LLW*notes*

Volume 12, Number 2 February 1997

Environmental Protection Agency (EPA)

National Environmental Justice Advisory Council Considers Ward Valley Resolution

At a December 10–12 meeting, EPA's National Environmental Justice Advisory Council (NEJAC) considered adopting a resolution stating that Ward Valley is an environmental justice issue. The resolution was brought before the full NEJAC by the Subcommittee on Indigenous Peoples, which recommended the resolution for adoption. NEJAC did not adopt the resolution at the meeting, but requested the subcommittee to provide further information regarding the background on the planned Ward Valley disposal facility.

According to EPA staff, the resolution is being drafted for consideration by the full NEJAC and will not be publicly available until after NEJAC has voted upon it. The next NEJAC meeting is tentatively scheduled for early-to-mid May. However, NEJAC may choose to vote on a revised resolution via a mail ballot or phone poll. Under the Federal Advisory Committee Act (FACA), NEJAC meetings must be publicized via a *Federal Register* notice. FACA public notice requirements do not apply to telephone or mail ballots.

EPA has agreed to recommend to NEJAC that the California Department of Health Services (DHS) have an opportunity to discuss this issue with the full NEJAC prior to the full NEJAC vote on a resolution. Alternatively, California DHS could be automatically granted five minutes of agenda time during the public comment period of the next meeting—the same amount of time that the full NEJAC allotted for discussion of the Ward Valley resolution at the December 1996 meeting. NEJAC will decide whether to allot time for California DHS to discuss the issue as a separate agenda item.

Executive Order on Environmental Justice

On February 11, 1994, President Bill Clinton signed an executive order on environmental justice—*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. (See *LLW Notes*, April 1994, p. 12.) The Executive Order charges federal agencies as follows:

> To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

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In This Issue

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Low-Level Radioactive Waste Forum

LLW Notes
Volume 12, Number 2 • February 1997
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The Low-Level Radioactive Waste Forum (LLW Forum) is an association of state and compact representatives, appointed by governors and compact commissions, established to facilitate state and compact implementation of the Low-Level Radioactive Waste Policy Act of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985 and to promote the objectives of low-level radioactive waste regional compacts. The LLW Forum provides an opportunity for state and compact officials to share information with one another and to exchange views with officials of federal agencies and other interested parties.

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LLW FORUM

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Key to Abbreviations

Code of Federal Regulations	CFR
U.S. Department of Energy	DOE
U.S. Department of Transportation	DOT
U.S. Environmental Protection Agency	EPA
U.S. General Accounting Office	GAO
U.S. Nuclear Regulatory Commission	NRC
naturally-occurring and accelerator-produced radioactive materials	NARM
naturally-occurring radioactive materials	NORM

Prepared by Afton Associates, Inc. for the LLW Forum under State of Washington Department of Ecology Contract Number C9700171 through a grant from the U.S. Department of Energy.

NGA Urges Congressional and Presidential Support for Low-Level Radioactive Waste Compacts and Transfer of Federal Land in Ward Valley

On Tuesday, February 4, the National Governors' Association (NGA) adopted a policy urging congressional and presidential "support for prompt ratification" of low-level radioactive waste compacts and, "prompt transfer of the Ward Valley site to the State of California." The policy was recommended to the full plenary session by the NGA Committee on Natural Resources. The Governors passed the policy as recommended with one refining amendment to the preamble.

Both the committee motion to recommend the policy and the motion to adopt the policy were passed by voice vote without objection. According to NGA staff, Nebraska Governor Ben Nelson (D) abstained from both the committee vote and the plenary vote.

—MAS

For further information, contact Tom Curtis of the National Governors' Association at (202)624-5389.

NR-19. Low-Level Radioactive Waste Disposal

Preamble

The Low-Level Radioactive Waste Policy Act was enacted in 1980 and amended in 1985 to make states responsible for the disposal of commercial low-level radioactive waste (LLRW) and to allow states to form compacts for LLRW disposal at regional facilities to be located within each compact. As early as 1980, the Governors had a policy on LLRW. The Governors have long recognized that states possess the technical and administrative capacity to manage low-level waste, and have urged Congress to exercise restraint with respect to interposing its own views on the substance of LLRW compacts submitted for congressional compact ratification.

More than a decade after the 1985 amendments to the act, the states and their compacts still require, to varying degrees, the cooperation of the federal government as the states seek to carry out their responsibilities under the act. In the case of the Texas-Maine-Vermont compact, ratification by Congress is necessary to limit the acceptance and disposal of waste to that from the compact states. In the case of the Southwestern Compact (serving Arizona, California, North Dakota, and South Dakota) the federal government's cooperation is required to accomplish the transfer of public land in Ward Valley to the State of California for a disposal facility.

Recommendations

The Governors urge that as states present compacts, and amendments to existing compacts, for the disposal of LLRW to Congress, Congress and the President should demonstrate their support for prompt ratification of those compacts.

The Governors also urge the prompt transfer of the Ward Valley site to the State of California, either immediately through administrative action, or through rapid enactment of Congressional legislation.

effective Winter Meeting 1997-Winter Meeting 1999

Southwestern Compact/California

RFP Issued for SEIS on Ward Valley Land Transfer

On December 11, 1996, the U.S. Department of Interior's Bureau of Land Management (BLM) issued a request for proposals (RFP) to prepare a second Supplemental Environmental Impact Statement (SEIS) on the transfer of federal land in Ward Valley to the State of California for use in siting a low-level radioactive waste disposal facility.

The first SEIS was prepared in 1992, after the proposed means of land transfer was changed from exchange of lands to direct sale.

Purpose

According to the Statement of Work, the purpose of the SEIS is to "analyze new information that has become available and new circumstances that have occurred since the initial Environmental Impact Report/Statement (EIR/S) was completed in April 1991."

Issues to be Addressed

BLM anticipates that the contractor will address a wide range of issues including, but not limited to, the following:

- the National Academy of Sciences' 1995 report *Ward Valley, an Examination of Seven Issues in Earth Sciences and Ecology*;
- the disposal site at Beatty, Nevada, as an analog to the Ward Valley site;
- radionuclide movement in the soil;
- potential for radionuclides and other materials to contaminate the aquifer below the site and the Colorado river;
- the nuclear waste stream;
- alternatives to the methods of disposal, including above-ground retrievable containment; shallow burial with trench liner; on-site storage at hospitals, nuclear power plants and other facilities generating low-level radioactive waste; incineration; and a no-action alternative;
- Native American issues, including examination of compliance with the Executive Orders pertaining to environmental justice and sacred sites, and consideration of potential impacts of the proposed facility on religious and cultural values, tourism, future economic developments, and agricultural cultivation;
- potential for introduction of exotic flora;
- potential impacts on the desert tortoise population, agricultural development, and the ecosystem;
- transportation issues;
- the state's legal and financial obligations in connection with the proposed facility;
- issues pertaining to US Ecology, such as past performance and "any uncertainty regarding its financial status"; and
- public health impacts.

Schedule

The solicitation period closed on January 23, 1997. After a contract is awarded, the contractor will have 120 days from the Notice to Proceed to prepare a preliminary draft SEIS. The approved draft SEIS will be published in the *Federal Register,* and a maximum of three public hearings will be held on the draft SEIS. Public comments will be incorporated into a final SEIS, which is to be completed and distributed within 335 days from issuance of the Notice to Proceed.

–CN

California's Position

By letter dated November 18, 1996, the California Department of Health Services (DHS) transmitted to BLM a 44-page summary and analysis of the public comments that BLM had received during its scoping process for the SEIS. (See *LLW Notes*, June/July 1996, pp. 16–17.) California's evaluation concludes:

> [N]one of the comments received during the scoping process contain significant new information relevant to adverse environmental effects of the Ward Valley project. The comments largely relate to matters previously addressed by DHS and BLM, and by the U.S. Fish and Wildlife Service and the National Academy of Sciences on behalf of BLM. The balance of the comments have no bearing on the Ward Valley project. Therefore, the comments do not support further environmental review …
>
> We again request that BLM set aside its decision to prepare the SEIS, and instead issue a Record of Decision to transfer the Ward Valley land to DHS.

For further information, contact Carl Lischeske of DHS at (916)323-9869.

Central Midwest Compact/Illinois

Illinois Siting Criteria Finalized

The Illinois Low-Level Radioactive Waste Task Group completed the first phase of the siting process for a regional disposal facility when it approved final siting criteria on December 19, 1996. The 25 criteria describe the geographic, geologic, seismologic, hydrologic and other scientific conditions best suited for a disposal site, as well as factors related to land use, natural resources, and other concerns.

Public Participation Announcement of the criteria is the culmination of nearly three years of work by the task group, which held more than 38 public meetings. Along with the criteria, the task group released a 117-page *Summary of Responses to Issues Raised by Public Comments*, which addresses questions raised during the public meetings and during the two public comment periods on the criteria.

Site Screening The Illinois State Geological and Water Surveys have now initiated the second phase of the siting process, in which they will screen the state to identify at least 10 locations of at least 640 acres each that appear likely to meet the criteria. During this phase, volunteer locations may be evaluated to determine if they seem likely to qualify. Locations may be volunteered within 60 days after publication of the criteria, i.e., through February 18, 1997. They may also be volunteered within three months after the contractor selected by the Illinois Department of Nuclear Safety (IDNS) to develop the facility begins to evaluate the ten or more locations—if the volunteer site is within one of those ten locations. Either individual land owners or local governments may submit locations under the volunteer process, which is being facilitated by IDNS. (For background information concerning the siting process and the task group, see *LLW Notes*, Feb./March 1994, p. 8.)

–CN

For further information, contact Helen Adorjan of the Illinois LLRW Task Group at (217)528-0538 or Michael Klebe of IDNS at (217)785-9986. See also "New Materials and Publications," LLW Notes, January 1997, p. 17.

Southwestern Compact/California (continued)

Consideration of Tribal Concerns During the Ward Valley Siting Process

During the siting process for the Ward Valley facility, US Ecology—the facility developer/operator—and DHS—California's licensing agency for low-level radioactive waste disposal—considered environmental justice concerns specific to the Indian Tribes in the area. The *Environmental Assessment and the Environmental Impact Statement* for the project include analyzes of

- archaeological resources;
- ethnographic information;
- historical resources; and
- paleontological resources.

Study Prepared in 1987 During the site-screening process, US Ecology contracted with Cultural Systems Research, Incorporated (CSRI), based in Menlo Park, California, for an ethnography study—*Ethnographic Resources Study: Candidate Sites Selection Phase*—prior to the selection of three candidate sites for the planned disposal facility. The initial study was divided into three phases. At the beginning of each phase, detailed maps of each of the desert basins under consideration as a site were provided to CSRI.

Phase I The first phase involved assembling, for each of the basins under consideration at the time:

1. mapping information to show which tribal groups have traditional or contemporary interest in the area;
2. the location within or near the areas of any sites or areas known (on the basis of a literature search) to have significance for Native Americans; and
3. a preliminary set of criteria for evaluating the relative impacts of alternative site use with respect to Native American values. These criteria were to be considered tentative and to be refined in consultation with the tribal councils of reservations with historic relationships and/or geographic proximity to alternative siting areas.

Phase II The second phase consisted of consultations with Native Americans whose ancestors traditionally occupied the study area. The report lists specific tasks that include the following:

1. Identification of specific locations within the mapped potential siting areas which have a particular and identifiable value (e.g., rock art sites, collection areas, ritual sites, etc.).
2. Identification of any general areas considered to have value for reasons that may not lend themselves to mapping of site-specific features.
3. A recommended framework for identifying impact criteria and related geographic locations which should be considered highly constrained for site development, and hence might most appropriately be excluded from further siting consideration.
4. Related to #3 above, a recommended framework for identifying criteria and/or locations for which the impacts of disposal site development might be mitigated through approaches found acceptable in the past or likely to be considered acceptable by tribal groups with an interest in such areas. It was understood that actual site-specific mitigation measures were to be evaluated at a future time. The purpose of this evaluation was to differentiate mitigable impacts from exclusionary impacts to the extent practicable at this stage of the project.
5. An assessment of perceived Native American reactions to the weighting approaches described in the Phase I preliminary impact assessment criteria (e.g., regular occupation vs. occasional use, recency of use, etc.), and to the criteria as a whole, including identification of possible areas of controversy. It was understood that the consultation interviews would lead to refined criteria.

Phase III As described in the report:

> This phase consisted of a second round of consultation with Native Americans whose ancestors traditionally occupied the study area, this time with limited on-site visits to most of [the] 16 Candidate Siting Areas (CSAs), which had been identified by US Ecology. These Candidate Siting Areas were greatly reduced portions of the Drainage Basins originally considered, and reflected elimination of geotechnically unsuitable areas. Visits to sites primarily included areas that could be viewed from public highways adjacent to them, rather than extensive on-site surveys for cultural resources.

Phase IV In early 1987, US Ecology had eliminated all but three valleys from consideration for siting due to the results of various technical studies that had been performed. In March, hydrological and biological studies of a four-square-mile area in each of the three valleys were performed. CSRI then obtained a list of the plants that botanists had found on the three sites and developed a document showing known uses of the plants by Native American groups in the area. The document was provided to the ethnographers for use in preparing for the ethnographic site walkovers. In April, a one-square-mile area in each of the three valleys was surveyed by archaeologists from the University of California–Riverside Archaeological Research Unit. The University of California surveyor was accompanied on two of the surveys—Panamint Valley and Ward Valley—by a Native American participant under contract to CSRI.

After the archaeological surveys of the three areas under consideration were completed, CSRI was asked to conduct ethnographic walkovers on the three areas for concerned Native Americans. The purpose of the walkovers was "to elicit information about plants and other cultural resources on each candidate site of concern to Native Americans." CSRI informed all of the Indian Tribes of the status of the site selection process and asked the Indian Tribes to

- make recommendations for the next phase of the ethnographic study; and
- recommend consultants from their groups to participate in an ethnographic walkover.

CSRI conducted the walkovers of each site with the consultants selected by the Southern Paiute, Chemehuevi, Mojave, Western Shoshone, Kawaiisu, and Cahuilla. Each candidate site was visited more than once and visited by different groups of tribal members. Ethnographers, biologists, and ethnobiologists also participated in the walkovers in order to accurately characterize the information provided.

—LAS

Evaluation and Weighting of Results

California DHS staff evaluated the results of the study and weighed the results with the data compiled on an alternative site—the Silurian site. DHS recognized that the Mojave and Chemehuevi tribes were opposed to the use of the Ward Valley site, while the Shoshone and Cehmehuevi tribes expressed initial opposition to the use of the Silurian site for low-level radioactive waste disposal. The Shoshone representative who toured the Silurian Valley site stated that the plant and animal resources were sparse and would have offered little sustenance to tribal ancestors.

According to DHS staff, the evaluation of the relative technical merits of the sites demonstrated that the Ward Valley site was more suitable than the Silurian site for a number of reasons. Among other considerations, the Silurian site had the following disadvantages vis-a-vis the Ward Valley site:

- potential seismic effects would be greater;
- erosion potential is greater;
- flooding potential is greater;
- ground water is more shallow;
- the site is relatively undisturbed, while the Ward Valley site is within a designated utility corridor;
- the Silurian site is in an area with a higher scenic quality rating as assigned by the U.S. Bureau of Land Management; and
- transportation effects are greater.

The preponderance of evidence and data evaluated by DHS weighed in favor of the Ward Valley site as the preferred site.

Background: Fort Mojave Indian Tribe v. California Department of Health Services

In litigation filed in October 1993, the Fort Mojave Indian Tribe and others—including the Los Angeles Physicians for Social Responsibility, the Southern California Federation of Scientists, and the Committee to Bridge the Gap—challenged the licensing of the Ward Valley facility on the grounds that California DHS had violated the California Environmental Quality Act (CEQA), the California Radiation Control Law, and the Southwestern Compact. (For a description of the lawsuit, see *LLW Notes*, Winter 1993, pp. 22-23.)

Fort Mojave Indian Tribe Assertions

Denial of "Adequate Opportunity to Participate"

The complaint contended that the Fort Mojave Indian Tribe did not have an adequate opportunity to participate fully in the siting and licensing process for the Ward Valley disposal facility:

> Petitioner Fort Mojave Indian Tribe has a beneficial interest in this action, in that the Tribe submitted written comments regarding the EIR/S [Environmental Impact Report and Environmental Impact Statement] pursuant to CEQA and on the proposed License issuance to [US Ecology] by [California DHS]. The Tribe also testified on or about July 22, 1991, at a public meeting convened by [California DHS] in Needles, California, on the proposed Ward Valley Radioactive Waste Disposal Facility. During the July 1991 meeting, [California DHS] denied the Tribe an adequate opportunity to participate fully and denied the Tribe an adequate opportunity to address the scientific and safety issues concerning the potential risks of the Ward Valley Radioactive Waste Disposal Facility. Petitioner Fort Mojave Indian Tribe, if given the opportunity to do so, would have more fully participated in the CEQA and licensing process. By virtue of its participation, Petitioner Fort Mojave Indian Tribe has exhausted all administrative remedies with regard to [California DHS'] certification of the EIR/S and/or issuance of the License.

Aggrievement "to an Extent Greater than the Public at Large"

The petition also asserted that the Fort Mojave Indian Tribe would be aggrieved to an extent greater than the public at large by California DHS's granting of a license for the Ward Valley disposal facility:

> Petitioner Fort Mojave Indian Tribe has a further beneficial interest in the outcome in this action in that it will be aggrieved by the decision of [California DHS] to grant the License to [US Ecology] to an extent greater than the public at large in that, among other things, members of the Tribe stand to be directly affected, and their health and safety be put directly at risk, by operation of the Ward Valley Radioactive Waste Disposal Facility as currently licensed due, among other things, to their physical proximity to the Facility.

Court of Appeal: Assertions "Without Merit"

On October 5, 1995, the California Court of Appeal partially reversed a judgment of a lower court in the lawsuit. In so doing, the appellate court found that the California Superior Court had erred in directing California DHS to set aside its approval of the project and to review—in a "pre-approval setting"—a December 1993 report by three scientists who work at the U.S. Geological Survey. The appellate court also affirmed that other grounds raised by the petitioners for setting aside the EIR and the license—including the assertions of the Fort Mojave Indian Tribe regarding the lack of an adequate opportunity to participate and its claim of an aggrievement to an extent greater than the public at large—were correctly determined to be without merit by the Superior Court. (For a description of the decision of the Court of Appeal, issues addressed, and the legal process, see *LLW Notes*, October 1995, pp. 23-25.)

Failure to Establish Abridgement of Rights

The Court of Appeal examined the contention that California DHS denied the Tribe an adequate opportunity to participate in the licensing process:

> Petitioners [Fort Mojave Indian] Tribe and Committee [to Bridge the Gap] contend that DHS abridged or denied their rights to participate in the licensing process, as provided for by two sources ... Health and Safety Code section 25845, subdivision (a) provides that "In any proceeding under this chapter for granting or amending any license, ... [DHS] shall afford an opportunity for a hearing on the record upon the request of any person whose interest may be affected by the proceeding, and shall admit that person as a party to such proceeding." ... The Tribe did not receive party status, because it did not specifically request it. The Tribe yet was allowed to participate. Nothing in the federal regulations granted the Tribe automatic party status. These regulations, as applicable to DHS here, allow for a tribal government's submission of, and the adoption of, a proposal for how it will participate in license application review. The Tribe does not contend that it submitted any such proposal. The Tribe did make its opposition to the project known to DHS, and DHS met with Tribe representatives and explained the environmental and license process before any hearings were held. [legal citations omitted.]
>
> The trial court correctly found that the petitioners failed to establish an abridgement of their rights to participate in the proceedings.

Fundamental Vested Rights not "Substantially Affected" by Licensing

The Court of Appeal also examined the contention that the Fort Mojave Indian Tribe would be aggrieved "to an extent greater than the public at large" by the licensing of the Ward Valley disposal facility:

> Recognizing that none of the other petitioners could assert such rights [fundamental vested rights] as involved in DHS's decisions, the trial court nonetheless applied the independent judgment test based on what it termed the Tribe's "unique position and rights." The rights in question are the Tribe's long-established rights to water in and from the Colorado River. These rights indeed are fundamental and vested. However, it cannot be said that they have been or will be substantially affected by the licensing of the project. DHS has not acted, directly or indirectly, to displace, abridge, or otherwise interfere with the Tribe's water rights. To contend otherwise involves total speculation about the long-term fate of the project ... Because DHS's decisions did not substantially affect the Tribe's fundamental vested rights, this case was not subject to the independent judgment test. [legal citations omitted.]

Fundamental Vested Right re Ancestral Lands not Addressed

The Court of Appeal decision noted: "Nor do we address the Tribe's assertion that the presence of Ward Valley among their ancestral lands confers some fundamental vested right that the project will adversely affect. This argument was not made to the trial court." The Mojaves have traditionally claimed the desert areas from the Colorado River to the coast of California. Among facilities located within the area encompassing Mojave ancestral lands are the

- China Lake Naval Weapons Center,
- Chocolate Mountains Gunnery Range,
- Fort Irwin Military Reservation,
- Joshua Tree National Monument,
- National Parachute Test Range,
- Twentynine Palms Marine Corps Base,
- Twentynine Palms Indian Reservation, and
- cities of Blythe and Needles.

CA Supreme Court Affirms Decision

In January 1996, the Supreme Court of California denied a petition to review a decision by the California Court of Appeal, Second Appellate District, regarding the licensing of the Ward Valley disposal facility. As a result of the Supreme Court decision, the Fort Mojave Indian Tribe and other petitioners exhausted their avenues for appeal in the state court system (For a description of the decision and its effect upon the status of the Ward Valley facility, see *LLW Notes*, Jan./Feb. 1996, pp. 1, 8.).

State Legislators' LLRW Working Group Meets in D.C.

On December 11, the Low-Level Radioactive Waste Working Group of the National Conference of State Legislatures (NCSL) met in Washington, D.C., in conjunction with the NCSL Assemblies on State and Federal Issues.

Agenda

The following topics were addressed during the half-day meeting.

Nuclear Medicine Robert Carretta, Chair of Organizations United for Responsible Low-Level Radioactive Waste Solutions, discussed the risks of inadequate disposal options. As a practicing physician in California, Carretta focused on the disposal needs of the medical community and discussed medical diagnostic procedures that depend on the use of radiation.

Ward Valley Land Transfer Lori Sonken, Special Assistant to the Deputy Secretary of the U.S. Department of the Interior (DOI), announced DOI's release of a request for proposals (RFP) to prepare a Supplementary Environmental Impact Statement (SEIS) on the transfer of federal land in Ward Valley to the State of California for use in siting a low-level radioactive waste disposal facility. (See related story, this issue.)

Envirocare Kenneth Alkema, Director of Environmental Affairs for Envirocare of Utah, explained the disposal services that Envirocare is licensed to provide at its facility.

Risk Analysis William Dornsife, Director of the Pennsylvania Bureau of Radiation Protection, discussed impediments to effective risk analysis and presented a risk-based methodology for assessing the efficacy and priorities of radiation protection programs.

Former Federal Facilities Stephen Mapley of the U.S. Department of the Army discussed the Department of Defense's (DOD) divestiture of excess lands. Terry Plummer, Manager of DOE's National Low-Level Waste Program, provided information on the cleanup of federal facilities. He also discussed DOE's role under the federal low-level radioactive waste legislation.

Assured Storage The concept of "assured storage" for low-level radioactive waste was explained by one of the idea's originators, William Newberry of the National Low-Level Waste Management Program at Idaho National Engineering and Environmental Laboratory (INEEL). James Kennedy of NRC commented on relevant NRC policy and regulations. Ron Gingerich of the Connecticut Hazardous Waste Management Service and John Weingart of the New Jersey Low-Level Radioactive Waste Disposal Facility Siting Board then offered their perspectives on the concept.

Background: NCSL LLRW Policy

In July 1996, the NCSL Energy & Transportation Committee amended its policy on radioactive waste management to add language supporting the transfer of Ward Valley to the State of California. The policy must be approved by the entire conference of legislatures at the NCSL 1997 annual meeting or it will sunset. The amended policy states, in part:

> NCSL urges the federal government to use its authority and resources to support state government efforts to comply with the Low-Level Radioactive Waste Policy Amendments Act. To that end, NCSL urges the federal government to expedite needed transfers of federal lands in California and elsewhere for development of low-level waste management facilities.

–CN

For further information, contact L. Cheryl Runyon, Program Principal, NCSL, at (303)830-2200. For background information on previous NCSL LLRW Working Group meetings, see the following issues of LLW Notes: May 1996, pp. 8–9; October 1995, pp. 19–19; and July 1995, p. 8.

Attendance

In addition to the speakers, the following persons attended the meeting.

State Legislators and Legislative Staff

Alabama	Walter Penry
Arizona	Rep. Jean McGrath Sen.-elect Elaine Richardson
Idaho	Rep. Jack Barraclough*
Indiana	Sen. Beverly Gard*
Maryland	Del. Carol Petzold
Minnesota	Sen. Len Price
New Mexico	Rep. Robert Light
North Carolina	Rep. John Nichols*
Ohio	Sen. Chuck Horn* Rep. Tom Roberts Sen. Gary Suhadolnik* *Chair, LLRW Working Group*
Oklahoma	Sen. Paul Muegge*
Pennsylvania	Terry Fitzpatrick*
Texas	Rep. John Hirsch
Utah	Sen. Eldon Money

* *LLRW Working Group member*

Other State Officials

District of Columbia	Cheryl Eason, Department of Consumer and Regulatory Affairs
Ohio	Jane Harf, Low-Level Radioactive Waste Facility Development Authority

Other Interested Parties

Afton Associates/ LLW Forum	Holmes Brown, Cynthia Norris
American Ecology	Richard Paton
McGraw-Hill Publications	Tom Harrison
NCSL-D.C. office	Rebecca Brady
Nuclear Energy Institute	Barbara Flemming Paul Genoa
Nuclear Information and Resource Service	Diane D'Arrigo
Radioactive Exchange	Jenny Weil

Staff

NCSL-Denver office	Jeff Dale L. Cheryl Runyon
INEEL	Sandra Birk

(Funding for the working group is provided by a subcontract from DOE's National Low-Level Waste Management Program at INEEL.)

Upcoming State and Compact Events

February	Event	Location/Contact
Pennsylvania	Low-Level Waste Advisory Subcommittee meeting: waste minimization	Harrisburg, PA Contact: Rich Janati (717)787-2163
Central Compact	teleconference meeting: discussion of host state license review, wetlands mitigation	Contact: Don Rabbe (402)476-8247 or e-mail don@cillrwcc.org
	Facility Review Committee meeting	Lincoln, NE Contact: Don Rabbe
Illinois	LLRW Task Group meeting: includes discussion of work plan, meeting schedule and related public participation issues	Bloomington, IL Contact: Helen Adorjan (217)528-0538
Ohio	LLRW Facility Development Authority Public Information and Involvement Committee meeting: review a draft media relations plan, frequently asked questions and their answers; and discuss the commissioning of a public opinion poll	Akron, OH Contact: Melissa Herby (614)644-2776
	LLRW Facility Development Authority Research and Technology Committee meeting: update on statewide screening contract, project schedule and peer advisory panel; discussions on preparation of developer/operator RFP	Worthington, OH Contact: Melissa Herby
	LLRW Facility Development Authority Administration and Finance Committee meeting: FY '98/'99 budget proposal and administrative policies and procedures	Worthington, OH Contact: Melissa Herby
	LLRW Facility Development Authority board meeting	Worthington, OH Contact: Melissa Herby
Northeast Compact	meeting: includes update of compact commission and member state activities, approval of FY '98 budget	Saddle Brook, NJ Contact: Janice Deshais (860)633-2060
Connecticut	LLRW Advisory Committee meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007
New Jersey	LLRW Disposal Facility Siting Board presentation on LLRW to the Somerset New Jersey Rotary Club	Somerset, NJ Contact: John Weingart (609)777-4247
	LLRW Disposal Facility Siting Board meeting	Trenton, NJ Contact: John Weingart

Upcoming State and Compact Events *continued*

February 1997	Event	Location/Contact
Southeast Compact	(tentative)Task Force on Facility Funding (new group) meeting: development of a consensus recommendation on funding the remaining work on the North Carolina LLRW disposal facility	location to be determined Contact: Ted Buckner (919)821-0500 or e-mail secclrw@interpath.com
Texas	LLRW Disposal Authority Board meeting	Austin, TX Contact: (512)451-5296
Massachusetts	LLRW Management Board meeting: includes discussions on issues involving the Volunteer Sites Program, reports on January meetings of working groups/committees, and radioactive materials users.	Boston, MA Contact: Carol Amick (617)727- 6018Harrisburg, PA
March 1997	**Event**	**Location/Contact**
Pennsylvania	(tentative) Low-Level Waste Advisory Committee meeting	Contact: Rich Janati (717)787-2163
Central Compact	spring quarterly meeting	Lincoln, NE Contact: Don Rabbe (402)476-8247 or e-mail don@cillrwcc.org
Midwest Compact	meeting	Eagan, MN Contact: Gregg Larson (612)293-0126
Northwest Compact	meeting	Seattle, WA Contact: Michael Garner (360)407-7102
Connecticut	Hazardous Waste Management Service Board of Directors meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007
New Jersey	LLRW Disposal Facility Siting Board meeting	Trenton, NJ Contact: John Weingart (609)777-4247
Southeast Compact	meeting: review progress of the licensing Work Plan for the North Carolina LLRW disposal facility	location to be determined Contact: Ted Buckner (919)821-0500 or e-mail secclrw@interpath.com
Massachusetts	LLRW Management Board public information meeting	location to be determined Contact: Paul Mayo (617)727-6018

Nebraska v. Central Interstate Low-Level Radioactive Waste Commission

Nebraska Sues Compact Over Adoption of Schedule for License Review

On November 27, 1996, the State of Nebraska filed suit in the U.S. District Court for the District of Nebraska against the Central Interstate Low-Level Radioactive Waste Commission. The lawsuit challenges recent actions by the commission to adopt a schedule for review of a license application for the proposed low-level radioactive waste disposal facility in Boyd County. The Central Commission filed an answer on January 14, 1997.

The Facts

The Central Commission's contractor, US Ecology, submitted a license application to the Nebraska Department of Environmental Quality (NDEQ) and the Nebraska Department of Health (NDOH) for the Boyd County facility in July 1990. The state agencies issued a Notice of Intent to deny the application in January 1993, alleging that the site did not, according to state definition, meet minimum site suitability requirements set forth in the applicable regulations because it contained wetlands and because the agencies determined that the 43 acres of wetlands on the site violated the provisions that require that the site be free of areas of flooding and frequent ponding. US Ecology challenged this decision by petition in February 1993. However, in August 1993, US Ecology notified the state agencies that it was reducing the site from 320 acres to 110 acres, in order to attempt to resolve the issue and eliminate references to wetlands from the site. US Ecology also notified the state that it would be amending its license application. The State of Nebraska subsequently withdrew its Notice of Intent to Deny.

The U.S. Corps of Engineers has determined, however, that the 110 acre site contains a wetland which US Ecology has contested. The U.S. Corps of Engineers has issued a permit approving US Ecology's plan to fill and mitigate the contested wetland. The state has determined, however, that filling in the wetland would constitute facility construction under state regulations and has advised US Ecology not to proceed with such action unless and until it receives a license.

On August 27, 1996, the commission held a special meeting "for the purpose of receiving comments, evidence, and reports on a reasonable time period for completion of the processing of the pending license application for a LLRW disposal facility." The Directors of NDEQ and NDOH were invited to participate in the special meeting, but the state declined. However, on August 19 and 21, the state provided briefings on the schedule for technical analysis and the public participation process to the public, the commission, and the generators.

The commission then held a meeting on September 30, 1996, at which time it voted to adopt "a range of dates from December 14, 1996, through January 14, 1997" for the State of Nebraska's issuance of a draft license decision and related documents for the proposed facility. Specifically, the commission's resolution calls for the state to "issue the Draft Safety Evaluation Report (DSER) and Draft Environmental Impact Analysis (DEIA) with recommendations and conditions and the Draft License Decision with conditions/justifications so that the technical review will lead towards a public comment period." The resolution passed by a vote of 4 to 1, with the Commissioner from Nebraska casting the opposing vote.

The commission also approved a motion that "there be a single consolidated public comment period and public hearing process on the draft documents and draft license decision conforming to Nebraska law, previous Nebraska regulations, and similar environmental permits and license applications, federal statutes, regulations, and guidance, and other NRC agreement states' licensing processes." This motion passed by a vote of 3 to 2, with the Commissioners from Nebraska and Kansas opposed. (See *LLW Notes*, October/November 1996, pp. 16–17.) Nebraska regulations provide for separate public hearings on the DEIA/DSER documents and on a proposed decision.

On October 2, 1996, the Executive Director of the Central Commission wrote to the Directors of NDEQ and NDOH to inform them of the resolutions and to schedule a meeting to discuss "the timely completion of the review process" and "the implementation of the consolidated and comprehensive public participation process." The Directors responded that the commission does not have the authority to impose a schedule, that the commission's schedule is unreasonable, that the state could not comply with such a schedule, and that a meeting would therefore serve no useful purpose. Thereafter, the state initiated legal action against the commission.

The Complaint

Issues/Legal Theories The State of Nebraska argues that the Central Commission's resolutions of September 30, 1996, concerning adoption of a schedule for license review are invalid and unenforceable because they violate state and federal law and the express terms of the Central Compact. Specifically, the state asserts that the resolutions are invalid insofar as they purport to be binding on the State of Nebraska and its administrative agencies because

- they infringe upon the state's sovereignty by directing state agencies on how to license or regulate in contravention of the Tenth Amendment to the U.S Constitution;
- they violate Article III(b) of the compact, which states that "a host state shall regulate and license any regional facility within its borders ... ";
- they violate Article VI(a)(5) of the compact, which states that nothing in the compact shall be construed to "alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions ... ";
- they violate Article VI(a)(2) of the compact insofar as they attempt to override existing Nebraska law;
- it is contrary to law, and good regulatory practice, to direct licensing agencies to submit to direction from an applicant or a party controlling the applicant;
- the commission has failed to exhaust its administrative remedies in that it has not sought to change state regulations through normal rulemaking processes and instead is seeking to supersede the regulations by decree;
- the process by which the resolutions were adopted is without authority and procedural due process in that adequate notice was not provided and governing rules were not adopted;
- the commission's action is an attempt to retroactively impose a review schedule on the state contrary to law and substantive due process; and
- the schedule adopted by the commission is unreasonable and does not take into consideration delays in the review process created by the commission and its contractor.

Relief Requested The State of Nebraska is asking the court to enter a declaratory judgment finding that the commission's resolutions of September 30, 1996, are contrary to law, without legal authority, and have no binding effect upon the state. In the alternative, the state is seeking a judgment by the court that the schedule and public participation process adopted by the commission are unreasonable and therefore invalid.

Jury Trial In conjunction with the filing of its complaint, the State of Nebraska filed a demand for a jury trial of the issues.

continued on page 16

Tenth Amendment to the U.S. Constitution

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (continued)

The Answer

Response to Nebraska's Charges and Affirmative Defenses The Central Commission denies that it has taken any actions which are invalid or unenforceable. In fact, the commission alleges "that all actions it has taken with regard to matters alleged in the [plaintiff's] complaint are legal and proper." In support of its position, the commission cites the Low-Level Radioactive Waste Policy Act and its 1985 amendments, which the commission alleges requires Nebraska to exercise its Agreement State authority in a manner compatible with all applicable federal laws, including the compact. Accordingly, the commission claims that Nebraska's statutes or regulations are invalid under the Supremacy Clause of the U.S. Constitution to the extent that they are incompatible with such federal law.

With regard to Nebraska's review of US Ecology's license application, the commission alleges that NDEQ and NDOH have failed to comply with compact and federal law in that the review "lacks any commitment to a reasonable schedule for completion and includes unreasonable duplication and extensions of the process." The commission further alleges that the refusal and failure of Nebraska regulators to meet with the commission to discuss timely processing of the license application and to provide material input regarding scheduling matters violates various provisions of the compact, including but not limited to

- Article V(e)(2), which states that the commission shall require the appropriate regulatory agency to process license applications "within a reasonable period from the time that a completed application is submitted";
- Article IV(m)(4), which states that the commission shall obtain information from the party states necessary to the implementation of its responsibilities; and
- Article III(f), which states, "Each party state has the right to rely on the good faith performance of each other party state."

The commission alleges that the State of Nebraska has further violated the above-referenced articles of the compact by refusing to participate in commission meetings, refusing to provide information to the commission, and refusing to acknowledge the commission's legal authority to require the state to process US Ecology's license application in a timely manner. Accordingly, the commission argues that the state has forfeited, under the equitable doctrines of waiver and estoppel, any right it may have had to complain about the commission's actions.

The commission also alleges that Nebraska's complaint fails to state a claim upon which relief can be granted.

Supremacy Clause of the U.S. Constitution

The clause contained in Article VI of the U.S. Constitution which states, in essence, that federal laws shall enjoy legal superiority over any conflicting provision of a state constitution or law.

Equitable Doctrines of Estoppel and Waiver

"Estoppel" is a legal theory whereby a party is prevented by its own acts from claiming a right to the detriment of another party because the other party was entitled to rely on such conduct and has acted accordingly. "Waiver" is another legal doctrine which refers to surrender of some claim, right, or privilege, or of the opportunity to take advantage of some defect, irregularity, or wrong.

Motion to Dismiss The commission filed a motion asking the court to dismiss Nebraska's claims concerning the validity of the resolutions because, the commission alleges, they fail as a matter of law.

Relief Requested The commission is asking the court to enter a judgment in its favor and to dismiss the action with prejudice, assessing all costs to the plaintiff.

Jury Trial The commission has filed a motion to strike the plaintiff's demand for a jury trial, arguing that no such right exists under the Seventh Amendment to the U.S. Constitution or under a statute of the United States.

Commission Action at January Meeting

At the Central Commission's regularly scheduled mid-year meeting on January 8, 1997, legal counsel for the commission outlined potential actions for the commission to consider taking if Nebraska failed to comply with the license review schedule adopted by the commission on September 30, 1996. These actions include

- ordering Nebraska to show cause why the deadline was not met;
- holding a special commission meeting to determine what action to take, if any;
- seeking legislative oversight from the Nebraska legislature;
- seeking assistance from the U.S. Nuclear Regulatory Commission based upon Nebraska's failure to abide by its agreement state responsibilities;
- initiating litigation to enforce the schedule;
- authorizing the commission's legal counsel to review and report on prospective future litigation on Nebraska's bad faith;
- taking note that litigation may be brought by other aggrieved parties, or that such parties may join in a suit brought by the commission;
- suspending privileges or terminating membership of Nebraska in the compact;
- noting and calculating delay damages;
- pursuing penalties contained in Nebraska statutes for up to $10,000 per day for violations of the compact agreement; and
- requiring Nebraska to provide additional documents and information.

Thereafter, the commission entered into an executive session for legal advice. During the public discussion portion of the meeting, five items were discussed with legal counsel, including:

- requesting Nebraska to provide indications of why the license review schedule would not be met;
- recommending a special telephone meeting of the commission to consider Nebraska's response to the above-mentioned request and to consider further commission actions;
- asking legal counsel to evaluate a bad faith claim against the State of Nebraska for failure to comply with the license review schedule;
- directing commission staff to begin a formalized accounting procedure to determine the accumulation of damages caused by the delay in issuance of a license; and
- contacting the Nebraska legislature to request its direct oversight of the project activities.

The commission in public session took up a motion to pursue the first four items listed above, and decided to take no action on the last item (contacting the Nebraska legislature). The motion passed by a vote of 4 to 1, with Nebraska casting the opposing vote.

—TDL

Court Calendar

Case Name	Description	Court	Date	Action
Anderson v. Semnani (See *LLW Notes*, January 1997, pp. 1, 5–12.)	Seeks in excess of $5 million for site application and consulting services related to the licensing and operation of the Envirocare low-level radioactive waste disposal facility.	Third Judicial District Court of Salt Lake County, Utah	October 18, 1996 November 1996	Complaint filed by Larry Anderson—a former state regulator—and Lavicka, Inc. Khosrow Semnani and Envirocare filed a joint answer and counterclaim.
California Department of Health Services v. Babbitt	Seeks to compel the Department of Interior (DOI) to transfer the Ward Valley land to California and to issue the land patent approved by DOI four years ago.	U.S. District Court for the District of Columbia	January 31, 1997	California Department of Health Services and its Director, Kimberly Belshe, filed complaint against the Interior Department, its Director—Bruce Babbitt, and the U.S. Bureau of Land Management.
Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (See related story, this issue.)	Seeks a declaration that recent motions of the commission seeking to impose deadlines and restrictions on state regulatory agencies are unlawful and invalid.	United States District Court for the District of Nebraska	November 27, 1996 January 8, 1997 January 14, 1997	State of Nebraska filed a complaint. Central Commission voted to pursue specified actions as a result of Nebraska's failure to comply with the license review schedule adopted by the commission. Central Commission filed an answer to the complaint.
Santini v. Connecticut Hazardous Waste Management Service (See *LLW Notes*, October 1994, p. 9.)	Involves a claim that the service's site designation prevented the plaintiffs from completing property development.	Connecticut Superior Court, Judicial District of Hartford/New Britain at Hartford	March 26, 1997	Trial is scheduled to begin. *—TDL*

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Stilp v. Knoll (See *LLW Notes*, October 1996, p. 25.)	Challenges the legislative procedures used to pass Act 12 of 1988, known as the Low-Level Radioactive Waste Disposal Regional Facility Act.	Common-wealth Court of Pennsylvania	December 6, 1996 January 2, 1997 January 13, 1997	Motion for peremptory judgment filed by plaintiffs. Application for stay of proceedings filed by Appalachian Commission. Court issued an order granting stay of proceedings pending decision by state supreme court on the commission's motion to intervene in the suit.
Byrd v. Raines	Challenges the constitutionality of recent congressional legislation that grants to the President a line-item veto.	U.S. District Court for the District of Columbia	January 2, 1997 January 16, 1997 January 27, 1997 February 24, 1997 Marc 3, 1997 March 21, 1997	Complaint filed by six members of Congress. Defendants filed a motion to dismiss the complaint Plaintiffs filed a response to the defendants' motion to dismiss and a motion for summary judgment. Defendants response to the plaintiffs' motion for summary judgment is due. Federal government's answer is due. Hearing is scheduled to begin.
Northern States Power Company v. U.S. Department of Energy and *Michigan v. U.S. Department of Energy*	Seeks to enforce a July 1996 decision that DOE must take title to commercial spent fuel by 1998; allows state regulators to put contributions to the nuclear waste fund into escrow.	U.S. Court of Appeals for the District of Columbia Circuit	January 31, 1997 April 1, 1997	Separate but similar lawsuits were filed by a group of nuclear utilities and a national coalition of states and attorney's general. Answer of the federal government is due.

Texas Compact/Texas

Texas Compact Legislation Introduced in Congress

Legislation to grant congressional consent to the Texas Low-Level Radioactive Waste Disposal Compact was introduced in the U.S. Senate on February 5 and in the U.S. House of Representatives on February 6. The bills, which are identical to legislation introduced during the 103rd and 104th Congresses, are expected to be referred to the Senate Judiciary Committee and the Subcommittee on Energy and Power of the House Commerce Committee, respectively.

No floor statements were made at the time of introduction of the bills in either chamber of Congress.

U.S. Senate

The Senate bill, S. 270, was co-sponsored by the following Senators:

Susan Collins (R-ME)
James Jeffords (R-VT)
Patrick Leahy (D-VT)
Olympia Snowe (R-ME)

U.S. House of Representatives

The following 22 Representatives are listed as co-sponsors of the House bill, which has yet to be assigned a legislative number:

Thomas Allen (D-ME)
Bill Archer (R-TX)
John Baldacci (D-ME)
Joe Barton (R-TX)
Ken Bentsen (D-TX)
Richard Burr (R-NC)
Larry Combest (R-TX)
Tom Delay (R-TX)
Chet Edwards (D-TX)
Kay Granger (R-TX)
Gene Green (D-TX)
Sheila Jackson Lee (D-TX)
Eddie Bernice Johnson (D-TX)
Sam Johnson (R-TX)
Charles Norwood, Jr. (R-GA)
Pete Sessions (R-TX)
Lamar Smith(R-TX)
Charles Stenholm (D-TX)
William Thornberry (R-TX)
Jim Turner (D-TX)
Ralph Hall (D-TX)
Bernard Sanders (I-VT)

The Compact Agreement

Terms and Conditions Under the terms of the compact, Texas will host a low-level radioactive waste disposal facility. Maine and Vermont are named as the other party states, although additional states may be admitted under the terms and conditions set by the host state, "subject to fulfillment of the rights of the initial nonhost party states."

Each nonhost party state is required to make a one-time contribution of $25 million to Texas, as well as to pay a pro rata share of compact commission expenses and to contribute $2.5 million in community assistance funds for the host county.

The amount of waste to be accepted from all nonhost party states is limited to 20 percent of the volume estimated to be disposed of by Texas in the years 1995–2045, not to exceed a total of 20,000 cubic feet per year.

Compact Commissioners The Texas Low-Level Radioactive Waste Disposal Compact Commission is comprised of one voting member from each nonhost party state and six voting members from Texas.

Background

The Texas Compact was signed into law by the Governors of Texas and Maine in June 1993 and by the Governor of Vermont in April 1994. (See *LLW Notes*, May/June 1994, p. 1.)

103rd Congress Compact legislation was first introduced during the 103rd Congress, but was not scheduled for floor action by either house before Congress adjourned on October 8, 1994. (See *LLW Notes*, August/September 1994, p. 21.)

104th Congress Compact bills were again introduced during the 104th Congress. The House bill—H.R. 558—was brought up for a vote on the suspension calendar on September 19, 1995. The House voted 243 to 176 against the motion to suspend debate on the legislation and enact the bill. A two-thirds majority would have been required to pass the motion, as is the case with all legislation placed on the suspension calendar. (See *LLW Notes*, October 1995, p. 29.)

On December 19, 1995, the House Rules Committee granted an "open rule" for consideration of the compact legislation on the House floor providing for the normal procedure, under which bills need only a majority vote for passage. (See *LLW Notes*, January/February 1996, p. 16.) The bill was, however, never scheduled for a floor vote in the House.

Similar legislation, S. 419, was approved by the Senate Judiciary Committee on May 18, 1995, without amendments. The bill was not scheduled for a vote on the full Senate floor, however, before the 104th Congress adjourned.

—TDL

The preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates via facsimile transmission in a Newsflash on February 6, 1997.

Superfund Reform is a Priority for 105th Congress

On January 21, Senators John Chafee (R-RI) and Bob Smith (R-NH) introduced S. 8—the Superfund Cleanup Acceleration Act of 1997. Chafee is Chair of the Environment and Public Works Committee. Smith chairs the Superfund subcommittee.

S. 8 is similar to a Superfund reform bill introduced during the 104th Congress. That bill, S. 1285, was rejected by the Clinton administration. S. 8, however, does include some important differences from its predecessor. For one thing, the liability scheme has been altered to exempt all generators and transporters at co-disposal landfills, or those that mainly receive municipal solid waste and sewage sludge, for conduct that occurred prior to January 1, 1997. The new bill also exempts small businesses with less than 30 employees or $3 million in gross revenues from the law's liability net.

In the House, jurisdiction over Superfund is shared by the Commerce Committee and the Transportation and Infrastructure Committee. Both committees are reported to be working toward reopening bipartisan negotiations on the issue and toward the introduction of new legislation.

—TDL

High-Level Waste Bill Gets Off to an Early Start

On January 21, Senators Frank Murkowski (R-AK) and Larry Craig (R-ID) introduced S. 104—the Nuclear Waste Policy Act of 1997. Murkowski is Chair of the Energy and Natural Resources Committee. As of press time, similar legislation had not been introduced in the House.

The Legislation

S. 104 calls for construction of a temporary storage facility at Yucca Mountain, Nevada. Construction is to begin on December 31, 1998, with waste to be accepted in phases beginning in 1999. The bill requires that DOE provide an assessment of the site's viability to the President and Congress at least six months before the commencement of construction. If the site is deemed unsuitable, the bill allows the President 18 months to find an alternative location for the interim storage facility—or construction must proceed.

The bill directs EPA to issue standards to protect the public from radioactive leaks from a permanent facility. NRC is designated as the agency responsible for issuance of a license based on EPA's radiation protection standard. Two separate environmental impact statements must be completed under the National Environmental Policy Act (NEPA)—one in advance of operation of the temporary storage facility, and one in advance of facility licensing by the NRC.

To date, the bill has at least 16 cosponsors.

Prior Legislative Attempts

The legislation is identical to a bill that was introduced during the 104th Congress. That bill, S. 1936, passed the Senate on July 31, 1996, by a vote of 63 to 37. The final tally was four votes shy, however, of the two-thirds majority needed to override a threatened Presidential veto. (See *LLW Notes*, August/September 1996, p. 37.) The House, which had been widely expected to move quickly on similar nuclear waste legislation (H.R. 1020), never brought its version of the bill to the floor.

Prior Appellate Court Decision

High-level waste storage is an issue of heightened concern due to a July 1996 decision by the U.S. Court of Appeals for the District of Columbia Circuit that DOE has a statutory obligation to begin taking the nuclear industry's spent nuclear fuel by 1998 even though a permanent disposal facility will not be ready by then. The decision, which was issued by a three-judge panel, was issued in a lawsuit brought against DOE by 25 nuclear utilities and 39 agencies from 29 states. DOE did not appeal the court's decision.

New Litigation

A group of nuclear utilities and a national coalition of states and Attorneys General filed two additional suits against DOE on January 31, 1997. The suits, which were filed in the U.S. Court of Appeals for the District of Columbia Circuit, are separate but similar. They seek, among other things, enforcement of the court's July 1996 decision and permission from the court for state regulators to put ratepayer contributions to the nuclear waste fund into an escrow account. As of press time, DOE had not responded to the litigation.

—TDL

Utah Indian Tribe Agrees to Store Spent Fuel

Recent news reports indicate that a consortium of 10 nuclear utilities signed an agreement with the Skull Valley Band of Goshute Indians on December 27, 1996, to build an interim storage facility on the tribe's reservation near Salt Lake City, Utah. Tribal members had voted to allow spent fuel storage on the reservation prior to passage of the agreement. Under the agreement, construction would start around the year 2000, with the facility commencing operations in 2002. The facility is intended to operate only as an interim storage site until DOE opens a facility for the acceptance of spent fuel. At such time, the waste would be removed from the reservation.

EPA (continued)

Fort Mojave Petition NEJAC for Ward Valley Resolution

In December 1995, the Fort Mojave Indian Tribe petitioned NEJAC to consider Ward Valley an environmental justice issue. The petition states that the Tribe has a "spiritual opposition to the radioactive waste dump", and concludes:

> [T]he fight to stop the nuclear dump in Ward Valley is a battle for environmental justice. We want to explain that to President Clinton and Secretary Babbitt, who do not yet understand the sacredness and value of our desert and our river.
>
> We request that NEJAC give the following recommendations to the Environmental Protection Agency:
>
> 1. that the EPA seek appointments for the Tribes with President Clinton and Secretary Babbitt, and
>
> 2. that the EPA direct President Clinton and Secretary Babbitt not to transfer the land in Ward Valley to the State of California for construction of a nuclear waste dump.

NEJAC Subcommittee Action

According to various press reports and press releases from organizations opposed to the Ward Valley disposal facility, in December 1996 the Subcommittee on Indigenous Peoples passed a resolution urging EPA Administrator Carol Browner to recommend that President Clinton and the Secretary of the Interior not to transfer federal land to the State of California for construction of the planned Ward Valley low-level radioactive waste disposal facility. The Subcommittee then recommended the resolution to the full NEJAC for adoption. Although the full NEJAC deferred action on the proposed resolution, several press articles appeared in California papers inaccurately stating that the full NEJAC had passed the resolution. According to EPA staff, the resolution is currently not publicly available since the resolution is being rewritten by James Hill, Acting Chair of the Subcommittee on Indigenous Peoples.

EPA's Response to NEJAC Recommendations

Upon receiving a formal recommendation from a federal advisory committee, EPA formally acknowledges receipt and conducts an in-house examination of the issues associated with the recommendation. EPA is not bound under law to abide by resolutions passed by an advisory committee. To date, EPA has not indicated a position on environmental justice issues pertaining to the planned Ward Valley disposal facility.

—LAS

State, Compact Not Consulted

After several inaccurate press articles appeared in California papers, staff of the California DHS contacted EPA headquarters staff and on December 22 provided information regarding the environmental justice concerns raised during the siting process and the state's actions to address those concerns.

Prior to California DHS contacting EPA headquarters, neither the State of California nor the Southwestern Compact had been contacted by NEJAC, the NEJAC Subcommittee on Indigenous Peoples, EPA headquarters, or EPA Region IX staff for information on the siting process for the Ward Valley disposal facility.

According to EPA headquarters, EPA Region IX environmental justice staff have briefed EPA headquarters staff on specific issues related to Ward Valley. At the request of California DHS, a conference call meeting was held on January 10 among California DHS, EPA headquarters, and EPA Region IX.

California DHS Questions Federal Process

Following are excerpts from a letter from Carl Lischeske, Manager, Low-Level Radioactive Waste Management Program, California DHS; to Clarice Gaylord, Director, EPA Office of Environmental Justice. For further information, see "New Materials and Publications."

The State of California Department of Health Services (DHS) is deeply concerned about possible environmental justice issues that have purportedly been raised before a subcommittee of the National Environmental Justice Advisory Council (NEJAC), an advisory committee to the U.S. Environmental Protection Agency, with regard to the planned Ward Valley disposal facility. The [DHS] and the project developer worked extensively with potentially affected Indian tribes throughout the site selection process to identify and to address specific Tribal concerns…

We were, therefore, disturbed by reports that the NEJAC may adopt a resolution on the environmental justice aspect of the Ward Valley project without learning what we have already done with regard to the issue of environmental justice… Under the circumstances, we feel it is only fair that we be allowed to present our case to the NEJAC and its relevant subcommittees before any further action is taken. Given that this is a significant waste disposal facility siting issue, we suggest that any further NEJAC consideration of this topic be broadened to include the NEJAC Waste and Facility Siting Subcommittee.

Finally, we urge the NEJAC to consider the issue in a larger context. The proposed disposal facility is some 20 miles from the nearest Indian community—no closer, in fact, than the predominantly white City of Needles.… On the other hand, the absence of the Ward Valley facility provides the potential for thousands of cubic feet of low-level radioactive waste (LLRW) to be stored indefinitely in much less closely monitored settings in urban areas throughout the state, most of it in locations considerably closer to comparatively large minority and economically disadvantaged communities than the Fort Mohave Tribe is to the site for the Ward Valley facility. Moreover, the Ward Valley facility would also serve Arizona, North Dakota, and South Dakota. Failure to proceed with this project may pose significant environmental justice considerations, not only for the large indigenous populations of these states, but also for other minority or economically disadvantaged people who live close to where LLRW is currently being stored. The DHS considers this to be a much greater potential public health risk, and a much more significant environmental justice issue, than the construction of a carefully monitored, permanent disposal facility in an uninhabited desert valley.

We await your positive response to our request that we be given a fair opportunity to explain our side of the issue before the NEJAC or its subcommittees take any further action…

EPA, DOI Meet with Tribal Representatives and Site Opponents

Attendees

On November 25, representatives from EPA Region IX and DOI met with tribal representatives and representatives of two organizations opposed to the Ward Valley low-level radioactive waste disposal facility. According to an EPA meeting summary dated December 6, tribal representatives from the following Indian Tribes attended the meeting:

- Fort Mojave Indian Tribe,
- Colorado River Indian Tribes (composed of Mojaves, Chemehuevis, Navajos and Hopis),
- Chemehuevi Indian Tribe,
- Fort Yuma-Quechan Indian Tribe, and
- Cocopah Indian Tribe.

Representatives from the following federal agencies attended the meeting:

- U.S. Bureau of Land Management (one representative),
- U.S. Bureau of Indian Affairs (three representatives),
- U.S. Fish and Wildlife Service (one representative), and
- EPA Region IX (two representatives of the Cross-Media Division and two representatives from the Air and Radiation Program).

Representatives from the following groups opposed to the Ward Valley facility also attended the meeting:

- Bay Area Nuclear (BAN) Waste Coalition; and
- Greenpeace, Inc.

The summary notes, "Five Indian Tribes along the Colorado River have expressed their grave, unalterable opposition to any low-level radioactive waste disposal facility in their traditional ancestral homeland."

Action Items Developed

The meeting summary alludes to EPA's next steps following the meeting.

> From EPA's vantage point, the November 25 meeting was a very good first step in both understanding the tribal concerns and laying the foundation for future dialogue with the Tribes. The meeting with the Tribes builds upon our ongoing communication with DOI agencies on Ward Valley. We have developed a variety of action items that we intend to undertake in the next month, both internally as well as coordinating with the Tribes and DOI agencies. These ongoing discussions will enable us to clearly understand how tribal concerns are best taken into account, particularly in our radionuclide NESHAP decision-making and in our review of BLM's upcoming [S]EIS.

(Consultation with California DHS and the Southwestern Compact was not among the action items developed by EPA Region IX.)

U.S. Environmental Protection Agency (continued)

EPA Withdraws Cleanup Rule from OMB

In a December 19 letter to the Office of Management and Budget (OMB), EPA Assistant Administrator Mary Nichols stated that EPA was withdrawing its Radiation Site Cleanup Rule (40 CFR Part 196) from OMB review. OMB must review and approve regulations promulgated by federal agencies before the regulations are formally proposed in the *Federal Register*. The letter to OMB Office of Information and Regulatory Affairs Administrator Sally Katzen explained:

> We began to work on this rule in response to a request from the Department of Energy (DOE). It now appears that the Department has changed its mind. We are, therefore, withdrawing the rule.
>
> We will continue to work with DOE on this and other matters and may resubmit the rule at a later date.

Background

In May 1994, EPA issued a preliminary draft Radiation Site Cleanup Rule to set standards for remediation of soil, ground water, surface water, and structures at federal facility sites contaminated with radioactive material. The rule would apply to federal facilities, including DOE and Department of Defense facilities. The preliminary draft regulation called for an annual committed effective dose limit of 15 millirem (mrem) per year above natural background levels for 1,000 years after the completion of a cleanup. (See *LLW Notes*, May/June 1994, pp. 28–30.)

Concurrent with EPA's development of its Radiation Site Cleanup Rule, NRC has been preparing a Radiological Criteria for Decommisioning Rule. According to a December 10 speech by NRC Chairman Shirley Ann Jackson, NRC staff have completed an analysis of public comments on the NRC rule (which would amend 10 CFR Parts 20, 30, 40, 50, 51 and 70) and will submit a final rule to the NRC Commission for consideration in early 1997.

If the Commission approves a final version of the rule, it will then be sent to OMB for review.

NRC and Agreement State licensees are potentially subject to any Radiation Site Cleanup Rule EPA might issue. However, EPA and NRC have signed a memorandum of understanding (MOU) on coordinating standards and avoiding dual regulation. The MOU specifies that "EPA's decisions to impose or not impose other regulations regarding NRC licensed materials or facilities will be based upon a determination as to whether NRC's regulatory program achieves a sufficient level of protection of the public health and environment."

NRC Describes Concerns to OMB

In a November 14 letter to OMB, NRC Chairman Shirley Ann Jackson notified OMB of NRC's current views and intentions regarding both EPA's Radiation Site Cleanup Rule and NRC's Radiological Criteria for Decommissioning rule. The letter stated that the NRC Commissioners will give particular consideration to the following issues when formulating and promulgating NRC's rule:

- an all-pathways dose criterion of up to 30 mrem/year,
- inclusion of specific alternative criteria for certain facilities,
- elimination of the separate ground water protection standard,
- elimination of As Low As Reasonably Achievable (ALARA) requirements from the rule, and
- the appropriate value of the maximum dose permitted if restrictions on use fail.

Individual Issues

The following excerpts from the November 14 letter address specific rulemaking issues.

All-Pathways Dose Criterion

> The NRC is continuing its deliberations on selection of an all-pathways dose criterion for decommissioning which will ensure protection of public health and safety and the environment. Compliance with this criterion would provide an ample margin below the 100 mrem/yr radiation protection guide currently contained in proposed federal guidance. We are giving particular consideration to a range of values at or above 15 mrem/yr for which we believe the desired margin can be achieved, given our cost-benefit analysis.

Separate Standard for Protection of Ground Water

> Given [NRC's] commitment to protect the public through an appropriate all-pathways dose criterion and our view that implementation of this criterion also will ensure that groundwater contamination is small, we do not believe we can justify the cost associated with the adoption of a separate groundwater standard. We, therefore, plan to delete the requirement from NRC's final rule based on the information currently available to us.
>
> In reaching this conclusion, the NRC has considered the safety impact of a separate groundwater standard and also has conducted analyzes of the cost and benefits which reasonably could be expected should a separate groundwater standard be included to supplement a basic all-pathways dose criterion in the range of 15-30 mrem/yr. Our conclusion is that a separate groundwater standard will have minimal additional safety benefit compared to an all-pathways dose criterion and that the costs associated with this benefit can be unreasonably large …
>
> We believe that, for most sites, the concentrations of radionuclides in the groundwater would be either below or only marginally above the Maximum Contaminant Levels codified in 40 CFR Part 141 [Safe Drinking Water Act]. In the former case, the costs of demonstrating compliance would have zero health benefits, and in the latter case, the benefits would be very small compared to the costs to achieve them …
>
> Under the rulemaking policy we have followed consistently for many years, inclusion of a separate groundwater protection standard in an NRC cleanup rule under the Atomic Energy Act would need to be supported by a regulatory analysis which demonstrates that the costs are justified by the benefits. As the above discussion indicates, our analyzes do not support this conclusion. If NRC is to include a separate groundwater protection standard in its rule, we would need EPA to provide us additional analyzes demonstrating that the benefits justify the costs. The EPA analysis supporting its current draft rule is not helpful in this respect. We recognize, of course, that EPA may propose to include a separate groundwater protection standard in its own Atomic Energy Act cleanup rule on other than cost-benefit grounds. Whatever the grounds may be, we acknowledge our obligation to implement EPA's final rule.

Technical Impracticability Determinations

> [W]e would call to your attention a specific requirement in EPA's draft standards that poses an unnecessary and duplicative regulatory burden that has a highly questionable legal basis. Under the draft standards (§ 196.11(h)), the [EPA] Administrator would have to approve technical impracticability determinations … EPA proposes to require such EPA approvals for facilities licensed by NRC and its Agreement States, even though these facilities otherwise would be exempted from the standards. As you are aware, NRC and EPA have coordinated the development of the standards to provide EPA the necessary basis to determine that NRC's regulatory program remains sufficiently protective of the public and environment. We see no value in requiring independent review and confirmation by EPA of decisions by NRC or Agreement States to grant technical impracticability waivers.

—LAS

U.S. Nuclear Regulatory Commission (continued)

Board Ruling Raises Doubts About Proposed Louisiana Enrichment Facility

On December 4, 1996, the Atomic Safety and Licensing Board—a panel appointed by NRC—issued a ruling which is likely to hinder the licensing prospects for a proposed uranium enrichment plant in Clairborne Parish, Louisiana. The ruling upheld three out of seven complaints about the proposed Louisiana Energy Services (LES) facility that have been raised by Citizens Against Nuclear Trash (CANT). Two of the other issues were dismissed by the board earlier in the year, while the remaining two issues are still undecided. The ruling is significant because NRC relies heavily on the board's decisions when deciding whether to issue operating licenses. If licensed, the LES facility would become the country's first privately owned facility for uranium enrichment.

The following is a brief summary of the complaints addressed in the December 4 ruling and the board's analysis of each item:

- Under the National Environmental Policy Act (NEPA), NRC is required to fully assess the impact of every proposed licensing action, weighing both the costs and benefits. The act requires that license applicants address alternatives available for reducing or avoiding adverse environmental impacts. CANT argued that LES' environmental impact report focused too heavily on the proposed facility's potential benefits and did not adequately consider environmental and social costs. The board agreed, finding that LES failed to demonstrate a "genuine need" for the facility and pointing out that worldwide enrichment production capacity exceeds, and is expected to continue to exceed, worldwide demand requirements.

- CANT argued that LES failed to consider alternatives to the proposed facility as required by NEPA, noting that a "no action" alternative was not considered. The board agreed, finding that NRC staff's review of LES' Environmental Impact Statement only minimally addressed the "no action" issue.

- The final complaint concerned LES' financial stability. CANT argued that LES is not financially qualified to build and operate the proposed facility. The board agreed, holding that "[LES] has not demonstrated that there is a reasonable assurance that funds will be available to construct the facility, and LES has failed to establish by a preponderance of the evidence that it appears to be financially qualified to build the [facility]."

As of press time, NRC had not issued a decision on LES' license application.

—TDL

U.S. Department of Energy (DOE)

DOE Recommends External Regulation by NRC

On December 20, Energy Secretary Hazel O'Leary announced that DOE will submit legislation to the U.S. Congress to transfer oversight of DOE nuclear safety to NRC. DOE's Working Group on External Regulation has recommended that the transfer of oversight be phased in over a ten-year period.

The working group had previously narrowed eight implementation options for external regulation of DOE to two options. The option chosen by Secretary O'Leary would establish NRC as DOE's external regulator and phase out oversight of the Defense Nuclear Facilities Safety Board.

The transition to external regulation will require legislation to be passed by the U.S. Congress and signed by the President. DOE is reportedly developing legislative language for introduction during this congressional session. Under the chosen option, Agreement States will have a role in external regulation of DOE facilities, but the role and the precise timing of Agreement State regulation of DOE facilities remains to be determined. EPA and states with EPA-delegated programs will continue with their current roles and responsibilities regarding DOE facilities.

Background

DOE and its predecessor agencies have historically regulated themselves with regard to nuclear safety. In February 1995, Secretary O'Leary established a federal advisory committee to provide advice and recommendations to her office, the White House Office of Environmental Policy, and the Office of Management and Budget (OMB) on whether and how new and existing DOE facilities and operations might be externally regulated to improve nuclear safety. According to a DOE press release, the advisory committee's charter "responds to a growing sentiment within the Department, at DOE facilities, and by external observers that DOE self-regulation is cumbersome and inefficient, and that external regulation could improve safety and cut costs."

Anticipated Timing

Within the first five years of the transition to external regulation, all nuclear energy and energy research facilities will be transferred to external regulation by NRC or Agreement States. All Environmental Management nuclear facilities and Defense Programs facilities will be regulated by NRC within ten years. The Environmental Management and Defense Programs nuclear facilities will continue to be regulated by DOE with oversight by the Defense Nuclear Facilities Safety Board until the facilities are transferred to NRC regulation.

—LAS

For further information, see "New Materials and Publications."

New Materials and Publications

Document Distribution Key	
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LLW Forum

[DM] Meeting Packet: LLW Forum meeting, February 11-14, 1997.

— *LLW Forum Meeting Agenda.* Afton Associates, Inc. February 1997.

— *LLW Forum Meetings-at-a-Glance Schedule*. Afton Associates, Inc. FEbruary 1997.

— *LLW Forum Meeting Preattendance List*. Afton Associates, Inc. February 1997.

— *Status of Technical Assistance.* DOE's National Low-Level Waste Management Program. February 1997.

— *Waste Burial in Arid Environments—Application of Information from a Field Laboratory in the Mojave Desert, Southern Nevada*. U.S. Department of Interior—U.S. Geological Survey. August 1995. Bibliography accompanies the document.

(Distributed on January 31, 1997.)

States and Compacts

Southwestern Compact/California

[D] Letter from Carl Lischeske, Manager, Low-Level Radioactive Waste Program, Department of Health Services, State of California, to Clarice Gaylord, Director, Office of Environmental Justice, U.S. Environmental Protection Agency, regarding a proposed National Environmental Justice Advisory Council proposed resolution concerning the Ward Valley low-level radioactive waste disposal facility project. January 23, 1997.

Massachusetts

1996 Annual Report to the Commonwealth; July 1, 1995 - June 30, 1996. The Massachusetts Low-Level Radioactive Waste Management Board. November 15, 1996. To obtain a copy, contact the Management Board at (617)727-6018.

Other

Transporting Radioactive Spent Fuel; An Issue Brief. The League of Women Voters Education Fund. Publication #1052. July 1996. 29-page document including background on spent fuel, key issues related to spent fuel transportation, questions and answers, federal laws and related policies, a glossary and a listing of other information and publications. $5.95 plus $3.50 for shipping and handling. To obtain a copy, contact the League of Women Voters at (202)429-1965.

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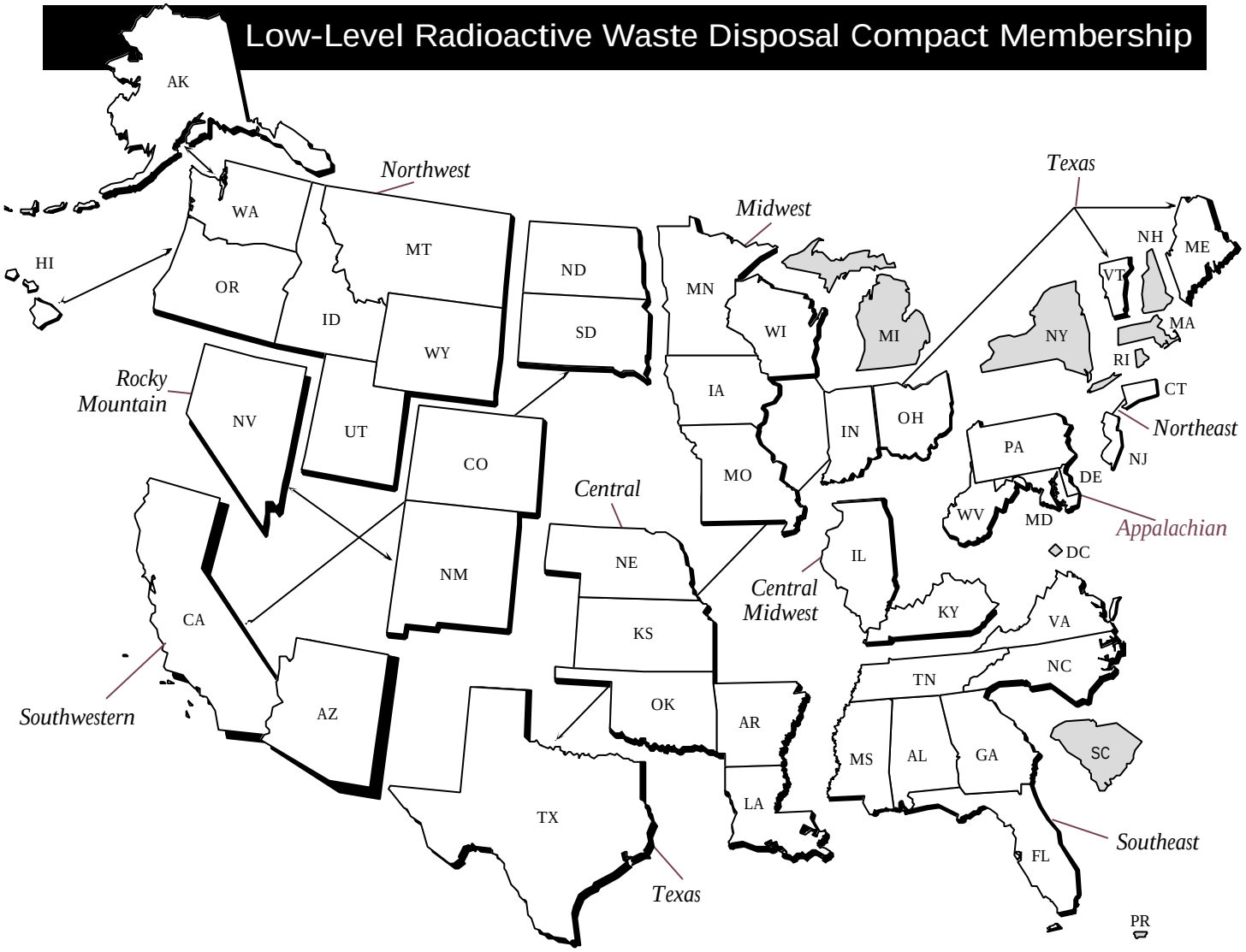
Receiving *LLW Notes* by Mail

LLW Notes and the *Summary Report: Low-Level Radioactive Waste Management Activities in the States and Compacts* are distributed to state, compact and federal officials designated by LLW Forum Participants or Federal Liaisons.

Members of the public may apply to DOE's National Low-Level Waste Management Program at the Idaho National Engineering and Environmental Laboratory (INEEL) to be placed on a public information mailing list for copies of *LLW Note*s and the supplemental *Summary Report*. Afton Associates, the LLW Forum's management firm, will provide copies of these publications to INEEL. The LLW Forum will monitor distribution of these documents to the general public to ensure that information is equitably distributed throughout the states and compacts.

To be placed on a list to receive LLW Notes and the Summary Report, by mail, please contact Donna Lake, Senior Administrative Specialist, INEEL at (208)526-0234. As of March 1996, back issues of both publications, are available from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, (703)487-8547.

Low-Level Radioactive Waste Disposal Compact Membership



Appalachian Compact
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Washington * •
Wyoming

Rocky Mountain Compact
Colorado
Nevada
New Mexico

Northwest accepts Rocky Mountain waste as agreed between compacts.

Northeast Compact
Connecticut *
New Jersey *

Southeast Compact
Alabama
Florida
Georgia
Mississippi
North Carolina *
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
Vermont

The compact has been passed by all three states and awaits consent by the U.S. Congress.

Unaffiliated States
District of Columbia
Massachusetts
Michigan
New Hampshire
New York
Puerto Rico
Rhode Island
South Carolina •

The Low-Level Radioactive Waste Forum includes a representative from each regional compact, each designated future host state of a compact *, each state with a currently operating facility •, and each unaffiliated state.

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