

## MEMORANDUM

**TO:** Appalachian States Low-Level Radioactive Waste Compact Commission  
Members

**FROM:** Timothy B. Anderson  
John W. Carroll  
Michelle M. Skjoldal

**DATE:** March 18, 2014

**RE:** Permissible Uses of Surcharge Funds

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### I. Introduction

This memorandum analyzes the permissible uses of surcharge funds received from the U.S. Department of Energy, including whether the Appalachian States Low-Level Radioactive Waste Compact Commission ("ASLLRWC" or "Commission") can use such monies to fund its annual budget. This issue was raised during the Commission's annual meeting held on October 31, 2013.

### II. Analysis

#### A. The permissible uses of surcharge funds are limited.

The Commission's surcharge funds were paid to the Commission by the U.S. Department of Energy ("DOE") pursuant to the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Act").

Pursuant to Section 5(d)(2)(E) of the Act, any amount paid pursuant to subparagraphs (B) or (C)<sup>1</sup>:

may only be used to – (I) establish low-level radioactive waste disposal facilities; (II) mitigate the impact of low-level radioactive waste disposal facilities on the host State; (III) regulate low-level radioactive waste disposal facilities; or (IV) ensure the decommissioning, closure, and care during the period of institutional control of low-level radioactive waste disposal facilities.

Act, Section 5(d)(2)(E).

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<sup>1</sup> Subparagraph (B) establishes procedures for payments of the yearly 25% of surcharge fees and subparagraph (C) sets procedures relating to such payments if state or regional disposal needs are not met by January 1, 1993.

A discussion of the use of surcharge funds for the Commission's operating expenses appears on pages 2-3 of Issue Paper #6 (copy attached) for the 1995 meeting of the Commission. Issue Paper #6 states, in relevant part:

The Low-Level Radioactive Waste Policy Amendments Act of 1985 authorizes (among other uses) compact commissions to use surcharge funds "to mitigate the impact of low-level radioactive waste disposal facilities on the host state." A reasonable argument can be made that the activities of the Appalachian States LLRW Commission helps[sic] to mitigate the impact of the regional disposal facility on Pennsylvania (the host state). Three compacts currently use some or all of their surcharge funds to support expenses of the compact's commission: the Central Midwest Compact; the Midwest Compact; and the Northeast Compact.

(Emphasis supplied.) This discussion was provided against the background of an active siting process for a regional disposal facility in Pennsylvania. When Pennsylvania suspended the siting process in 1998, the Commission adopted Resolution 1998-3S, pursuant to which the Commission established a \$200,000 fund for "re-establishment of an active business office and staff in the event that the suspension of the Siting Process is terminated." (Emphasis supplied.) At the time, we advised that a reasonable argument could be made that a re-established business office of the Commission would mitigate the impact of the regional disposal facility on the host state if the siting process for a regional disposal facility is ongoing. It appears, however, that the so called "restart fund" was not derived from surcharge funds.

In light of Section 5(d)(2)(E) of the Act, and consistent with prior advice, an argument can be made that surcharge funds can be used to support the Commission's activities so long as the host state has developed or is in the process of developing a regional disposal facility. Where that process has been suspended, however, our advice is that surcharge funds may not be used to support the Commission's activities. It is important to note that the existing Fiscal Stabilization Fund was not derived from surcharge funds.

B. The Commission can request an interpretation of the Act by DOE.

The Commission has the option of asking DOE to interpret the Act as allowing use of surcharge funds to support the current activities of the Commission.

If DOE interpreted the Act to allow surcharge funds to be used to support the Commission's activities even when the siting process has been suspended, the Commission would have a heightened level of assurance that such use is appropriate. Under the principle of *Chevron* deference<sup>2</sup>, because DOE is the agency charged with administering the Act, a court

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<sup>2</sup> *Chevron* deference is a principle of administrative law requiring courts to defer to interpretations of statutes made by those government agencies charged with enforcing them, unless such interpretations are unreasonable. The principle stems from the U.S. Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which involved a dispute over the Environmental Protection Agency's interpretation of a provision of the Clean Air Act Amendments of 1977. Under *Chevron*, even if a court finds that

reviewing DOE's interpretation of the Act would likely defer to its determination. DOE does not, however, have authority to adopt an interpretation that is contrary to the Act. Seeking an interpretation by DOE is thus not without risk. If DOE interpreted the Act as allowing surcharge funds to support the Commission's current activities, and the Commission used the funds for such activities, there would be a risk that an opponent would challenge the use and succeed. If such a challenge were successful, the Party States would have to contribute money to replenish the surcharge fund.

In determining whether to seek such an interpretation from DOE at this time, the Commission should weigh these possible outcomes in light of the Commission's current operating fund balance and that fund's anticipated future expenditures.

### III. Conclusion

As discussed more fully above, the Commission cannot utilize surcharge monies to fund its annual budget at this time, given that the siting process has been suspended. In an effort to gain a favorable interpretation of this issue, however, the Commission has the option of asking DOE to interpret the Act to allow use of surcharge funds to support the Commission's current activities.

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another interpretation is reasonable, or even better than the agency's interpretation, it must defer to the agency's reasonable interpretation. Reasonableness in part turns on whether the statute unambiguously addresses the issue. If it does, then the unambiguous meaning controls. If the statute is ambiguous, however, the court asks whether the agency's interpretation of the ambiguous provision is based on a permissible construction of the statute. A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute."

## ISSUE PAPER #6

### FY 1996-97 PROPOSED BUDGET

#### Background

Each year, the Commission must submit a fiscal year budget to each of the party states to support the operations of the Appalachian States Low Level Radioactive Waste Commission. A FY 1996-97 budget for the Commission must be passed in July 1995 in order to meet the party state deadlines for budget submissions. The Maryland Department of the Environment requests that the Commission's budget be submitted no later than mid-July so that it can be included with its budget request as part of Maryland's budget process. Budget submission deadlines for the other three party states fall between August and October.

Attached is a proposed General Operating Fund budget for Fiscal Year 1996-97 for the Appalachian States LLRW Commission, including statements of receipts and disbursements for each special fund.

#### Analysis

Preparing a budget by specific cost accounts more than a year before that budget will take effect is difficult to accomplish because it requires estimating cost increases and work levels so far in advance. In the past, the Commission has projected general cost increases based on expected rates of inflation and planned work activities for that budget year. Generally, the most significant numbers are the total budget amount and the sources of revenue (particularly appropriations to be requested from the party states).

Because the inflation rate and planned activities can change between the time the budget is adopted by the Commission and the receipt of funds from the party states, the Commission adopts a revised budget in June immediately preceding the fiscal year. The revised budget more closely approximates the likely expenses for specific accounts during the coming fiscal year. In a sense, it serves as a "rebudget" that many state agencies perform after the legislature approves a budget. For example, the Commission will likely adopt a revised FY 1995-96 budget at its July 27, 1995 meeting.

## REVENUES

The proposed FY 1996-97 budget is \$245,500, which contains \$133,517 less in total expenditures than the proposed revised FY 1995-96 budget. The decrease is primarily attributable to lower than budgeted spending for legal services and special projects. The Commission did not need to spend \$50,000 to defend itself because Pennsylvania did not select three potentially suitable sites. The Commission had budgeted \$50,000 in anticipation of one or more municipalities suing over its identification as a possible regional disposal facility. Also, the Commission did not make \$85,000 in public information grants because of a lack of requests by municipalities. This low response was not unexpected although the Commission and the Pennsylvania Department of Environmental Resources had hoped for greater interest and participation in the program.

Delaware, Maryland and West Virginia would each pay \$48,000 while Pennsylvania would be asked to pay \$96,000. This is the same level of contribution that the states will pay for 1995-96. This will be six straight years without seeking an increase from the party states.

However, the Commission has an alternative source of funds to pay for operating costs in 1996-97 and beyond. The U.S. Department of Energy (USDOE) awarded the Appalachian States Commission \$2.2 million in surcharge funds for providing disposal from January 1, 1993 through June 30, 1994 for the region's LLRW generators at the disposal facility in Barnwell, South Carolina. On May 22, 1995, the U.S. District Court for the Middle District of Pennsylvania ordered USDOE to pay the Commission an additional \$2.3 million (approximate) in surcharge funds that USDOE was withholding from the Commission. The Commission has not received these funds and expects USDOE to appeal the decision. Depending on the length of the appeal process, the Commission could receive the \$2.3 million by the end of the 1995-96 fiscal year.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 authorizes (among other uses) compact commissions to use surcharge funds "to mitigate the impact of low-level radioactive waste disposal facilities on the host state." A reasonable argument can be made that the activities of the Appalachian States LLRW Commission helps to mitigate the impact of the regional disposal facility on Pennsylvania (the host state). Three compacts currently use some or all of their surcharge funds to support expenses of the compact's commission: the Central Midwest Compact; the Midwest Compact; and the Northeast Compact.

Any surcharge funds used to pay Commission expenses, reduces the amount of funds available to Pennsylvania to site a regional disposal facility. Pennsylvania is facing a severe funding crisis as it determines how to proceed in its siting process. Chem-Nuclear Systems, Inc. has estimated that it will need an additional \$55-89 million to complete the siting process. Pennsylvania has only enough funds to continue the current

process through 1996. It remains about \$50-84 million short of the amount estimated to site a LLRW disposal facility.

If the Commission receives no more surcharge funds (i.e. the Commission loses its recent court decision on appeal), the Commission could support its budget for about 10 years until 2006. This assumes the operating budget increases 3 percent each year and the return on investments is 5 percent annually.

If the May 22, 1995 court decision is upheld and the Commission receives an additional \$2.3 million (approximate), the Commission could support its operating budget for about 24 years until 2020. Under this scenario, the Commission would still have about \$4 million in surcharge funds left by the year 2006. This assumes the operating budget increases 3 percent each year and the return on investments is 5 percent annually. However, the 3 percent annual increase may be too low once the regional facility is operational (possibly in 5 - 7 years). The Commission assumes some additional responsibilities such as preparing contingency plans if the regional facility is closed, review financial records of the site operator, and ensuring the safe disposal according to federal and state laws after the facility is operational which may require additional staff and greater resources. Therefore, the 24 year projection is probably overstated.

## EXPENDITURES

In general, the proposed FY 1996-97 budget assumes either no increase, a five percent increase, or a nominal \$100 increase for each budget account based on expected inflation. The following is a summary of accounts which are expected to increase by more than this amount and a summary of the special funds:

### Employee Benefits

Employee benefits are 10 percent higher than the revised FY 1995-96 budget amount. This increase is based on general trends in health insurance coverage. Previous annual increases in health insurance costs has generally been in the 10-12 percent range. Life and disability insurance are expected to increase only nominally in the future.

### Legal Services

The Legal Services account is being reduced by \$123,000 or 82 percent to reflect the completion of litigation regarding surcharge rebates. If additional funds are needed for unexpected litigation such as the an appeal of the surcharge rebate litigation to the U.S. Supreme Court, funds can be transferred from the Legal Services Fund or the Surcharge

Fund. The \$27,000 set aside for the Legal Services account is adequate to pay for general counsel activities.

### Special Projects

The Special Projects account has been reduced to zero because the Commission does not know how Pennsylvania intends to proceed with the siting of the regional disposal facility. Pennsylvania may request that the Public Information Grant Program be continued if it decides to implement an enhanced volunteer site selection process.

### Special Fund Balances and Transfers

The Surcharge Fund is projected to have a balance of \$4,997,127 by June 30, 1997. This assumes that the Commission receives the \$2.3 million in surcharge funds that was ordered by the U.S. District Court for the Middle District of Pennsylvania on May 22, 1995.

By June 30, 1997, the Unemployment Compensation Fund is projected to have a balance of \$16,405, sufficient to handle unemployment claims for a full year for one Commission employee. The Commission is treated as any other governmental body in Pennsylvania. It does not contribute to the Pennsylvania Unemployment Compensation Fund until an unemployment claim is filed by a former employee.

The Commission's Fiscal Stabilization Fund is projected to have a balance of \$62,170 by June 30, 1997. This amount is slightly more than one party state share of the Commission's budget. This amount should be sufficient to cover the Commission's budget for one year should a party state be delinquent in paying or not pay its share of the Commission's budget.

The Legal Services Fund is projected to have a balance of \$233,576 by June 30, 1997 to cover unbudgeted legal expenses, most likely involving the selection of three potentially suitable sites by Chem-Nuclear Systems, Inc.

The Technical Services Fund which will have a projected balance of \$35,955 by June 30, 1997. This amount should be sufficient to pay for unbudgeted technical services needed by the Commission on a one-time basis.

## **Recommendation**

The Commission must decide whether it wants to use surcharge funds to pay the operating costs of the Commission or continue to ask the party states to make contributions as has been done in the past.

The attached FY 1996-97 proposed budget should be adopted.



**APPALACHIAN STATES LOW-LEVEL  
RADIOACTIVE WASTE COMMISSION**

**1996-97 PROPOSED GENERAL OPERATING FUND BUDGET**

Fiscal Year Ended June 30

	<u>1994-95</u> <u>ESTIMATED</u>	<u>1995-96</u> <u>REVISED</u>	<u>1996-97</u> <u>BUDGET</u>
<b>REVENUES</b>			
Party State Contributions:			
State Of Delaware	\$58,300	\$48,000	\$48,000
State Of Maryland	58,300	48,000	48,000
Commonwealth Of Pennsylvania	116,600	96,000	96,000
State Of West Virginia	58,300	48,000	48,000
Interest Income	7,300	2,000	2,000
Workshop Fees	0	3,500	3,500
Surcharge Funds from USDOE	2,155,590	2,300,000	0
Carryover From Previous Year	<u>82,712</u>	<u>133,517</u>	<u>0</u>
<b>TOTAL REVENUES</b>	<u>\$2,537,103</u>	<u>\$2,679,017</u>	<u>\$245,500</u>

**EXPENDITURES AND FUND TRANSFERS**

Expenditures

Salaries And Wages	\$86,659	\$97,100	\$102,000
Employee Benefits	12,619	16,000	17,600
Taxes -- Payroll	5,504	7,500	7,800
Retirement	10,226	11,400	12,300
Janitorial Services	1,043	1,300	1,400
Repairs & Maintenance	0	500	500
Repairs/Maint -- Equipment	1,520	1,900	2,000
Rent	21,767	23,100	24,300
Insurance -- General	1,607	1,700	1,800
Legal Services	57,381	150,000	27,000
Special Projects	14,827	22,017	0
Technical Services	0	0	0
Out-Service Training	0	900	1,000
Workshops	0	3,500	3,500
Automobile	386	700	900
Meals	989	1,500	1,700
Travel	6,907	8,000	8,700
Meetings	1,040	4,000	4,200
Accounting/Auditing	5,931	5,000	5,400
Office Supplies	4,854	10,000	10,000
Telephone	2,297	2,600	2,700

**APPALACHIAN STATES LOW-LEVEL  
RADIOACTIVE WASTE COMMISSION**

**1996-97 PROPOSED GENERAL OPERATING FUND BUDGET**

Fiscal Year Ended June 30

	<u>1994-95</u> <u>ESTIMATED</u>	<u>1995-96</u> <u>REVISED</u>	<u>1996-97</u> <u>BUDGET</u>
Postage	3,000	3,000	3,100
Advertising	888	2,200	2,300
Magazines/Publications	1,910	1,900	2,000
Equipment	4,582	1,000	1,000
Furniture & Fixtures	1,236	1,200	1,200
Bank Service Charges	<u>821</u>	<u>1,000</u>	<u>1,100</u>
<b>Total Expenditures</b>	<b>\$247,995</b>	<b>\$379,017</b>	<b>\$245,500</b>
<b>Fund Transfers</b>			
Surcharge Fund	2,155,590	2,300,000	0
Unemployment Compensation Fund	0	0	0
Fiscal Stabilization Fund	0	0	0
Legal Services Fund	0	0	0
Technical Services Fund	<u>0</u>	<u>0</u>	<u>0</u>
<b>Total Fund Transfers</b>	<b>\$2,155,590</b>	<b>\$2,300,000</b>	<b>\$0</b>
<b>TOTAL EXPENDITURES AND FUND TRANSFERS</b>	<b>\$2,403,585</b>	<b>\$2,679,017</b>	<b>\$245,500</b>
 <b>EXCESS OF REVENUES OVER EXPENDITURES AND FUND TRANSFERS (BUDGETARY BASIS)</b>	 <b>\$133,517</b>	 <b>\$0</b>	 <b>\$0</b>

APPALACHIAN STATES LOW-LEVEL  
RADIOACTIVE WASTE COMMISSION

SURCHARGE FUND

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

Fiscal Year Ended June 30

	1993-94 <u>ACTUAL</u>	1994-95 <u>AVAILABLE</u>	1995-96 <u>AVAILABLE</u>	1996-97 <u>ESTIMATED</u>
<b>CASH BALANCE, BEGINNING</b>	\$31,238	\$31,238	\$2,277,614	\$4,714,271
<b>RECEIPTS:</b>				
Transfer from General Operating Fund	0	2,155,590	2,300,000	0
Interest Income	<u>0</u>	<u>90,786</u>	<u>136,657</u>	<u>282,856</u>
<b>TOTAL FUNDS AVAILABLE</b>	31,238	2,277,614	4,714,271	4,997,127
<b>DISBURSEMENTS:</b>				
Transfer to General Operating Fund	0	0	0	0
<b>CASH BALANCE, ENDING</b>	\$31,238	\$2,277,614	\$4,714,271	\$4,997,127

26-Jun-95

APPALACHIAN STATES LOW-LEVEL  
RADIOACTIVE WASTE COMMISSION

UNEMPLOYMENT COMPENSATION FUND

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

Fiscal Year Ended June 30

	<u>1993-94</u> <u>ACTUAL</u>	<u>1994-95</u> <u>ACTUAL</u>	<u>1995-96</u> <u>AVAILABLE</u>	<u>1996-97</u> <u>ESTIMATED</u>
<b>CASH BALANCE, BEGINNING</b>	\$14,600	\$14,600	\$14,600	\$15,476
<b>RECEIPTS:</b>				
Transfer from General Operating Fund	0	0	0	0
Interest Income	<u>0</u>	<u>0</u>	<u>876</u>	<u>929</u>
<b>TOTAL FUNDS AVAILABLE</b>	14,600	14,600	15,476	16,405
<b>DISBURSEMENTS:</b>				
Transfer to General Operating Fund	0	0	0	0
<b>CASH BALANCE, ENDING</b>	<b>\$14,600</b>	<b>\$14,600</b>	<b>\$15,476</b>	<b>\$16,405</b>

22-Jun-95

APPALACHIAN STATES LOW-LEVEL  
RADIOACTIVE WASTE COMMISSION

FISCAL STABILIZATION FUND

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

Fiscal Year Ended June 30

	1993-94 <u>ACTUAL</u>	1994-95 <u>ACTUAL</u>	1995-96 <u>AVAILABLE</u>	1996-97 <u>ESTIMATED</u>
<b>CASH BALANCE, BEGINNING</b>	\$45,331	\$55,331	\$55,331	\$58,651
<b>RECEIPTS:</b>				
Transfer from General Operating Fund	10,000	0	0	0
Interest Income	<u>0</u>	<u>0</u>	<u>3,320</u>	<u>3,519</u>
<b>TOTAL FUNDS AVAILABLE</b>	55,331	55,331	58,651	62,170
<b>DISBURSEMENTS:</b>				
Transfer to General Operating Fund	0	0	0	0
<b>CASH BALANCE, ENDING</b>	\$55,331	\$55,331	\$58,651	\$62,170

22-Jun-95

**APPALACHIAN STATES LOW-LEVEL  
RADIOACTIVE WASTE COMMISSION**

**LEGAL SERVICES FUND**

**STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS**

Fiscal Year Ended June 30

	<u>1993-94</u> <u>ACTUAL</u>	<u>1994-95</u> <u>ACTUAL</u>	<u>1995-96</u> <u>AVAILABLE</u>	<u>1996-97</u> <u>ESTIMATED</u>
<b>CASH BALANCE, BEGINNING</b>	\$187,517	\$207,882	\$207,882	\$220,355
<b>RECEIPTS:</b>				
Transfer from General Operating Fund	20,365	0	0	0
Interest Income	<u>0</u>	<u>0</u>	<u>12,473</u>	<u>13,221</u>
<b>TOTAL FUNDS AVAILABLE</b>	207,882	207,882	220,355	233,576
<b>DISBURSEMENTS:</b>				
Transfer to General Operating Fund	0	0	0	0
<b>CASH BALANCE, ENDING</b>	<b>\$207,882</b>	<b>\$207,882</b>	<b>\$220,355</b>	<b>\$233,576</b>

22-Jun-95

APPALACHIAN STATES LOW-LEVEL  
RADIOACTIVE WASTE COMMISSION

TECHNICAL SERVICES FUND

STATEMENT OF CASH RECEIPTS AND DISBURSEMENTS

Fiscal Year Ended June 30

	1993-94 <u>ACTUAL</u>	1994-95 <u>ACTUAL</u>	1995-96 <u>AVAILABLE</u>	1996-97 <u>ESTIMATED</u>
CASH BALANCE, BEGINNING	\$22,000	\$32,000	\$32,000	\$33,920
RECEIPTS:				
Transfer from General Operating Fund	10,000	0	0	0
Interest Income	<u>0</u>	<u>0</u>	<u>1,920</u>	<u>2,035</u>
TOTAL FUNDS AVAILABLE	32,000	32,000	33,920	35,955
DISBURSEMENTS:				
Transfer to General Operating Fund	0	0	0	0
CASH BALANCE, ENDING	<u>\$32,000</u>	<u>\$32,000</u>	<u>\$33,920</u>	<u>\$35,955</u>

22-Jun-95

