating to import permit criteria. What INIS proposed is that the material not be considered a waste at the time of import. Once the fluorine has been extracted and the waste has been converted to an oxide it would then be considered a waste. Mr. Laflin posed the idea of requesting an exemption to Rule 7 and suggested avoiding a waste definition discussion. His position is that this is a revolving door process, similar to the Rule 7 exemption for sealed sources that are returned to the manufacturer, in that all of the DU coming into the compact will also go out as an export action for disposal within 30 days. He reiterated that either because DU imported into the compact is not a waste or because it is going out of the compact soon after arrival.

Mr. Curry complemented INIS for working so diligently with the State of New Mexico in satisfying the agreement. He added that the approach is something that Mr. Curry would like to

see from all companies working with his office in the future. Mr. Curry asked Mr. Laflin if the request for an exemption he posed with the Board is consistent with the agreement between INIS and the State of New Mexico. Mr. Laflin responded that the agreement talks about chemical forms and does not get into the waste issue other than the oxide that is clearly a waste form. Mr. Curry wanted to make sure that there is no connection between what has been presented to the Board and the agreement with the State of New Mexico.

Ms. Green asked Mr. Laflin if he has reasons why INIS would seek an exemption should the Board determine that it is waste. Mr. Laflin explained that hassle and cost factors are primary reasons. With 150,000-200,000 cubic feet per year, cost is estimated at $0.35-0.45 per cubic foot into and then out of the compact. Mr. Slosky suggested that the Board obtain legal advice before responding with either a decision or establish a process for making a decision. Mr. Curry asked if there was a specific timeframe Mr. Laflin would like an answer. He responded that there is plenty of time since they are not planning to ship any waste into or out of the region until 2012.

Mr. Curry suggested the Board plan a full discussion of the process that Mr. Laflin anticipates so that the Board will have a clear understanding of what INIS proposes doing. He added that this may be the quickest way for the Board to vote on an exemption. Mr. Slosky stated that the Board will meet again sometime before July of 2010. Mr. Curry stated that he would prefer the Board hold a meeting before July and added that a decision could be made before or at a July meeting. Ms. Green asked for clarification of Mr. Curry's suggestion as to whether the Board will plan to take action at the next meeting or develop a process for taking action. Mr. Curry responded that he would like the Board to have a very detailed discussion and, if the Board is comfortable at that time, take action.

Mr. Drozdoff added that he would prefer that we have further discussion sooner rather than later. Mr. Baughman agrees that further discussion would help him gain better understanding of the process and he further stressed the importance of legal considerations. Mr. Curry suggested that the next meeting be held late March in Los Alamos where the Board could incorporate some additional activities. Mr. Slosky added that the LLW Forum is meeting March 22-23 in Austin, Texas so he would prefer something after that.

Mr. Curry closed the discussion by stating that further discussion with INIS will be added to the agenda and anticipates scheduling the meeting in Los Alamos, New Mexico.

DISCUSSION OF U.S. DOE REQUEST FOR ASSISTANCE IN DISPOSING OF SEALED SOURCES

Mr. Slosky directed the Board to Tab K and explained that he was anticipating a letter from the DOE on this matter which has not yet been received and suggested that further discussion of this matter be postponed until a future Board meeting. Mr. Slosky provided a brief background of the issue by explaining that the DOE has developed a program for collecting unwanted sealed

sources to reduce the risk that they would fall into the hands of those who might threaten national security. They are tracking thousands of sealed sources through a registry and are physically collecting sealed sources that have become orphaned or that they believe are a threat. They now want to dispose of those sealed sources commercially and have recently made inquiries as to what procedure they must follow to dispose of, for example, sources that originated in this region at the U.S. Ecology in Washington. There are several issues related to this that will be framed and presented to the Board at the next meeting.

DISCUSSION OF FISCAL YEAR 2008-2009 AUDIT

Mr. Slosky reminded the Board that the annual audit was completed and sent out when it was completed in August. He added that a copy of the audit is included in the briefing book at Tab L. Mr. Slosky explained that as normal practice it has been placed on the agenda for any discussion. There were no questions or further discussion of the audit.

Mr. Baughman posed an off-agenda question regarding the status of the LES operations. Mr. Curry asked if Mr. Laflin might have more information. Mr. Laflin believes that the operational readiness review with the NRC began on November 15, 2009 and should be completed by the middle of January. At that point, they will be off and running.

With no further questions, Mr. Baughman moved to adjourn Regular Meeting of December 14, 2009 at 1:05 p.m. Mr. Drozdoff seconded; the motion carried unanimously.