LLWnotes

Volume 15, Number 2 March/April 2000

Entergy Arkansas v. State of Nebraska

Eighth Circuit Upholds Preliminary Injunction against Nebraska

Sovereign Immunity Waived via Compact

On April 12, the U.S. Court of Appeals for the Eighth Circuit upheld the issuance of a preliminary injunction against the State of Nebraska by a lower court in a case that challenges the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County, Nebraska. The preliminary injunction, which was issued by the U.S. District Court for the District of Nebraska on April 15, 1999, basically extends a temporary restraining order granted by the same court on March 8. (See *LLW Notes*, April 1999, pp. 7–13.) It restrains the State of Nebraska and its officials, employees, agents, and representatives from

- holding a contested case hearing on the state's decision to deny US Ecology's license application; and
- expending or attempting to collect any monies, including federal rebate monies, from regional utilities, the Central Interstate Low-Level Radioactive Waste Commission, or US Ecology.

The court's ruling did not address appeals by the State of Nebraska from orders of the district court denying the state's motions to dismiss the claims against it. (See *LLW Notes*, October 1999, pp. 15–19.) Those appeals remain pending.

Issues on Appeal

In its appellate brief, the State of Nebraska argued that the district court lacked jurisdiction to issue the preliminary injunction because of the sovereign immunity and *Ex Parte Young* doctrines, that the Central Commission did not make the necessary showing for such issuance, and that the injunction violated the Anti-Injunction Statute.

In its response, the Central Commission asserted that Nebraska waived its sovereign immunity by entering into the compact, that the district court had jurisdiction under prior case law, that the injunction did not violate the Anti-Injunction Statute, and that the commission made a sufficient showing of likelihood of success on the merits and irreparable harm to support the issuance of a preliminary injunction.

continued on page 20

In This Issue

South Carolina Senate Passes Compact Legislation; Bill Advances through House • Page 8

Charts on Commercial LLRW Volumes and Activity 1986–1999 • Supplement

Low-Level Radioactive Waste Forum

LLW Notes
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Editor, Cynthia Norris; Associate Editor, Holmes Brown
Contributing Writers: Todd Lovinger, Cynthia Norris, M. A. Shaker, Joel Weiss
Layout and Design: M. A. Shaker

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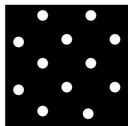

LLW FORUM

Low-Level Radioactive Waste Forum
c/o Afton Associates, Inc.
403 East Capitol Street
Washington, DC 20003

VOICE **(202)547-2620**
FAX **(202)547-1668**
E-MAIL **llwforum@afton.com**
INTERNET **www.afton.com/llwforum**

Table of Contents

Courts **1**
Eighth Circuit Upholds Preliminary Injunction against Nebraska 1
LLW Forum **2**
NGA Calls on Congress, DOE to Support LLW Forum 3
IG Report Criticizes DOE Spending on LLW Forum 4
Eleven Individual Governors Express Support for the LLW Forum . .5
Recent Support for the LLW Forum 6
States and Compacts **7**
Maine Passes Legislation Giving State Control re Decommissioning 7
GTS Duratek to Purchase Chem-Nuclear Systems, Other Services . .7
South Carolina Senate Passes Compact Legislation; Bill Advances through House 8
Northeast Compact Announces Proposed Rule re Eligibility 9
Connecticut DEP Seeks Briefing for NRC re Assured Isolation . . .10
Mobley Named Alternate Forum Participant by the SE Compact . .10
Texas Board Discusses Waste Management Options 11
NCSL Working Group Recommends LLRW Policy Changes 12
1999 Disposal Data Available on MIMS .13
Utah Legislature Presses for Expedited Review of Rad Waste Applications 16
Southwestern Compact Writes to California Governor 17
US Ecology Seeks Damages from California re Ward Valley 18
Courts (continued) **19**
Appellate Court Upholds Denial of Intervention in Relicensing Case 19
Central Commission Files Motion to Preserve Documents 22
Appellate Court Affirms NE Lacks Veto Authority over Export . . .24
Court Finds No Breach of Contract in Ward Valley Dispute 26
Appellate Court Upholds Remand of WCS Suit to State Court . . .28
Envirocare Files Defamation Suit against WCS 29
Utah Court Dismisses Former Regulator's Suit against Envirocare . .30
Court Calendar **33**
Federal Agencies and Committees **34**
NRC Releases Commission Paper re Rubblization 34
NRC Responds to Maine Yankee re Rubblization 36
NRC to Hold Hearings re PFS Application 36
NRC Requests NAS Study re Control of Solid Materials 37
NRC Upholds Decision to Allow IUC to Accept FUSRAP Waste . .37
NRC Accepts Petition re FUSRAP Regulation 38
NRC Chair Provides Personal Views re FUSRAP Regulation 39
NRC Approves Recommendations re Source Material 40
NRC Proposes Advance Notice to Tribes re Transportation of Waste 40
NRC Grants First License Extensions for Commercial Plants 41
USGS Says Atlas Mill Tailings Pile Should Be Moved 41
DOE Issues Record of Decision re Waste Management Program . .42
DOE Updates Cleanup Forecast 42
Obtaining Publications **43**
Accessing LLW Forum Documents on the Web 43
Charts on Commercial LLRW Volumes and Activity, 1986–1999 . . . . **Supplement**

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National Governors' Association Calls on Congress, DOE to Support LLW Forum

On February 29, the National Governors' Association (NGA) adopted an amended policy on low-level radioactive waste disposal. The amended policy deletes compact-specific references and adds language calling on Congress and the U.S. Department of Energy to "continue to support state, compact, and federal interaction through the Low-Level Radioactive Waste Forum, a national organization of gubernatorial and compact appointees."

The vote was held during the closing plenary session of NGA's winter meeting in Washington, D.C.

NGA's Natural Resources Committee had previously adopted the amended policy on February 27. All policies put forward by the Natural Resources Committee were adopted en bloc by the full association.

On March 31, Governors Kenny Guinn (R-NV) and Thomas Vilsack (D-IA), Chair and Vice Chair respectively of the NGA Committee on Natural Resources, transmitted the policy to the U.S. Secretary of Energy and to the full membership of the U.S. House and Senate Appropriations Committees.

The Governors' letter noted that

> [h]istorically, the LLRW Forum has provided valuable services to states and compacts in the form of data collection, information dissemination, and useful background materials. This technical assistance is critical to the efforts of states and compacts to find permanent disposal locations for low-level radioactive waste.

The letter also indicated that the Governors "look forward to working with [the addressees] to ensure that states continue to benefit from the important work carried out by the LLRW Forum."

—CN, MAS

National Governors' Association Policy NR-19. Low-Level Radioactive Waste Disposal

19.1 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. More than a decade after the 1985 amendments to the act, the states and their compacts still require, to varying degrees, the cooperation and technical assistance of the federal government as the states seek to carry out their responsibilities under the act.

19.2 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 support prompt ratification of those compacts. Additionally, Congress should exercise restraint with respect to imposing its own views on the management of compacts. Congress and the U.S. Department of Energy should also continue to support state, compact, and federal interaction through the Low-Level Radioactive Waste Forum, a national organization of gubernatorial and compact appointees.

IG Report Criticizes DOE Spending on LLW Forum

Forum Convenor Cites Flawed Report Methodology

A U.S. Department of Energy Inspector General's audit report issued on February 24, 2000, criticized federal funding of the Low-Level Radioactive Waste Forum. The report also called into question expenditure of DOE technical assistance funds on development of the "assured isolation" concept for low-level radioactive waste management.

The Inspector General's office initiated the internal performance audit of DOE's National Low-Level Waste Program after a DOE official requested a review to determine whether the program's "assistance to states and compact regions supports the development of low-level waste disposal facilities." The audit report covers only the assured isolation portion of the National Low-Level Waste Management Program's activities, and the grant given by the National Low-Level Waste Program to fund the LLW Forum—ignoring completely the other parts of the extensive DOE program.

Methodology Shoddy

Though state and compact officials were not consulted by its authors, the report presumes to conclude "that the Forum is not a State or Compact priority." And, in the audit report, the Inspector General's office concedes that DOE management has said that "states have routinely identified the Low-Level [Radioactive] Waste Forum as being the highest priority for DOE support to the states."

In response to the audit report, Forum Convenor Kathryn Haynes observed, "If the Inspector General's Office had consulted us, we could have provided documentation to show that many individual Governors, the National Governors' Association, and numerous other compact and state officials actively support federal funding for this important and cost-effective information-sharing organization."

The National Governors' Association adopted a policy on February 29 stating that "Congress and the U.S. Department of Energy should also continue to support state, compact, and federal interaction through the Low-Level Radioactive Waste Forum, a national organization of gubernatorial and compact appointees." (See related story, this issue.)

And, in a letter dated March 7, the Governors of Connecticut, Indiana, Maryland, Nevada, New Jersey, Oregon, South Carolina, Utah and Wisconsin called the LLW Forum a "vital clearinghouse of information … [that] maintains a much-needed infrastructure that provides independent information to states, federal agencies, Congressional committees, user groups, and other stakeholders." (See related story, this issue.)

Haynes also pointed out that the Inspector General's report errs when it says that states and compacts do not contribute to support the LLW Forum, the main reason cited for DOE to withhold funding. "A recent poll of our members, done at the request of DOE, shows that in 1999 states and compacts contributed at least as much or more to the organization as the Department of Energy—in staff time, meeting participation, travel costs, and document production," Haynes noted.

She added, "Saying that because states and compacts don't give money directly to our group means they don't think it's important is like saying that people don't value the federal highway system because they don't pay tolls on every road. The LLW Forum has consistently been identified by representatives of Governors and compact commissions as crucial to our continuing work. We think that a federal contribution to this national effort is not only appropriate but also necessary."

Conclusions Suspect

Haynes pointed out that the Inspector General's report relies heavily on 1999 House Appropriations Committee report language but fails to note that it was altered by House-Senate conference committee action. In fact, the final FY 2000 appropriations bill gave DOE funds to continue the National Program, although at a reduced level. In addition, the Inspector General's report refers to Congressional language from a 1990 committee report, but completely ignores the controlling language of the 1985 Low-Level Radioactive Waste Policy Amendments Act.

The federal legislation directs the Secretary of Energy to "provide to those compact regions, hosts states, and non-member states determined by the Secretary to require assistance for purposes of carrying out this Act—(1)continued technical assistance to assist them in fulfilling their responsibilities under this Act …"

The Inspector General's report also fails to recognize strong support for the organization by key Members of Congress such as Joe Barton (R-TX), Chair of the House Commerce Subcommittee on Energy and Power, which has jurisdiction over DOE's program.

"These omissions seem to be promoting a particular agenda," Haynes concluded.

DOE Management Position

The letter accompanying the audit report concedes that DOE management has said that "states have routinely identified the Low-Level Waste Forum as being the highest priority for DOE support to the states." According to Haynes, this has been true for many years despite the changing tides in low-level radioactive waste management.

As noted in the report's transmittal letter, the DOE response to the audit also indicated that "most of the substantive issues arose from differing interpretations of the Department and States' duties under the Act." Further, the letter states that DOE management "believes that it is appropriate and legally defensible for the Department to provide technical assistance to States and compact regions on assured isolation, as well as support to States through the grant process for the Low-Level [Radioactive] Waste Forum."

Forum Support Builds

The LLW Forum has always had broad-based, bipartisan support for its activities and services. Recently, with DOE funding of the LLW Forum up for renewal, many state and federal officials have once again expressed their appreciation for the group. (See box listing LLW Forum support.)

—MAS

Eleven Individual Governors Express Support for the LLW Forum

On March 7, nine Governors sent a joint letter to the Secretary of Energy expressing their support for funding of the LLW Forum. The Governors of Connecticut, Indiana, Maryland, Nevada, New Jersey, Oregon, South Carolina, Utah, and Wisconsin wrote as follows:

> A vital clearinghouse of information to states and Governors is the Low-Level Radioactive Waste Forum (LLW Forum), a multi-state organization of Governors' appointees and interstate compact representatives. This operation maintains a much-needed infrastructure that provides independent information to states, federal agencies, Congressional committees, user groups, and other stakeholders …
>
> The high probability that future access to the Barnwell, South Carolina disposal facility will no longer exist for most states means that the LLW Forum services are needed now more than ever.

The Governor of Michigan also wrote to the Secretary of Energy, stating in a March 21 letter,

> I join with many other governors who value the services that have been provided by the Forum to urge your continued support of the Forum consistent with the level of services that states and governors have received in recent years.

Rhode Island's Governor communicated his support for the LLW Forum to the Secretary of Energy by letter dated December 10, 1999. He wrote a second letter of support on March 30, 2000—this time to the Chair of the House Appropriations Subcommittee on Energy and Water Development—in which he stated that Rhode Island's "ability to deal with this issue would be greatly impeded without the expertise of the [LLW] Forum."

—MAS

Members of Congress, Governors, Compacts, State Officials, Federal Officials and Others Who Have Expressed Support for the Low-Level Radioactive Waste Forum

United States Senate
Senator Jack Reed (D-Rhode Island)
Senator Olympia Snowe (R-Maine)

U.S. House of Representatives
Representative Joe Barton (R-Texas)
Representative Virgil Goode (I-Virginia)
Representative Patrick Kennedy (D-Rhode Island)
Representative Bob Weygand (D-Rhode Island)
Representative Albert Wynn (D-Maryland)

Governors (organization representing all Governors, 13 individual Governors)
National Governors' Association Policy Statements February 2000, February 1999
Governor John Rowland (R-Connecticut)
Governor Frank O'Bannon (D-Indiana)
Governor Parris Glendening (D-Maryland)
Governor Thomas Vilsack (D-Iowa)
Governor John Engler (R-Michigan)
Governor Edward Schafer (R-North Dakota)
Governor Kenny Guinn (R-Nevada)
Governor Christine Todd Whitman (R-New Jersey)
Governor John Kitzhaber (D-Oregon)
Governor Lincoln Almond (R-Rhode Island)
Governor Jim Hodges (D-South Carolina)
Governor Michael Leavitt (R-Utah)
Governor Tommy Thompson (R-Wisconsin)

Compact Commissions (7 compacts representing 34 states)
Central Compact Commission (Arkansas, Kansas, Louisiana, Nebraska, Oklahoma)
Midwest Compact Commission (Indiana, Iowa, Minnesota, Missouri, Ohio, Wisconsin)
Northeast Compact Commission (Connecticut, New Jersey)
Northwest Compact Committee (Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, Wyoming)
Rocky Mountain Board (Colorado, Nevada, New Mexico)
Southeast Compact Commission (Alabama, Florida, Georgia, Mississippi, Tennessee, Virginia)
Southwestern Compact Commission (Arizona, California, South Dakota, North Dakota)

Other State Officials (11, some from compact member states)
Alabama Department of Economic and Community Affairs
California Low-Level Radioactive Waste Program
Georgia Commissioner to the Southeast Compact Commission
Massachusetts Low-Level Radioactive Waste Management Board
Mississippi State Department of Health, Division of Radiological Health
New Jersey Department of Environmental Protection
Rhode Island Atomic Energy Commission
South Carolina Department of Health and Environmental Control
Tennessee Commissioner to the Southeast Compact Commission
Utah Department of Environmental Quality
Virginia State Senator; Virginia Department of Environmental Quality

Federal Agencies
Department of Defense Executive Agency for Low-Level Radioactive Waste Disposal
Department of the Interior, U.S. Geological Survey
U.S. Environmental Protection Agency Radiation Protection Division
National Research Council (The National Academies) Board on Radioactive Waste Management
former chair of NRC's Advisory Committee on Nuclear Waste

Others
California Radioactive Materials Management Forum
Appalachian Compact Users of Radioactive Isotopes (Maryland, Pennsylvania, West Virginia, Delaware)

Texas Compact/Texas

Maine Passes Legislation Giving State Control re Decommissioning

On April 14, the Maine legislature passed two bills that would give the state added control over decommissioning of the Maine Yankee Nuclear Power Plant. One bill provides the state with added authority to inspect and monitor decommissioning activities at the plant. The other establishes a standard—the strictest in the country—for how much radiation can be left on site.

Prior to passage of the legislation, Maine Yankee, the Town of Wiscasset, and three antinuclear activist groups signed a binding agreement that

- endorses both bills,
- stipulates that the Maine Yankee plant will not be considered a low-level radioactive waste disposal site under Maine law, and
- stipulates that none of the signers will seek, or endorse, a citizens' veto of either of the bills.

The legislation and agreement are the product of negotiations that followed Maine Yankee's announcement of a plan to implement rubblization as a decommissioning alternative—a plan that the state's Attorney General found may qualify the site as a low-level radioactive waste disposal facility under state law. (See *LLW Notes,* January/February 2000, pp. 9–10.) Under the legislation and agreement, only concrete that could otherwise be disposed of in ordinary landfills will be left on site.

The legislation specifies that existing foundations will be remediated to a 10-millirem (mrem) residual dose standard, as will the soil, with a 4-mrem standard being applied for ground water. This is currently the most stringent standard in the country; the U.S. Nuclear Regulatory Commission applies a 25-mrem standard, and the U.S. Environmental Protection Agency uses a 15-mrem standard.

—TDL

South Carolina

GTS Duratek to Purchase Chem-Nuclear Systems, Other Services

On March 29, GTS Duratek, Inc. announced that it has entered into a "definitive agreement" to acquire the nuclear services business of Waste Management, Inc.—Chem-Nuclear Systems' parent company. The acquired business includes Chem-Nuclear Systems' operations at the commercial low-level radioactive waste disposal facility at Barnwell, South Carolina.

Other business components covered by the agreement consist primarily of Waste Management's

- Federal Services Division, which provides radioactive waste handling, transportation, treatment, packaging, storage, disposal, site cleanup, and project management services mainly for the U.S. Department of Energy and other federal agencies; and
- Commercial Services Division, which provides radioactive waste handling, transportation, licensing, packing, disposal, and decontamination and decommissioning services primarily to nuclear utilities.

Under the agreement, GTS Duratek will pay up to $65 million in cash, consisting of $55 million in cash at closing and up to $10 million additional cash consideration upon the satisfaction of certain post-closing conditions. The proposed acquisition is subject to certain regulatory approvals and other customary conditions. Closing of the transaction is targeted for May 2000.

According to a prepared statement from GTS Duratek, Waste Management Nuclear Services is expected to add approximately $100 million in revenues, thereby increasing GTS Duratek's revenue run rate by approximately 55 percent.

Waste Management, Inc. announced its intention to sell the nuclear services business last summer. (See LLW Notes, August/September 1999.) The sale is part of a strategic plan that involves divesting the company of assets that are not part of its North American solid-waste business.

—CN

South Carolina (continued)

South Carolina Senate Passes Atlantic Compact Legislation; Bill Advances through House

On March 29, the South Carolina Senate passed S 1129, the Atlantic Interstate Low-Level Radioactive Waste Compact Implementation Act. (See *LLW Notes*, January/February 2000, pp. 1, 4–7.) The legislation would establish the state as a member of the Northeast Interstate Low-Level Radioactive Waste Compact, which currently comprises Connecticut and New Jersey. Upon South Carolina's membership, the compact would become known as the Atlantic Compact.

After Senate passage, the bill was read across the House desk on March 30 and referred to the House Committee on Agriculture, Natural Resources and Environmental Affairs. On April 11, a subcommittee approved the legislation with three amendments but did not substantially change the bill. On April 19, the the full committee voted to favorably report the bill with an amendment pertaining to the adoption of a rate schedule for regional generators. South Carolina officials indicate that the bill could be scheduled for a vote by the full House as early as the first week of May.

South Carolina Budget and Control Board Membership

Jim Hodges (Chair)	Governor
Grady Patterson, Jr.	State Treasurer
James Lander	Comptroller General
John Drummond	Chair, Senate Finance Committee
Robert Harrell, Jr.	Chair, House Ways and Means Committee

Schedule Set for Phasing Out Access

The legislation as approved by the Senate and now under consideration in the House differs substantially from the bill as first introduced. Significant revisions include the addition of a provision prohibiting acceptance of non-Atlantic Compact waste after 2008. Until then, total volumes of waste accepted at the facility would be reduced each year, beginning in 2001, in accordance with the following schedule.

year	***maximum allowable volume (cubic feet) of waste from all sources***
2001	160,000
2002	80,000
2003	70,000
2004	60,000
2005	50,000
2006	45,000
2007	40,000
2008	35,000

During the transition period, shipments from non–Atlantic Compact generators would be approved on a case-by-case basis by the South Carolina Budget and Control Board, as authorized by the compact commission.

To obtain a copy of S 1129, visit the South Carolina legislature's web site at

http://www.leginfo.state.sc.us

—CN

Northeast Compact/Connecticut/New Jersey

NE Compact Announces Proposed Rule re Eligibility

In a *Federal Register* notice (65 FR 13700) published on March 14, the Northeast Interstate Low-Level Radioactive Waste Commission solicited public comment on a proposed rulemaking to "establish the conditions under which a state not a party to the [compact] may be declared eligible to become a party state." Comments on the rule were due by mid-April, with public hearings held on April 17 and 18.

Before a state may become a party to the compact, the commission must first declare the state to be eligible for membership. The proposed rule specifies the commission's procedures for receiving petitions for party state eligibility and describes the essential conditions for declaring such eligibility.

In order to be declared eligible under the proposed rule, a petitioning state must

- "agree that it will be the voluntary host state for a[t] least that period of time until all currently licensed nuclear power stations within the [compact] region have been fully decommissioned and their licenses (including any licenses for storage of spent nuclear fuel under 10 CFR part 72) have been terminated";
- "agree that, so long as [it] remains in the compact, it will be the sole host state";
- "warrant the availability of a regional disposal facility that will accommodate 800,000 cubic feet of waste from generators located within the borders of the existing party states";
- "agree to establish a uniform fee schedule for waste disposal at the regional disposal facility that shall apply to all generators within the region"—with fees that "shall not exceed the average fees that generators within the existing party states paid for disposal at the Barnwell, South Carolina, facility at the end of calendar year 1999, adjusted annually based on an acceptable inflation index";
- "agree with the existing states that regional generators shall be permitted to process or dispose of waste at sites outside the Compact boundaries based solely on the judgment and discretion of each regional generator";
- "agree to indemnify the Commission or the existing party states for any damages incurred solely because of the new state's membership in the Compact and for any damages associated with any injury to persons or property during the institutional control period as a result of the radioactive waste and waste management operations of any regional facility"; and
- "agree that any incentive payments made by the existing party states as an inducement for a state to join the Compact will be returned … with interest, on a pro rata basis if, for any reason, the regional disposal facility ceases to be available to generators in the existing party states for a period of more than six months (other than periods that have been expressly approved and authorized by the Commission) or is unavailable for disposal of 800,000 cubic feet of waste from generators within the borders of the existing states"; and
- "agree with the existing states that once a new party state has been admitted to membership in the Compact pursuant to these rules, declaration of any other state as an eligible party state will require the unanimous consent of all members of the Commission."

The commission is currently reviewing the comments received. It will announce a decision regarding the rulemaking at the upcoming commission meeting scheduled for May 3.

A copy of the proposed rulemaking may be accessed on the Internet at

http://www.access.gpo.gov/su_docs/fedreg/a000314c.html

—CN

For further information, contact Kevin McCarthy of the Northeast Commission at (860)633-2060.

Northeast Compact/Connecticut/New Jersey (continued)

CT DEP Seeks Briefing for NRC re Assured Isolation

In late February, Arthur Rocque, Commissioner of the Connecticut Department of Environmental Protection (DEP), sent a letter to U.S. Nuclear Regulatory Commission Chair Richard Meserve regarding the assured isolation concept for management of low-level radioactive waste. The letter stated that, although NRC Commissioners have been briefed on assured isolation in the past, "substantial new information on the assured isolation concept has been developed." Accordingly Rocque requested an opportunity in the next few months for Edward Wilds, Director of DEP's Division of Radiation, to brief NRC Commissioners on the concept and the new studies and reports that have come out since the Commissioners were last briefed. According to the letter, Tom Kerr of the National Low-Level Radioactive Waste Program and Ronald Gingerich of the Connecticut Hazardous Waste Management Service would likely participate in the briefing. As of press time, Meserve had not responded to the letter.

Rocque described assured isolation as a technique that "relies on engineered barriers and long-term inspection and preventative maintenance to isolate low-level radioactive waste rather than on the natural characteristics of the site as is the case for traditional disposal." He noted that the concept has been discussed at many workshops of the Conference of Radiation Control Program Directors (CRCPD) and that there has been discussion of creating a CRCPD subcommittee to develop regulations for such a facility.

Rocque's letter included a suggested outline for the briefing and discussion topics, including

- a general overview,
- a review of assured isolation studies and reports, and
- a review of assured isolation legal studies prepared by Texas and Connecticut.

—TDL

Mobley Named Alternate Forum Participant by the SE Compact

In March 2000, Michael Mobley, Commissioner for Tennessee to the Southeast Compact Commission for Low-Level Radioactive Waste Management, was named an Alternate Forum Participant for the commission.

As a Commissioner from Tennessee, Mobley represents the interests of the state in deliberations of the commission. Mobley has represented Tennessee on the commission since 1984, with service on a number of committees including the Technical Advisory Committee and the Planning Committee.

His Tennessee government experience spans more than 30 years and includes serving as Director of the Tennessee Division of Radiological Health prior to his retirement in 1999, and working in every aspect of the Division's Radiation Control Program. He is currently a private consultant who specializes in regulatory radiation issues.

Mobley received an undergraduate degree in physics and mathematics from Austin Peay State University, a master of science degree in physics from the University of Tennessee, and a master of public administration degree from Tennessee State University.

He has served on the U.S. Department of Energy's Advisory Committee on External Regulation of DOE Nuclear Safety, and he has been involved in several national efforts concerning high-level radioactive waste with DOE and the U.S. Nuclear Regulatory Commission. Mobley currently serves on the Food and Drug Administration's National Mammography Quality Assurance Advisory Committee. He is also an active member of the Health Physics Society.

—MAS

Texas Compact/Texas (continued)

Texas Board Discusses Waste Management Options

Legislature Holding Related Hearings

On April 15, the Texas Radiation Advisory Board (TRAB) accepted a memorandum containing recommendations from its Waste and Industrial Committee concerning low-level radioactive waste management. The recommendations are intended for the Texas Department of Health's Bureau of Radiation Control.

The memorandum conveyed the following points:

- that Texas needs a solution to the question of low-level radioactive waste disposal;
- that Texas should take title to low-level radioactive waste from generators and hold the license to a low-level radioactive waste disposal facility;
- that a low-level radioactive waste facility should be operated by a private company with necessary financial assurances provided for any future liabilities;
- that assured isolation should be pursued as an option for Texas, Maine, and Vermont waste;
- that only one storage or disposal site should be operated; and
- that consideration should be given to site areas where the local public is supportive and informed.

In addition, the memorandum recommended evaluation of a 160-year life for a long-term storage and processing facility.

No change was recommended to the current Texas Bureau of Radiation Control policy granting storage licensing for a seven-year term.

Background

The Waste and Industrial Committee's recommendations to the TRAB resulted from a series of discussions concerning

- the proper time frame for low-level radioactive waste storage,
- the viability of assured isolation in Texas, and
- whether certain waste management solutions would satisfy the state's obligations under the Texas Low-Level Radioactive Waste Disposal Compact.

These concepts were discussed at a public meeting on March 10 as well as at meetings of the committee and the board on April 15.

Legislative Hearings The Texas House of Representatives' Committee on Environmental Regulation has announced plans to hold hearings on May 3 regarding various waste management options. Assured isolation is expected to be one of the options addressed at the hearings.

The Texas Senate's Committee on Natural Resources has continued to hold hearings and take public testimony on low-level radioactive waste issues.

—TDL

NCSL Working Group Recommends LLRW Policy Changes

Committee to Consider Policy Amendments in May

At a meeting on March 31, the Low-Level Radioactive Waste Working Group of the National Conference of State Legislatures (NCSL) recommended revisions to the organization's policy on radioactive waste management. The proposed amendments will be forwarded to NCSL's Environment Committee, which shares jurisdiction over the policy with the Energy and Transportation Committee.

The working group meeting was held in Denver, Colorado, in conjunction with NCSL's Assembly on State Issues. State Senator Bob Peck of Wyoming chaired the meeting. Guest speakers included Hank Stallworth of the South Carolina Governor's Office; Kelly Johnson, a professional staff member with the United States Senate's Committee on Energy and Natural Resources; and Jay Rhoderick, Acting Director of the Office of Planning and Analysis in the U.S. Department of Energy.

Stallworth reported on pending legislation in South Carolina that would establish the state as a compact member and limit access to the low-level radioactive waste disposal facility at Barnwell, South Carolina. (See related story, this issue.) Johnson discussed Congress' perspective on low-level radioactive waste management, including assured isolation. Rhoderick, who addressed the group via telephone, gave an update on DOE's National Low-Level Waste Program. Reports were also provided by state legislators Rep. Warren Chisum of Texas and Rep. Joseph Murray of Utah, who spoke regarding activities in their respective states, as well as by NCSL staff member Jeff Dale, who discussed California's Advisory Group on Low-Level Radioactive Waste Disposal.

Suggested Revisions

Among other policy amendments, the working group has proposed the addition of a statement that "NCSL believes that the LLRWPA ... no longer addresses adequately the conditions of the market place and state efforts to provide disposal for low-level waste."

Suggested new language also would urge Congress to "review the Low-Level Radioactive Waste Policy Act and the Low-Level [Radioactive] Waste Policy Amendments Act of 1985—especially Title II, the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act—to determine whether other options for disposal by regional compact or unaffiliated state are available." One option that Congress would be asked to evaluate is "co-location of commercial disposal (or assured isolation) facilities at U.S. Department of Energy sites that would be licensed and regulated by the host states."

The proposed language also calls on Congress to "[c]ontinue to provide states both with support and flexibility in their efforts to provide generators with consistent access to low-level radioactive waste disposal and other options such as assured isolation." (See box for the complete low-level radioactive waste policy with the working group's suggested revisions.)

Next Steps

The Environment Committee is scheduled to meet in Washington, D.C. on May 5, 2000, in conjunction with NCSL's Assembly on Federal Issues. If the committee adopts an amended policy on radioactive waste management, the policy will be taken up by NCSL's Energy and Transportation Committee at NCSL's annual meeting in Chicago, Illinois, in July 2000.

If the Energy and Transportation Committee adopts the amended policy, it will be added to the consent calendar for adoption by the full organization during the business session of the annual meeting.

—CN

Attendance

State Legislators and Legislative Staff

Alabama	Rep. Walter Penry
Texas	Rep. Warren Chisum
Utah	Rep. Judy Ann Buffmire Rep. Joseph Murray Mark Bleazard
Wyoming	Sen. Bob Peck

Other State Officials

South Carolina Governor's Office	Hank Stallworth

State Organizational Representatives

NCSL	Cheryl Runyon Jeff Dale

U.S. Congress

U.S. Senate Energy and Natural Resources Committee staff	Kelly Johnson

Federal Agencies

DOE	Jay Rhoderick (via telephone)
Idaho National Environmental and Engineering Laboratory (INEEL)/Bechtel BWXT	Tom Kerr Ken Henry

Other Interested Parties

Envirocare	Charles Judd Nancy Sechrest
Nuclear Energy Institute	Jim Hagan Julie Jordan Offner

1999 Disposal Data Available on MIMS

Data are now available on the Manifest Information Management System (MIMS) for low-level radioactive waste disposed of in 1999 at the Barnwell, Richland, and Envirocare of Utah facilities. For the 1999 data, Envirocare has, for the first time, joined the Barnwell and Richland facility operators in providing information that indicates generator type and "sees through"" brokers and processors to the original generators.

Availability of the more detailed Envirocare data accords with a resolution adopted by the LLW Forum in February 1999. The resolution requested that Envirocare provide data including "identification of the original generator of all shipments of commercial LLRW to that facility if the origin of the waste is easily attributable." The resolution also asked that the information be posted on MIMS "in a way that the state of origin and type of the original generator can be readily identified."

MIMS is maintained by the U.S. Department of Energy's National Low-Level Waste Management Program at Idaho National Engineering and Environmental Laboratory (INEEL). The system can be accessed through the LLW Forum's web site under "Federal Government Links" at

http://www.afton.com/llwforum

—CN

For further information, contact Ron Fuchs of INEEL at (208)526-9717.

For information in chart form on volumes and activity of commercial waste disposed of at all facilities between 1986 and 1999, see the supplement to this publication.

NCSL Working Group's Proposed Amendments

Radioactive Waste Management

Note from NCSL: This is the LLW component of the radioactive waste management policy. Other components of the policy such as High Level Waste, Transportation of Radioactive Waste and Spent Fuel, Monitored Retrievable Storage, and the Waste Isolation Pilot Plant are not included here. The entire policy is available on the Internet at

http://www.ncsl.org/statefed/environ.htm#radioactive

Low-Level Waste

[**bold**=proposed addition, ~~strike through~~=proposed deletion]

Congress mandated that the states assume total responsibility for providing commercial low-level waste disposal capacity with the passage and enactment of the Low-Level Radioactive Waste Policy Act 1980 and the Low-Level Waste Policy Amendments Act of 1985. These laws encouraged states to develop regional solutions to siting low-level radioactive waste disposal facilities. NCSL believes that states are best prepared to ~~administer the disposal~~ **license and regulate** low-level waste **disposal facilities that operate within their borders** in order to protect the health, safety and welfare of their citizens. ~~States have encountered numerous barriers to developing disposal facilities. 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 Act Amendments Act.~~
~~NCSL urges Congress to:~~

Since passage of the Low-Level Radioactive Waste Policy Act of 1980 and the Amendments Act of 1985, many changes have occurred in the low-level waste public policy arena—changes in the industries and institutions that create low-level waste, and changes in state efforts to pursue development of low-level radioactive waste disposal facilities.

State legislators have examined closely the market forces and new trends that have altered many state and compact perceptions of what is needed to efficiently manage LLRW disposal. Legislators have identified the following reasons that many states and compacts have abandoned efforts to build disposal capacity:

- **decreasing volumes of LLRW nationwide;**
- **continued access to operational disposal facilities; and**
- **the numerous barriers that hinder development of disposal facilities, including high development costs greater than projected.**

South Carolina and Washington continue to host disposal facilities that together offer disposal to generators in every state except North Carolina. Utah has licensed a private sector facility that also is open to generators across the country for Class A low-level radioactive waste. A few states and compacts continue to pursue development of low-level waste disposal capacity, while several others have slowed or stopped their work.

NCSL believes that the LLRWPA, the federal law which governs low-level radioactive waste management, no longer addresses adequately the conditions of the marketplace and state efforts to provide disposal for low-level waste.

NCSL urges Congress to review the Low-Level Radioactive Waste Policy Act and the Low-Level Waste Policy Amendments Act of 1985—especially Title II, the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act—to determine whether other options for disposal by regional compact or unaffiliated state are available. In doing so, Congress should:

- **Rely upon the U.S. General Accounting Office report, Low-Level Radioactive Wastes: States Are Not Developing Disposal Facilities (GAO/RCED-99-238, September 1999) in order to**

  - **Analyze developments in the industries and institutions that generate low-level waste, such as waste minimization and volume reduction; and**

  - **Examine state and compact efforts to develop disposal sites and the difficulties encountered by the host states.**

- **Continue to provide states both with support and flexibility in their efforts to provide generators with consistent access to low-level radioactive waste disposal and other options such as assured isolation.**

- **Acknowledge that some compacts have been successful in achieving the goals of the LLRWPA. These compacts should be allowed to continue to function as they are without interruption.**

- **Recognize that other states and compacts are concerned that future access to disposal facilities is uncertain and that these states and compacts may need alternative facilities in order to provide disposal (and assured isolation) to their generators.**

- **Acknowledge the role that licensed private disposal (and assured isolation) facilities can play in meeting generators' needs for safe, cost-effective disposal of low-level radioactive waste, while also recognizing state authority to regulate these facilities.**

- **Consider an evaluation of the feasibility of co-location of commercial disposal (or assured isolation) facilities at U.S. Department of Energy sites that would be licensed and regulated by the host states.**

- Establish an insurance fund for facility decommissioning and extended care and maintenance until an adequate fund is established through the ongoing operation of each facility.

- Clarify liability issues surrounding the entire waste cycle and, in particular, the transportation of low-level waste, the shared liability of the compact (but non-host state) members, the liability of unaffiliated host states forced to accept out of state waste, and the continuing or residual liability of waste generators.

- Amend the Section 142(h) of the Internal Revenue Code to permit tax-exempt financing of low-level radioactive waste disposal facilities through the issuance of private activity bonds.

- Clarify in statute the responsibility of the federal government for federal waste, identify any federal waste that might be disposed at compact facilities, and ensure that any federal waste disposed of at compact or unaffiliated state facilities is subject to negotiation and the same laws, regulations, fees and requirements as nonfederal waste.

- Closely monitor the progress of the involved federal agencies with regard to the issue of mixed wastes, ensuring that a clear policy is defined and interagency differences are resolved.

- Address the issue of the disposal of NORM and NARM (naturally occurring and accelerator produced radioactive material) waste and mixed waste, in particular with regard to reconciling the different regulatory actions of the Nuclear Regulatory Commission (NRC) and the U.S. Environmental Protection Agency (EPA).

- Clarify that Congressional ratification of compact agreements also mandates federal enforcement of those agreements.

NCSL will continue to provide assistance to the states during the development and implementation of low-level waste management activities. NCSL encourages the federal government to work with NCSL toward that end.

December 1999
Proposed March 2000

Northwest Compact/Washington

Utah Legislature Presses for Expedited Review of Rad Waste Applications

Envirocare Lobbied for Measure

The Utah legislature has passed appropriations legislation that includes language aimed at speeding review of license applications submitted by Envirocare of Utah. The language also calls for regular reporting to the legislature regarding the progress of such review.

The language, which is attached to the budget for the Utah Department of Environmental Quality, reads as follows:

> It is the intent of the legislature that the Department of Environmental Quality expeditiously process radioactive waste permit applications once the application is deemed complete and all necessary information is received by the Department.
>
> It is the intent of the legislature that the Department of Environmental Quality report to the President of the Senate and the Speaker of the House of Representatives, or their designees, and the Legislative Management Committee of the progress made in review of radioactive waste disposal license applications.

Envirocare of Utah lobbied heavily for the language. Similar language was struck from the Senate appropriations bill earlier in the session but was reinstated with some modifications.

The Governor signed the legislation into law on March 17, and the language pertaining to legislative intent became effective on that date. The actual appropriations apply to Fiscal Year 2000–01, which begins July 1.

Envirocare's Applications

Envirocare of Utah currently has pending siting and license applications for authorization to dispose of class B and C low-level radioactive waste, as well as a permit modification request to allow disposal of mixed waste with the same radioactive content. (See *LLW Notes*, November/December 1999, p. 18.)

On March 2, the Utah Department of Environmental Quality (DEQ) issued an interrogatory seeking additional information regarding 30 of the 46 criteria that must be met before the siting application can be deemed complete. Envirocare responded on March 8, and DEQ determined the application to be complete on March 15.

On March 16, William Sinclair, the Executive Secretary of the Utah Radiation Control Board, made a preliminary decision to approve the siting application, and a draft Siting Evaluation Report supporting the preliminary decision was published for public comment. During the ensuing 30-day comment period, which ended April 17, DEQ held two public hearings on the application. A final decision regarding adequacy of siting will occur after DEQ responds to the comments. DEQ must also evaluate and rule on the other two pending applications.

If Envirocare is licensed by DEQ to accept class B and C low-level radioactive and mixed wastes, the company must still obtain state legislative and gubernatorial approval. Because the legislature meets for only 45 days beginning in late January of each year, it would be most advantageous for the company if the license review could be completed by early 2001.

DEQ's Response to "Intent" Language

Sinclair, who also serves as Director of DEQ's Division of Radiation Control, indicated that, as a standard business practice, DEQ strives to issue licenses and permits in a timely manner while protecting human health and the environment.

Sinclair also indicated that DEQ officials will make themselves available to provide briefings at the monthly meetings of the Legislative Management Committee during the interim period while the legislature is out of session. The committee consists of the majority and minority leaders of both the House and the Senate, as well as the Co-Chairs of the Executive Appropriations Committee.

DEQ officials are responding to requests from other legislative committees as well. On April 19, Sinclair provided a 1.5-hour briefing to the Agriculture, Natural Resources, and Environment Committee. Other briefings are being scheduled.

Other Reaction

Press accounts have criticized the legislature's inclusion of the intent language in DEQ's appropriation. A March 1 editorial by the Salt Lake Tribune asserted of the language, "Not only does it apply subtle pressure, but it also makes it appear that lawmakers have prejudged the [Envirocare] application favorably." The Senate author of the language, however, was quoted elsewhere saying that the language is not intended to pressure regulators into approving the application and that it does not change the process.

—CN

Southwestern Compact/California

Southwestern Compact Writes to CA Governor

Export Authority an Issue

The Southwestern Low-Level Radioactive Waste Commission has written to the Governor of California emphasizing the need for cooperation with the other member states. By letter dated March 10, Dana Mount, Chair of the commission, invited Governor Gray Davis to send a representative to the commission's April 7 meeting in Sacramento to "explain … what California is planning to do to fulfill its obligations to all states which are party to the Southwestern Low-Level Radioactive Waste Disposal Compact."

In his correspondence, Mount said that the commission had attended meetings of California's Advisory Group on Low-Level Radioactive Waste Disposal and its scientific panel, and had been "disappointed not to hear acknowledgment of California's role in relationship to Arizona, North Dakota, and South Dakota as Compact host state." (See *LLW Notes*, November/December 1999, pp. 12–16.)

Mount emphasized that California "needs help from the other party states"—particularly on the issue of waste exportation. In this regard, he noted that

> exportation from the Compact for disposal in Utah or South Carolina requires a 2/3 vote of the Commission, or 5 of the 7 Commissioners. Since California has but 4 members, agreement is needed from another party state to avoid California generators from being disallowed to export waste for disposal.

As of press time, the commission has not received a response. No representative of the Governor's office attended the commission meeting.

—CN

For further information, contact Don Womeldorf of the Southwestern Commission at (916)448-2390.

Southwestern Compact/California (continued)

US Ecology Seeks Damages from California re Ward Valley

On February 25, a law firm representing US Ecology sent a letter to the Government Claims Division of the California State Board of Control seeking damages stemming from the company's efforts to site a low-level radioactive waste disposal facility in Ward Valley, California. On March 20, the board forwarded a response indicating that it has no jurisdiction over the claim.

US Ecology's Letter

The letter states as follows:

> In light of the State's apparent decision to abandon its continuing obligation to use its best efforts to obtain the Ward Valley property, US Ecology hereby asserts this claim seeking recovery from the State of all monies spent and debt incurred by US Ecology to site, license and maintain the proposed LLRW disposal facility. US Ecology further seeks recovery of lost earnings during the thirty-year period of facility operation specified by the Southwestern Compact as adopted into California law.

The letter does not specify a dollar amount for the alleged damages to be recovered. It does, however, indicate that the alleged damages include "attorneys' fees and costs in defending numerous lawsuits that have been filed with respect to the facility, in an amount still to be determined."

The Control Board's Response

The Control Board's response states that it has no jurisdiction to consider the claim because it "was filed more than one year from the date of the incident that is the basis of the claim, and it is too late for the Board to consider an application to present a late claim."

The letter specifically states that the Control Board will take no further action on the claim.

Background Information

The filing of the administrative claim follows a February 7 letter from US Ecology to the California Department of Health Services (DHS) requesting that the state

- object to the U.S. Interior Department's intended site reclamation order (see box, p. 19),
- accept responsibility for reclamation expenses,
- file a new purchase request for the Ward Valley site with the Bureau of Land Management,
- disclose its plans for the Ward Valley project, and
- indicate a willingness to participate in mediation of the land transfer appeal.

To date, neither DHS nor the state has responded to US Ecology's letter.

—TDL

National Whistleblowers Center v. U.S. Nuclear Regulatory Commission

Appellate Court Upholds Denial of Intervention in Relicensing Case

On April 11, the U.S. Court of Appeals for the District of Columbia Circuit denied the National Whistleblower Center's petition for review of its lawsuit against the U.S. Nuclear Regulatory Commission. The suit involves a challenge to NRC's denial of the Center's petition to intervene in license renewal proceedings for the Calvert Cliffs Nuclear Power Plant. (See related story, this issue.)

Background NRC adopted a streamlined schedule in license renewal proceedings which, among other things, requires any third party that seeks to intervene in such proceedings to file a motion to do so, followed by a timely submission of contentions. The National Whistleblower Center filed a petition to intervene in the Calvert Cliffs relicensing proceeding in August 1998 but failed to make a timely filing of supporting contentions. The Center twice requested an extension of time. NRC granted the initial request, but denied the subsequent request on the basis of an "unavoidable and extreme circumstances" standard. (See *LLW Notes*, December 1998, p. 30,)

The center then filed suit, arguing that NRC's streamlined approval system did not give opponents adequate time to develop a case against relicensing and that NRC should have applied a "good cause" test in considering the petition for an extension of time. The appellate court ruled in favor of the center in November 1999. In an unusual move, however, the court threw out that ruling 11 days later and ordered a new hearing. Arguments were heard in March 2000.

Appellate Court's Holding The appellate court made the following findings in its decision upholding NRC's rejection of the National Whistleblower Center's intervention petition:

- that NRC was free to adopt, without resort to notice-and-comment rulemaking, the "unavoidable and extreme circumstances" standard since affected parties were given proper notice, and it was not arbitrary, capricious, or otherwise in violation of law; and

- that the center can show no cognizable injury because NRC reversed its Licensing Board's initial decision to reject the center's petition for a filing extension and did indeed grant additional time—after which the Center failed to meet the extended deadline.

—TDL

Interior Denies US Ecology's Request for Permit Renewal

On January 28, the U.S. Department of Interior denied US Ecology's request for a renewal of its right-of-way/temporary use permit to conduct data collection and on-site monitoring activities at Ward Valley, California, for the proposed low-level radioactive waste disposal facility. The order of denial—which was signed by Sylvia Baca, Assistant Secretary Designate for Land and Minerals Management—gives a detailed history of prior permit requests and the department's November 2, 1999 denial of the California Department of Health Services' land transfer request. (See *LLW Notes*, November/December 1999, p. 13.)

The order requires that US Ecology, within a reasonable time, remove all structures and improvements related to past permits and restore the site to a satisfactory condition. The order indicates that Interior will notify US Ecology separately of the deadline for the reclamation.

The decision specifically states that it is "without prejudice to US Ecology's ability to apply for and hold a right-of-way grant in the future should the need for activities on site be warranted."

—TDL

Entergy Arkansas v. State of Nebraska **(continued from page 1)**

Did the District Court Have Jurisdiction? *Application of Sovereign Immunity*

The District Court's Ruling The doctrine of sovereign immunity precludes a litigant from asserting an otherwise meritorious cause of action against a state and its officials unless the state consents to suit. The district court held that Nebraska waived its sovereign immunity under Articles IV.m.8 and IV.e of the Central Compact as to actions brought by the Commission to enforce obligations arising under the compact.

Article IV.m.8 provides:

> The Commission shall … require all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum designated in section e. of Article IV …

Article IV.e specifies a mechanism by which the commission may enforce the obligations of the parties:

> The Commission may initiate any proceedings or appear as an intervenor or party in interest before any court of law, or any Federal, state or local agency, board or Commission that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact.

Since the commission is seeking to enforce compact obligations—specifically, Nebraska's obligation of "good faith"—the district court concluded that sovereign immunity did not apply.

Nebraska's Argument Nebraska relies on Articles V.g and VII.e to support its contention that the exclusive enforcement remedy for the commission under the compact is to revoke a state's membership or suspend its privileges.

Article V.g provides:

> The Commission may, by two-thirds affirmative vote … revoke the membership of any party state which … shall be found to have arbitrarily or capriciously denied or delayed the issuance of a license or permit to any person authorized by the Commission to apply for such license or permit …

Article VII.e provides:

> Any party state which fails to comply with the terms of this compact or fulfill its obligations hereunder, may, after notice and hearing, have its privileges suspended or its membership in the compact revoked by the Commission.

The Appellate Court's Holding In addressing whether the compact language constitutes a "clear declaration" of consent to suit in federal court, the appellate court held as follows:

> The nature of the Compact supports the Commission's argument [that the state waived its sovereign immunity], for the Compact is a Congressionally sanctioned agreement which authorizes, and indeed requires, the Commission to enforce the obligations it imposes upon party states. Nothing in this Compact states that revocation or suspension of a state's membership is the exclusive enforcement mechanism. The language in Article IV.e supports the Commission's argument that by entering into the Compact, Nebraska consented to action by the Commission to enforce the Compact in federal court … We conclude that by entering into the Compact, Nebraska waived its immunity from suit in federal court by the Commission to enforce its contractual obligations.

Did the District Court Have Jurisdiction? *Application of Prior Case Law*

Ex Parte Young The Central Commission argues that there is an alternative basis for jurisdiction under the *Ex Parte Young* doctrine. Under *Young*, "a party may sue a state officer for prospective relief in order to stop an ongoing violation of a federal right." This doctrine allows for injunctive relief. Nebraska, however, argues that jurisdiction under this doctrine does not apply because

- the rights advanced by the commission arise under Nebraska law, and state claims may not be enforced against state officials in federal court, and
- injunctive relief under *Ex Parte Young* may not be premised upon a finding of past misconduct.

The Appellate Court's Holding The appellate court agreed with Nebraska's assertion that violations of state law cannot be enjoined by a federal court under *Ex Parte Young* but found that the commission is not attempting to enjoin a state law violation. Instead, the court held that "the rights that the commission seeks to enforce are federal rights which arise under the Compact."

In regard to Nebraska's other argument, the court held as follows:

> Nebraska's argument that injunctive relief under *Ex Parte Young* cannot be premised on proof of past misconduct by the state is similarly without merit: such relief "is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." While the relief granted under *Ex Parte Young* may only be prospective, proof for the claim necessitating relief can be based on historical facts, and most often will be.
> (emphasis original, citations omitted)

Was a Sufficient Showing Made for Issuance of a Preliminary Injunction?

In its appellate brief, Nebraska argues that a sufficient showing was not made to support issuance of a preliminary injunction because the Central Commission has shown neither that it is likely to succeed on the merits of its claim nor that it would suffer irreparable harm if an injunction were not issued. The commission disagrees, asserting that it has shown a likelihood of success on the merits and that it will suffer irreparable harm in that it will not be able to recoup the costs of the administrative proceeding.

Likelihood of Success on the Merits The appellate court held that "there is sufficient evidence in the record to support the district court's factual findings and its conclusion that the Commission has shown a likelihood of success on the merits." According to the court, this includes evidence of

- interference in the licensing process by Nebraska's executive branch,
- state-fostered delay and expenditures, and
- the denial of the second license application on "an apparent pretext."

Existence of Irreparable Harm Nebraska argues that litigation costs, even if unrecoverable, can not constitute irreparable injury and that any injury arising from issue or claim preclusion is speculative. The commission complains that it is being charged under state regulations for all litigation costs associated with the administrative proceeding, in stark contrast to the general American rule that each litigant pays its own costs.

In reviewing the arguments, the appellate court noted that "[a]lthough federal courts are generally reluctant to interfere with ongoing state administrative proceedings … the deference owed such proceedings does not apply if they are used to harass or discourage the exercise of a federal right." Such abuse, according to the court, justifies federal intervention.

In holding that the Central Commission was likely to suffer irreparable harm if an injunction were not issued, the appellate court found as follows:

> The party states, the Commission, and US Ecology had the right under the Compact to fair and impartial consideration of US Ecology's license applications. The Commission has submitted substantial evidence which tends to show that Nebraska did not provide, or intend to provide, impartial consideration of those applications. Nebraska has instead used its administrative process wrongfully to delay and deny the license, at considerable expense to US Ecology, the Commission, and the Utilities. Under these circumstances, the deference generally due a state's administrative proceeding does not apply. The Commission has made a sufficient showing of Nebraska's abuse of the administrative process to demonstrate irreparable harm.
>
> The importance of preliminary injunctive relief is heightened in this case by the likely unavailability of money damages should the Commission prevail on the merits of its claims. Relief in the form of money damages could well be barred by Nebraska's sovereign immunity.
> (citations omitted)

Accordingly, the appellate court held that a sufficient showing was made to justify issuance of a preliminary injunction.

continued on page 22

Entergy Arkansas v. State of Nebraska (continued)

Did the District Court's Order Violate the Anti-Injunction Act?

The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments."

Nebraska argues that the district court order violated the act in that the preliminary injunction operates against the Nebraska state courts by preventing the administrative process—which calls for appeal to state courts—from going forward.

The commission asserts, however, that the act by its own terms applies only to state court proceedings, not to state administrative proceedings.

The appellate court agreed, finding as follows:

> [The Anti-Injunction Act's] plain language refers only to injunctions issued by federal courts "to stay proceedings in a state court." While the Supreme Court has expressly declined to address whether the Anti-Injunction Act applies to state administrative proceedings, every circuit to have addressed the question has held that it does not. Moreover, the purpose underlying the statute is the prevention of unnecessary friction between state and federal courts. An injunction related to an administrative proceeding does not impact the state courts. The argument that the result of such a proceeding might end up in a state court is speculative at this point, and the injunction here does not implicate the Nebraska courts. Both the text of the statute and its purpose support the conclusion that the Act applies only to state courts and not to state administrative agencies.
> (citations omitted)

Accordingly, the appellate court held that the preliminary injunction issued by the district court did not violate the Anti-Injunction Act.

Next Step

The parties have until April 26—fourteen days after issuance of the appellate court's decision—to file a petition for rehearing.

—*TDL*

Entergy Arkansas, Inc. v. State of Nebraska

Central Commission Files Motion to Preserve Documents

On April 14, the Central Commission filed a motion to have boxes of documents marked "shred" stored for preservation and storage with a Special Master previously appointed by the court. (See *LLW Notes*, January/February 2000, p. 18.) In a reply brief dated April 21, the State of Nebraska offered no objection to the motion to store the boxes off state premises, arguing that they contain only "flawed" copies of original documents.

The documents at issue were prepared by the state in response to a resolution passed at a September 1999 special meeting of the commission to consider Nebraska's withdrawal from the compact. The resolution requests that the state provide or make available any documents that could be relevant to the commission's determination regarding Nebraska's performance and duties under the compact. (See *LLW Notes*, October 1999, pp. 7–9.)

According to court documents, commission attorneys observed boxes marked "shred" from the hallway outside a workroom used by the state's attorneys to manage production of the state's documents. The commission alleges that, upon inquiry, state attorneys stated that (1) the boxes were obtained from some prior use and that the word "shred" does not actually refer to the documents contained within them, and (2) the documents are useless, are not originals, and are just quality control. In an April 11 letter, state attorneys described the content of the boxes as discards from the production effort—"mistakes" made in the course of document copying and production. In addition, the letter contained the attorneys' assurance that "no documents have been destroyed or are at risk of destruction in connection with this production effort."

While acknowledging that the state's attorneys have provided certain assurances and statements of intention with regard to the documents in the boxes marked "shred," the commission contends that there are inconsistencies in the explanations that raise doubts and justify storage and preservation with the Special Master.

Background: Entergy Arkansas v. State of Nebraska

On December 21, 1998, Nebraska regulators announced their decision to deny US Ecology's license application. (See *LLW Notes*, January/February 1999, p. 8.) Nine days later, five regional utilities filed suit, arguing that Nebraska regulators violated the compact, state, and federal law—as well as a statutory and contractual obligation to exercise "good faith"—in their review of the license application. (See *LLW Notes*, January/February 1999, pp. 16–17.)

The Parties The utilities pursuing claims are

- Entergy Arkansas, Inc.;
- Entergy Gulf States, Inc.;
- Entergy Louisiana, Inc.;
- Wolf Creek Nuclear Operating Corporation; and
- Omaha Public Power District.

In addition, US Ecology has joined the action as a plaintiff.

The Nebraska Department of Environmental Quality and the Nebraska Department of Health and Human Services Regulation and Licensure (NDHHS) were named as defendants to the action, as were several of the departments' employees and various unnamed contractors and subcontractors. The Central Interstate Low-Level Radioactive Waste Commission was also originally named as a defendant in the suit, but subsequently realigned itself as a plaintiff.

The Issues The plaintiffs claim that US Ecology's license application was denied on improper grounds and that the entire license review process was tainted by bias on the part of Nebraska and by the improper involvement of NDHHS. They assert that the state's bad faith is evidenced by, among other things, improper delays and impediments, the state's refusal to adopt adequate budgets or schedules, and the filing of repeated litigation against the project. They also challenge the constitutionality of the procedures employed in making a licensing decision, and they allege various related statutory and constitutional violations. (For a more detailed explanation of the issues raised by the plaintiffs, see *LLW Notes*, January/February 1999, pp. 16–17.)

Requested Relief In addition to the injunctive relief that was granted by the court in its April 15 order, the plaintiffs are asking that the court issue

- a declaratory order finding that the actions of the defendants constitute a violation of their "good faith" duty, a violation of the plaintiff utilities' rights to procedural and substantive due process under the U.S. Constitution, and a violation of the plaintiff utilities' statutory rights under the compact;
- a declaratory order finding that the state license review process is "unrectifiably tainted" and that the State of Nebraska should be removed from supervising and managing any further aspect of the license review process; and
- an award of money damages against individual defendants and the State of Nebraska.

Nebraska v. Central Interstate Low-Level Radioactive Waste Commission

Appellate Court Affirms Nebraska Lacks Veto Authority over Export Authorizations

On April 4, the U.S. Court of Appeals for the Eighth Circuit issued a decision in a lawsuit filed against the Central Interstate Low-Level Radioactive Waste Commission by the State of Nebraska concerning veto authority of the host state. In the decision, the appellate court affirmed a lower court's ruling that Nebraska does not have the right to veto the Central Commission's decision to issue permits for the export of waste from the compact region. In addition, the appellate court affirmed the lower court's refusal to decide whether Nebraska has the right to veto waste import permits because there is no "actual controversy" under the Declaratory Judgment Act.

Background

The Facts During the months of June and July 1997, the Central Commission voted on applications from various generators to export low-level radioactive waste for disposal outside the compact region. All applications were approved unanimously except for those of seven "major" generators. Four of the five Commissioners voted to approve these seven applications, but the Nebraska Commissioner voted against them, claiming veto power pursuant to Article IV(m)(6) of the compact.

After receiving an oral opinion by outside legal counsel that Nebraska's negative vote did not constitute a veto, the commission declared the motions passed and granted permission for all seven applicants to export low-level radioactive waste from the compact region. (See *LLW Notes*, July 1997, p. 6.) On August 22, 1997, the State of Nebraska filed a lawsuit challenging the commission's action. (See *LLW Notes*, July 1997, p. 6.)

The Issues In its suit, Nebraska argues that Article IV(m)(6) of the compact grants the host state the right to veto waste export licenses and that, in the absence of the host state's approval, export licenses may not be granted by the commission. Nebraska further claims that the compact affords the host state a similar right with regard to import licenses.

The Central Commission, however, asserts that the export authorizations are not covered by the language of Article IV(m)(6). Instead, the commission argues that the export authorizations are covered by Article III(g). This provision does not provide for veto authority and allows an export from the region to be authorized by a simple majority vote of the Commissioners.

Article IV(m)(6) of the Central Compact provides:

> The Commission shall: ...
>
> 6. notwithstanding any other provision of this compact, have the authority to enter into agreements with any person for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. Such authorization to import or export waste requires the approval of the Commission, including the affirmative vote of any host state which may be affected ...

Article III(g) of the Central Compact provides:

> Unless authorized by the Commission, it shall be unlawful, after January 1, 1986, for any person:
>
> 1. to deposit at a regional facility, waste not generated within the region;
> 2. to accept, at a regional facility, waste not generated within the region;
> 3. to export from the region, waste which is generated within the region; and
> 4. to transport waste from the site at which it is generated, except to a regional facility.

The District Court's Decision The district court's decision was issued on November 23, 1998. (See *LLW Notes*, December 1998, pp. 16–17.)

The district court found that the compact does not provide the host state with veto authority over permits that have been routinely issued by the commission to authorize generators to export low-level radioactive waste from the region. The court declined, however, to address the related issue of host state authority to veto low-level radioactive waste import licenses because no "actual controversy" exists as no such licenses are pending.

The Appellate Court's Decision

The appellate court framed the main issue before it as "whether permits to export waste from the region fall within the narrow veto provision of Article IV(m)(6) or whether export permits do not fall within Article IV(m)(6) and are subject to the majority vote arrangement of Article IV(b)."

In addressing the issue, the court found as follows:

> Nebraska argues that "agreements with any person … for the right of access to facilities outside the region" includes two categories of Commission action: 1) permits under Article III(g)(3) from the Commission to regional generators for the exportation of waste from the region, and 2) agreements between the Commission and outside waste depositories for the latter to accept waste exported from the region. Nebraska argues that both categories qualify as "agreements with any person … for the right of access to facilities outside the region" because both types of authorization are necessary before waste can be removed from the region and deposited elsewhere. Nebraska's argument fails for two main reasons: 1) Article IV(m)(6) only encompasses agreements granting the "right of access," which export permits do not grant, and 2) Article IV(m)(6) only covers agreements between the Commission and "person[s]" outside the Compact region while export permits involve the Commission and "person[s]" inside the Compact region.

Right of Access As part of its holding, the appellate court found that export permits are not subject to a veto by the host state because they do not confer "the right of access to facilities outside the region." Instead, according to the court, export permits "merely allow[] a person to export low-level radioactive waste outside of the region if such shipment of waste is otherwise lawful."

The court contrasted export permit documents with specific agreements made by the Central Commission for the right of access to facilities outside the region.

According to the court, such agreements—which may be subject to host state veto authority—actually specify that they grant the right of access to out-of-region facilities. The court cited the October 1993 agreement between the Central Commission and the Southeast Compact for access to Barnwell as an example of such an agreement.

Accordingly, the court found as follows:

> It is undisputed that Article IV(m)(6)'s language refers, at least in part, to agreements, such as the Southeast Compact agreement, between the Commission and facilities outside the Compact region for the right of access to such facilities for waste generated within the region. However, it is not reasonable to also construe an export permit as granting "the right of access to facilities outside the region." An export permit is a "right to remove," it is not a "right of access" to anything. The mere fact that being granted an export permit is a necessary condition to exporters obtaining a "right of access to facilities outside the region" does not mean that export permits were meant to be included within the term "agreements … for the right of access to facilities outside the region" and to be subject to a veto from a host state. It is clear that "agreements … for the right of access" refers only to the second necessary condition, to obtaining the right to deposit waste in a facility outside the Compact region; the actual agreement made by the Commission with a waste disposal facility outside the Compact region.

continued on page 26

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

Definition of "Person" According to the court, the second reason export permits are not subject to Article IV(m)(6) veto authority is that "it is clear that the 'person' Article IV(m)(6) is referring to is a person outside of the party states, not a person within the party states."

In so ruling, the court held as follows:

> Nebraska's argument that export permits fall within the terms of Article IV(m)(6) can prevail only if "agreements with any person … for the right of access to facilities outside of the region" could refer to the Commission authorizing an action by a person within the Compact region. However, Article IV(m)(6) cannot be interpreted in this manner. When the Commission enters "into agreements with any person for the importation of waste into the region," it is entering into agreements with persons outside the region that would allow those persons to transport waste into the region. Similarly, when the Commission enters "into agreements with any person … for the right of access to facilities outside the region," the "person" referred to is not a person within the Compact region but a person outside of the region who can grant access to a waste facility outside of the region. The language of Article IV(m)(6), "agreements with any person … for the right of access to facilities outside of the region," does not refer to the Commission authorizing anything by a person within the Compact region. The language refers only to a person outside of the Compact region entering into an agreement with the Commission allowing the Compact region access to waste disposal facilities outside of the Compact region. Because the Commission only confers export permits upon persons inside the Compact region and Article IV(m)(6) refers only to agreements between the Commission and persons outside the Compact region, export permits are not within the terms of Article IV(m)(6).

Obtaining Copies of Decision A copy of the court's decision is available at

http://www.wulaw.wustl.edu/8th.cir.

—TDL

US Ecology v. United States of America
California Department of Health Services v. United States of America

Federal Claims Court Finds No Breach of Contract in Ward Valley Dispute

On March 27, 2000, the U.S. Court of Federal Claims issued an order granting summary judgment to the defendant in consolidated lawsuits filed by US Ecology and the California Department of Health Services (DHS) against the United States of America.

The suits, which were filed in early 1997, allege that the federal government breached a contract—either express or implied—to sell 1,000 acres of federal land in Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility. They sought reimbursement for plaintiffs' past costs, lost future profits, and lost opportunity costs associated with the project.

The court, however, ruled that the parties never entered into a valid contract and that the plaintiffs are therefore not entitled to the requested relief. In so finding, the court held that a previous temporary restraining order issued by the U.S. District Court for the Northern District of California prohibited then-Interior Secretary Manuel Lujan from completing the steps necessary to transfer the land.

(continued on page 27)

Background

On January 8, 1993, a group of antinuclear activists filed a lawsuit in the Northern District of California alleging that Lujan violated the Endangered Species Act because he failed to designate a critical habitat for the desert tortoise, a threatened species, some of which are located in Ward Valley. (See *LLW Notes*, January 1993, p. 8.) That same day, the court granted a temporary restraining order enjoining transfer of the Ward Valley land.

The order was orally extended during a hearing on January 19. Discussion arose during the course of the hearing on the signing of a patent for the requested land transfer. At that time, the Assistant United States Attorney said that the signing of a patent "in and of itself would not have resulted in a transfer of title." He further stated that, depending on the court's ruling, Lujan "would like to sign the patent, but not transfer title to the state."

The attorney added:

> The Secretary would also propose to sign the Record of Decision, which would be a further step towards accomplishing this transfer. All of these steps were … not taken on advice that this might be a violation of the spirit of the Court's temporary restraining order.

Sometime after the hearing, nonetheless, Lujan issued a Record of Decision (ROD) finding that the requested land transfer complied with federal environmental laws and stating his intention to transfer the land by direct sale. He did not, however, issue the patent.

A written order extending the temporary restraining order was filed by the Northern California District Court at 6:25 p.m. PST on the date of the hearing. The order enjoined the Interior Department from "executing any document or taking any other action, including but not limited to signing any patent, in connection with any transfer of any land in Ward Valley, California, to the State of California."

For a detailed description of the facts leading up to the filing of the lawsuits, and the claims put forward by the plaintiffs, see LLW Notes, August/September 1997, p. 21.

The Claims Court's Decision

In their lawsuits, US Ecology and DHS argue that the January 8, 1993 temporary restraining order did not bar Secretary Lujan from signing the ROD. The Federal Claims Court disagreed, finding that Lujan "violated the injunction when he signed the Record of Decision because the ROD was a 'step towards accomplishing the transfer.'"

In support of its ruling, the court noted that "persons who proceed in the face of the prohibition of an injunctive order are required procedurally to seek judicial review of the injunction, 'not to disobey it, no matter how well founded their doubts might be as to its validity.'" The court cited the Assistant United States Attorney's statement that Lujan had not taken certain actions on advice that they might be a violation of the spirit of the temporary restraining order as evidence that the government understood the scope of the injunction. The court also pointed out that even if Lujan was unaware of the limitations on his authority, any contract entered into without authority or in violation of law is void.

In addition, the court rejected the plaintiffs' claims of the formation of an implied-in-fact contract between California and the United States. In so doing, the court held as follows:

> [T]he same elements of a government contract apply to implied-in-fact contracts, which normally are unwritten. "Oral assurances do not produce a contract implied-in-fact until all the steps have been taken that the agency procedure requires; until then, there is no intent to be bound."
>
> (citations omitted)

The parties have until May 26 to file a notice of appeal of the court's decision. On March 30, US Ecology announced its intention to file an appeal.

A similar action by US Ecology, which seeks to compel the U.S. Department of Interior to actually transfer the land, remains pending before the U.S. Court of Appeals for the District of Columbia Circuit. (See *LLW Notes*, November/December 1999, p. 27.)

—TDL

Waste Control Specialists, LLC v. Envirocare of Texas, Inc.

Appellate Court Upholds Remand of WCS Suit to State Court

Overturns Payment of Attorney's Fees

On March 15, the U.S. Court of Appeals for the Fifth Circuit issued an order in response to petitions for panel rehearing and rehearing en banc in a lawsuit filed by Waste Control Specialists (WCS) against Envirocare of Texas, Inc.; Envirocare of Utah, Inc.; Khosrow Semnani and Charles Judd, both of whom are Envirocare officers; and other individuals. The order denied Envirocare's appeal of the appellate court's earlier decision to vacate a lower district court's order and remand the case back to state court. It granted, however, Envirocare's challenge to the appellate court's determination that Envirocare was responsible for the plaintiff 's attorney's fees and costs.

Background

The Complaint On May 2, 1997, WCS filed a complaint in the District Court of Andrews County, Texas, alleging that during the spring of 1996 Envirocare conceived of and implemented a plan to destroy WCS' ability to compete in the low-level radioactive and mixed waste business. (See *LLW Notes*, July 1997, pp. 20–22.) The complaint contained exclusively state law causes of action including free enterprise and antitrust violations, libel and slander, business disparagement, and tortious interference with prospective business relations.

Removal The defendants were nonetheless successful at removing the case to federal district court despite WCS' objections. To do so, the defendants noted that the allegations contained in WCS' amended complaint applied only to the non-commercial waste market—a market in which DOE is the only customer. Based on this fact, they alleged that WCS' case must involve federal antitrust law even though WCS' complaint made no reference to any federal law. WCS subsequently filed a motion to remand the case back to state court, which the district court denied. WCS also filed a motion to reconsider the order denying remand.

Dismissal Subsequently, the defendants filed a motion to dismiss. The district court strongly suggested that WCS' only potentially viable claim was a federal one, so WCS amended its complaint to expressly allege a violation of the Sherman Act.

Nevertheless, the district court dismissed WCS' complaint on August 31, 1998, holding that Envirocare's activities are protected under the Noerr-Perrington Doctrine, which was established by the U.S. Supreme Court in 1960s. The doctrine provides that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." The doctrine is designed to protect both the participation of affected parties in government processes and the First Amendment right to petition the government. It recognizes that the outcome of valid government activity will often negatively impact economic competition.

Remand On January 18, the U.S. Court of Appeals for the Fifth Circuit vacated the district court's order and remanded the case to the federal district court with instructions to remand it back to the state court in which it was originally filed. (See *LLW Notes*, January/February 2000, pp. 21–22.) The appellate court held that since the Sherman Act does not completely preempt the Texas Antitrust Act, and since WCS' original complaint included claims under Texas antitrust law, the case should not have been removed from state court. The appellate court also held that Envirocare must pay WCS' reasonable attorney's fees and costs related to the removal.

continued on page 29

Envirocare of Utah, Inc. v. Waste Control Specialists, LLC

Envirocare Files Defamation Suit against WCS

On April 14, Envirocare of Utah and its owner, Khosrow Semnani, filed a defamation lawsuit against Waste Control Specialists (WCS), its former President, a private investigator, and other unnamed defendants. The suit—which was filed in the U.S. District Court for the District of Utah, Central Division-—seeks unspecified damages to be proven at trial.

In general, the complaint alleges that WCS has engaged in an extensive campaign of misinformation, libel, slander, and disparagement of Envirocare and Semnani in an attempt to weaken or destroy them as potential competitors both in their Utah operations and in the company's attempt to develop a low-level radioactive waste disposal facility in Andrews County, Texas. It alleges that the defendants contacted, or caused others to contact, law enforcement authorities and regulatory officials to provide them with a "stream of lies and false rumors" suggesting that plaintiffs were involved in various illegal activities and had knowingly violated environmental laws and regulations.

The alleged misinformation cited in the complaint includes, among other things, the following:

- that the defendants were engaged in illegal arms trading, diversion of radioactive waste to weapons brokers, and the financing of Mideast terrorists and that they made death threats to those who opposed them;
- that Semnani maintained illicit sexual relations with, or hired others to perform sexual favors for, various officials to obtain favorable regulatory treatment or inside information;
- that regulatory and company officials are engaged in an active cover-up of regulatory violations and that Envirocare has never paid "a penny in penalties" for such violations;
- that Envirocare "never performed its mandatory projects" and accepts waste it is not legally permitted to take;
- that Semnani obtained control over and converted to his own use a public reserve account for long-term decontamination of environmentally hazardous sites;
- that Semnani purchased a home in Mexico for a regulator to obtain favorable treatment; and
- that Semnani is a bigamist.

The complaint alleges that, as a result of the defendants' defamatory statements, Envirocare has suffered damage to its business relationships, lost contracts, and endured enhanced and unjustified regulatory scrutiny and audits and inquiries.

—TDL

Waste Control Specialists, LLC v. Envirocare of Texas, Inc. (continued)

The Appellate Court's Order

The appellate court's March 15 order upheld the January 18 decision to remand the case to state court. However, it withdrew that portion of the decision requiring Envirocare to pay the plaintiff's attorney's fees and costs and replaced it with the following language:

> Finally, we note that WCS has asked for the imposition of attorney's fees pursuant to 28 U.S.C. s. 1447(c), which states in relevant part: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In this connection, the district court on remand shall decide, in the light of this opinion and other facts and evidence as may be relevant, whether the removal of this case was or was not objectively reasonable, and, thus, whether to enter an appropriate award of attorney's fees as provided in s. 1447(c).
>
> (citations omitted)

—TDL

Anderson v. Semnani

Utah Court Dismisses Former Regulator's Suit against Envirocare

NRC Closes Investigation

On March 22, a Utah district court issued an order granting summary judgment to Envirocare of Utah and its owner, Khosrow Semnani, in a lawsuit filed against them by Larry Anderson, a former Director of the Utah Division of Radiation Control, and Lavicka Inc., a Utah corporation set up by Anderson. In so doing, the court found that a contractual arrangement in which a regulator is given an interest in the success of an applicant is void as against public policy and a clear violation of Utah law. The order is not final due to pending counterclaims filed by the defendants.

On March 27, less than a week after issuance of the court's order, the U.S. Nuclear Regulatory Commission announced that it is taking no action against Semnani in response to a Demand for Information issued by the commission in July 1999. In so doing, NRC emphasized the significance of certain assurances included in Semnani's responses to NRC's questions.

The Lawsuit

Background The suit—which was filed in October 1996 in the Third District Court of Salt Lake County, Utah—alleges that the defendants owe Anderson in excess of $5 million for site application and consulting services related to the licensing and operation of Envirocare's disposal facility. In response to the litigation, Semnani admitted to giving Anderson cash, gold coins, and real property totaling approximately $600,000 in value over an eight-year period, but denied that such payments were for consulting services. Instead, he asserted that the payments were made in response to Anderson's ongoing practice of using his official position to extort money from the defendants.

The defendants filed motions to dismiss the suit and for summary judgment arguing that

- the alleged consulting agreement is illegal and contrary to law and, therefore, void as against public policy;
- the alleged agreement cannot constitute a contract implied in law (to enforce restitution) or a contract implied in fact (established by conduct) since the performance thereof is prohibited by Utah law;
- the defendants cannot be guilty of fraudulent misrepresentation since Anderson's demands for payment were illegal; and
- Envirocare cannot be liable for damages because no allegations have been made of privity between the parties or of improper representations by Envirocare.

In response to the defendants' motions, the plaintiffs asserted as follows:

- the alleged agreement does not violate Utah's ethics law because Envirocare and Semnani did not receive favorable treatment from the Utah Bureau of Radiation Control;
- the ethics law was not violated since the alleged agreement was provided through a corporate entity, not a regulator;
- there was a sufficient meeting of the minds to uphold the alleged contract; and
- even though there was no written contract, the parties' oral understandings create an enforceable arrangement.

On August 27, 1999, the district court issued an order denying the defendants' motion to dismiss.

For a complete description of the lawsuit, see LLW Notes, January 1997, pp. 1, 5–12.

The Court's Order

In granting summary judgment to the defendants, the court held as follows:

> The instant case presents a contract giving a regulator an interest in the success of an applicant. This clearly violates public policy as well as the express provisions of the [Utah Public Officers' and Employees' Ethics] Act. While Anderson claims no conflict of interest was created because he did not actually favor defendants in his official position, such is irrelevant. Indeed, it is the conflict (actual or potential) that is prohibited, the outcome is immaterial. As to Anderson's claim that he did not know his conduct violated the law, even assuming this is true, Anderson's subjective belief does not change the result.
>
> While the Court is persuaded the obvious conflict of interest clearly violated the purpose of the statute and is sufficient to warrant granting summary judgment in favor of the defendants, for the sake of completeness, it is also noted that the independent elements of statutory violation are also present. For example, Anderson's alleged contract gave him an expectation of income measured by the success of the regulated business, which is prohibited by the statute. Moreover, Anderson's alleged agreement to provide initial and ongoing consulting services to Semnani is employment within the meaning of the Act. Although it is true compensation was not regulated until 1989, such was clearly precluded by the public policy behind the Act.

In response to specific claims and defenses presented by the plaintiffs, the court held as follows:

- The court found that the use of Lavicka as an agent by Anderson did not alleviate the ethical violations. In so ruling, the court noted that Anderson, not Lavicka, received the benefit of all of the monies from Semnani—even the few hundred dollars that were deposited into Lavicka's bank account.
- The court denied the plaintiffs' claims for recovery based on equity or fairness "since it is the compensation that creates the conflict of interest in the case and makes the alleged contract illegal."
- The court determined that even if the alleged agreement did not violate Utah's ethics law, it would not be enforceable because there was no meeting of the minds on essential terms—a required element for the formation of a valid contract.
- The court rejected the plaintiffs' claim for fraudulent misrepresentation, holding that reliance was not reasonable since it was based on an alleged promise to participate in an illegal contract.

Next Step/Appeals

The court order is not final due to pending counterclaims filed by the defendants. In those counterclaims, Semnani is seeking the return of approximately $600,000 in cash, gold coins, and real property that he previously gave to Anderson. Nonetheless, the plaintiffs may file a petition requesting an interlocutory appeal that would address only those issues covered in the district court's March 22 order. If they choose to do so, the petition must be filed within 20 days of entry of the order. As of press time, the order had not been formally entered. It would be within the appellate court's discretion whether or not to accept the petition for interlocutory appeal.

Envirocare's Reaction

In response to the court's order, Envirocare of Utah President Charles Judd stated:

> Today's dismissal of Mr. Anderson's lawsuit shows that there was absolutely no basis for his allegations against Envirocare or Mr. Semnani. The Court's action vindicates Envirocare's position and is consistent with the federal grand jury's criminal indictment of Anderson.

Anderson was indicted by the U.S. District Court for the District of Utah in March 1999 on charges of extortion, mail fraud, tax evasion and the filing of false tax returns. (See *LLW Notes*, March 1999, p. 8.) Semnani, who was not indicted, had previously pleaded guilty to a misdemeanor tax charge for helping to conceal one of his payments to Anderson. (See *LLW Notes*, August/September 1998, p. 32.)

continued on page 32

Anderson v. Semnani (continued)

NRC's Evaluation of the Demand for Information from Semnani

Background On July 12, 1999, NRC issued a Demand for Information from Semnani concerning his relationship with Anderson. The demand was made in response to a December 1998 petition from the Natural Resources Defense Council (NRDC) requesting that NRC issue an order to show cause as to why Semnani should not be permanently prohibited from participating in any NRC-licensed activity. The demand included a series of questions that NRC wanted answered so that the agency could determine if enforcement action was necessary.

Semnani responded to the NRDC petition on January 12, 1999 and April 5, 1999. He responded to the NRC demand on September 13, 1999 and November 19, 1999.

For further information on the Demand for Information, see LLW Notes, June/July 1999, p. 21.

NRC's Response NRC provided its evaluation of Semnani's responses by letter dated March 27. In the letter, the Commission reiterated that it had issued the demand in response to NRDC's petition and out of concern that Semnani's "payments to a State official with official responsibilities over matters integrally related to the NRC's regulatory program could undermine the NRC's reasonable assurance of adequate protection of the public health and safety."

In providing its evaluation, NRC's letter stated:

> The NRC has completed its evaluation of your responses to the NRC's . . . [Demand for Information and Request for Additional Information], as well as all available related information, and has concluded that no further action is warranted. In reaching this conclusion, we wish to emphasize the significance of your assurances that you . . . "understand what is required and expected of individuals involved in the management of NRC-licensed activities . . . that the NRC must rely on the candor and integrity of those individuals, and that the issuance of an NRC license is a privilege to be entrusted to persons who will work diligently to ensure the safety of the public and workers and to ensure compliance with NRC requirements."

The letter was signed by R. W. Borchardt, Director of NRC's Office of Enforcement.

Envirocare's Reaction In response to NRC's closure of its enforcement considerations, Judd stated

> I am hopeful today's action by the NRC puts to rest the baseless and fundamentally unfair allegations that have been leveled against Mr. Semnani and Envirocare as a result of Larry Anderson's demands for money from Mr. Semnani . . .
>
> Envirocare's licenses and permits have been thoroughly reviewed by the State of Utah and the NRC, and they were found to have been appropriately issued and proper. In fact, our facility in Toole County has probably been more exhaustively reviewed and audited by more state and federal agencies over the last three years than any other facility in the country. I am pleased that, in the face of such careful scrutiny, our facility has been found to be properly licensed and operated.

—TDL

Court Calendar

Case Name	Description	Court	Date	Action
Hudspeth County v. Maine and Vermont (See *LLW Notes*, November/ December 1999, p. 30.)	Alleges that the States of Maine and Vermont owe $1.25 million each to Hudspeth County, Texas, under the terms of the Texas Low-Level Radioactive Waste Disposal Compact legislation passed by the US Congress in July 1997.	United States District Court for the Western District of Texas	January 19, 2000	Maine and Vermont filed a motion to dismiss on the ground that Hudspeth County was never designated as the compact's host county under the terms of the federal legislation.
Santini v. Connecticut Hazardous Waste Management Service (See *LLW Notes*, November/ December 1999, p. 24)	Claims that a site designation made by the Connecticut Hazardous Waste Management Service prevented plaintiff from selling adjacent real estate for residential use, thus resulting in an unlawful taking of private property.	United States Supreme Court	March 31, 2000	The plaintiff filed a petition for a writ of certiorari to the US Supreme Court to review the decision of the Connecticut Supreme Court.
Tri-Valley Communities Against a Radioactive Environment v. U.S. Department of Energy (See *LLW Notes*, December 1998, p. 23.)	Accuses DOE of willfully and habitually violating the Freedom of Information Act by failing to appropriately respond to certain information requests within the time frame set forth in the statute.	United States District Court for the Northern District of California	November 17, 1999	The case was settled after the Department of Energy turned over all of the documents requested by the plaintiff.
Northern States Power v. United States (See *LLW Notes*, October 1999, pp. 22-23.)	Seeks contractual damages from DOE for its failure to take title to spent nuclear fuel by the January 31, 1998 deadline set forth in Article II of the Standard Contract.	United States Court of Appeals for the Federal Circuit	May 3, 2000	Oral arguments are scheduled.

U.S. Nuclear Regulatory Commission

NRC Releases Commission Paper re Rubblization

On March 2, the U.S. Nuclear Regulatory Commission released a commission paper on rubblization—"the in-situ disposal by burial of building rubble at reactor sites undergoing decommissioning." The paper, which is dated February 14, 2000, was prepared by NRC staff after Maine Yankee indicated an interest in implementing the rubblization concept. In the paper, staff recognize the need to review site-specific models for dose assessment and identify various technical and policy areas that will need to be considered, including the concern that the buried rubble will essentially constitute a low-level radioactive waste disposal site. Nonetheless, staff indicate that upon initial examination, they believe that "it is technically possible to approve a … [License Termination Plan] that includes rubblization." Consultation with the Commissioners by the staff may be necessary in the future.

Background

In January 2000, Maine Yankee submitted to NRC a draft License Termination Plan (LTP) which includes a proposal to use rubblization as a decommissioning alternative. Shortly thereafter, Maine State Senator Sharon Anglin Treat (D) inquired about the plan to Andrew Ketterer, the state's Attorney General. Ketterer responded by letter dated February 8, finding that Maine Yankee's proposal may violate Maine's Nuclear Waste Activity Act. Ketterer suggested, however, that the state legislature revisit the issue due to significant changes over the years in the field of low-level radioactive waste management. (See *LLW Notes*, January/February 2000, pp. 9–11.)

In the Commission paper, NRC staff note that during an August 1999 LTP workshop at NRC headquarters, "several licensees indicated they were considering rubblization." Accordingly, staff expect to receive additional LTPs in the future which include rubblization.

The Paper

What Is Rubblization? The commission paper includes the following definition for rubblization:

> As proposed for the decommissioning of reactor sites, "rubblization" involves: (a) removing all equipment from buildings; (b) some decontamination of the building surfaces; (c) demolishing the above-grade part of the structure into concrete rubble; (d) leaving the below-grade structure in place; (e) placing the rubble into the below-grade structure; and (f) covering, regrading, and landscaping the site surface. Demolition of the above-grade concrete structures of the turbine building, reactor building, spent fuel building, and auxiliary building (potentially contaminated structures) could result in material ranging from gravel-size to large concrete blocks, or a mixture of both.

The concept of leaving rubblized material on site or using it as backfill in building foundations is not new. In fact, the commission paper identifies two previously released reactor sites at which similar approaches have been taken—the Shoreham Nuclear Power Station in New York and the Fort St. Vrain Nuclear Generating Station in Colorado.

Rationale/Benefits In the commission paper, NRC staff provide the following explanation of the rationale for rubblization and the potential benefits to be derived:

> Once a facility's license is terminated, structures can be demolished and buried, provided relevant Federal, State, and local requirements are met. The major difference in the current proposal is the level of contamination that can remain on building surfaces. Reduction in the level of surface decontamination required to be removed could save a licensee several million dollars. Reportedly, calculations performed by licensees show that the Part 20 unrestricted dose limit of 25 millirems and as low as reasonably achievable (ALARA) can be met with contamination levels considerably higher for a demolished buried building than one left standing and reused. The staff's reuse scenario model for buildings includes doses from both direct exposure as well as internal exposure from resuspension of surface activity and ingestion from transferred contamination. For a given total quantity of a radioisotope this may be the highest possible dose sce-

nario. Any other configuration may give a lower dose. The cost reduction … results because of the significant reduction in the amount of concrete required to be removed compared to meeting the screening or site-specific surface-contamination values; the reduction in disposal cost because of the reduced volume of contaminated material resulting from the use of higher surface-contamination values allowed by rubblization; and elimination or reduction of the costs associated with the purchase and transport of fill dirt to backfill a building.

Stakeholder and Agency Responses Several stakeholders have provided input to NRC on the rubblization concept. The Nuclear Energy Institute (NEI) has prepared an issue paper supporting the concept, whereas the New England Coalition on Nuclear Pollution and the State of Maine have submitted papers which are critical of rubblization. Staff of the U.S. Environmental Protection Agency have also written a paper identifying concerns, including the potential for dilution and the possibility that a Resource Conservation and Recovery Act (RCRA) permit may be required. In addition, several low-level radioactive waste compact commissions have expressed concerns about rubblization and the impact it may have on compact agreements.

Technical and Policy Issues An attachment to the commission paper listed the following six technical and policy issues that were raised by stakeholders in regard to the rubblization concept:

- whether placing the waste in a below-grade structure constitutes a low-level radioactive waste disposal facility, thereby resulting in a proliferation of sites;

- whether rubblization of contaminated material requires special approval under 10 CFR 20.2002—that portion of the license termination rule which provides authority to dispose of material that is not otherwise authorized by the regulation;

- whether leaving elevated contaminated material on site constitutes a significant departure from past licensing practice;

- whether as low as reasonably achievable (ALARA) principles can be adequately demonstrated with regard to rubblization;

- whether the rubblization concept has the potential to conflict with a proposed initiative on the control of solid materials (the "clearance rule"); and

- whether environmental impacts need to be reconsidered through a generic or site-specific environmental impact statement before allowing a licensee to use the rubblization approach.

The commission paper states that NRC staff will address the above-listed concerns when they conduct a review of a specific licensee's submittal using rubblization.

Conclusion NRC staff offered the following preliminary conclusion in the commission paper regarding the feasibility of rubblization:

> At this time, the staff believes that it is technically possible to approve a LTP that includes rubblization. The staff's belief is premised on a licensee's demonstration that rubblization meets the requirements of Part 20, Subpart E, considering the scenarios of intrusion, excavation, and reuse of buried material and recognizes that, in some cases, mixing/diluting of contaminated material might occur. This appears to be consistent with the performance-based approach set forth in the license termination rule. However, the staff recognizes that substantial technical review will be necessary before it will be able to approve a site-specific rubblization application. In addition, resources will need to be allocated to support the revision of the GEIS [Generic Environmental Impact Statement], and to incorporate review methods and acceptance criteria into the Standard Review Plan (SRP) being developed by the staff. The staff will include these resources in the next budget cycle, and incorporate available guidance on rubblization into the SRP as an update of the final SRP due to be issued in July 2000. Consultation with the Commission may be warranted before the staff completes its assessment of a rubblization application.

—TDL

NRC Responds to Maine Yankee re Rubblization

On March 1, Carl Paperiello, Deputy Executive Director for Materials, Research and State Programs at the U.S. Nuclear Regulatory Commission, responded to a January 21 letter from Michael Meisner, President of Maine Yankee. Meisner had inquired whether leaving on-site residual radioactivity that meets NRC's License Termination Rule (LTR) in 10 CFR Part 20, Subpart E, "leads to the designation of the site as a low-level radioactive waste facility or that residual radioactivity is low-level waste under the laws and regulations [NRC] administers."

Paperiello responded to Meisner's inquiry:

> Under 10 CFR Part 61, "Licensing Requirements for Land Disposal of Radioactive Material," material released under 10 CFR Part 20, "Standards for Radiation Protection," is not subject to Part 61. In our view, material released for unrestricted use under the LTR is considered residual radioactive material that is not subject to future regulatory controls. Accordingly, this residual radioactive material does not need to be treated as low-level radioactive waste as it is not required to be disposed of at a "licensed land disposal facility" as that term is used in Part 61.

Paperiello's letter points out that the Maine Attorney General has prepared an analysis of Maine state law on low-level radioactive waste. (See *LLW Notes*, January/February 2000, pp. 9–10.)

In that analysis, the Attorney General finds that, under a strict reading of the Maine Nuclear Waste Activity Act, a proposal by Maine Yankee to implement rubblization as a decommissioning alternative may be seen as creating a low-level radioactive waste disposal facility.

The analysis suggests, however, that the state legislature revisit the issue due to significant changes over the years in the field of low-level radioactive waste management. Paperiello states in his letter that NRC "express[es] no views on the Maine Attorney General's analysis of state law."

—TDL

U.S. NRC (continued)

NRC to Hold Hearings re PFS Application

From June 19 through mid-July, the U.S. Nuclear Regulatory Commission has scheduled a series of public hearings to receive comment on issues related to a proposal by Private Fuel Storage (PFS) L.L.C. to construct a temporary spent-fuel storage facility on the Skull Valley Band of Goshute Indians' reservation in northwestern Utah. Discussion has also been scheduled on the financial viability of the consortium of eight public utilities that make up PFS.

In May 2000, NRC is expected to issue a draft environmental impact statement (EIS) on PFS' proposal. NRC will likely hold a hearing on the EIS in 2001. Utah officials, including Governor Michael Leavitt (R), continue to oppose the project and have vowed to fight it.

—TDL

For background information on the PFS plan, see LLW Notes, April 1997, pp. 26–27. For information concerning NRC's review of the proposal, see LLW Notes, January/February 2000, p. 31.

NRC Requests NAS Study re Control of Solid Materials from Licensed Facilities

On April 12, the U.S. Nuclear Regulatory Commission announced its intention to request that the Board on Energy and Environmental Systems of the National Academy of Sciences (NAS) "conduct a 9-month study and provide recommendations on possible alternatives for the control of slightly contaminated radioactive materials originating at licensed nuclear facilities." Public meetings on the issue have been scheduled at NRC headquarters in Rockville, Maryland, on May 3 and 9.

NRC's press release states as follows:

> The Nuclear Regulatory Commission is in the preliminary stages of examining its approach to controlling such material. Over the past year, the agency has been seeking comment on its decision-making process through public meetings and publication of an "issues" paper that discusses alternative courses of action.
>
> The Commission is considering a staff paper (SECY-00-0070) which summarizes the stakeholders' views and makes recommendations for proceeding, including the integration of the NAS study into the agency's overall approach for the control of solid material. On May 3, the NRC staff will brief the Commission on the details of this paper. On May 9, the Commission will hear comments and concerns from a number of invited groups. The participants represent citizen groups, tribal and state governments, federal agencies, private industry, and workers. Both meetings are open to the public for observation.

The staff paper and other background information on the control of solid materials from licensed facilities are available on the web at

www.nrc.gov/NMSS/IMNS/controlsolids.html.

—TDL

NRC Upholds Decision to Allow IUC to Accept FUSRAP Waste

On February 10, the U.S. Nuclear Regulatory Commission issued a memorandum and order affirming an NRC Atomic Safety Advisory Board judge's decision to uphold a license amendment granted to the International Uranium Corporation (IUC). The amendment authorizes IUC to receive, process and dispose of particular alternate feed material from Tonawanda, New York, at the company's White Mesa Uranium Mill near Blanding, Utah. The material is being removed from Tonawanda under the Formerly Utilized Sites Remedial Action Program (FUSRAP).

The amendment was originally issued in August 1998 after NRC concluded that mill tailings from Tonawanda qualified as feed material and are being processed primarily for their source material content. (See *LLW Notes*, March 1999, p. 24.) The State of Utah challenged the license amendment, however, arguing that the acceptance of FUSRAP waste at White Mesa constitutes "sham disposal" and that uranium extraction is only a pretext to allow the facility to offer cheap disposal rates, in violation of federal rules that allow alternate feed to be accepted only if processed "primarily for its source-material content." In addition, Utah asserts that the amendment essentially allows IUC to circumvent the State of Utah's regulatory process. (See *LLW Notes*, August/September 1999, p. 10.)

In its order, NRC held that the IUC license amendment was properly issued and that the mill tailings at issue do constitute 11e.(2) byproduct material. The Commissioners determined that it was reasonable for NRC staff to have concluded that processing would take place and that uranium would be recovered from the ore. The Commissioners rejected Utah's argument that the amendment should not be issued because the monetary value of the recovered uranium would be much lower than the price charged for the extraction services. Economic factors, according to NRC, are not controlling.

A copy of the Commissioners' memorandum and order can be obtained from NRC's web site.

—TDL

US. NRC (continued)

NRC Accepts Petition re FUSRAP Regulation

On April 11, the U.S. Nuclear Regulatory Commission held a Review Board Meeting to obtain additional information in connection with two section 2.206 petitions filed by Envirocare of Utah and the Snake River Alliance. The petitions seek action with respect to the Army Corps of Engineers and Envirosafe of Idaho. Specifically, they request that NRC regulate FUSRAP 11e.(2) byproduct material being sent by the Corps to facilities, such as Envirosafe's, that are permitted under the Resource Conservation and Recovery Act (RCRA) but are not licensed by NRC.

Following the meeting, NRC determined to accept the petitions for review. NRC has established a 120 day target for ruling on the petitions.

The Petitions The Snake River Alliance filed its petition on February 24. Envirocare's petition was filed on March 13. An NRC meeting announcement summarizes the petitions as follows:

> Snake River Alliance and Envirocare of Utah are requesting the NRC to regulate disposal of mill tailings from the Formerly Utilized Sites Remedial Action Program (FUSRAP) and to take action to ensure that workers and the public are fully protected from radiation exposure due to the disposal of this material. Additionally, petitioners have requested that NRC take action to enforce the Atomic Energy Act (AEA) and NRC's regulations governing disposal of 11e.(2) byproduct material whether or not it was generated after 1978. Envirocare has also asked the NRC to take appropriate action to license disposal sites which are currently disposing, or intend to dispose, of FUSRAP materials.

Regulatory Jurisdiction NRC previously issued guidance stating that pre-1978 FUSRAP 11e.(2) materials do not require disposal at a facility licensed pursuant to the Atomic Energy Act and may be disposed of at RCRA Subtitle C facilities if authorized by the appropriate state or federal regulatory agency. Both petitions assert that NRC's interpretation is incorrect, however.

As summarized by NRC, the petitioners' arguments are as follows:

> Both petitions assert that the Commission's interpretation is in conflict with the express statutory language of [the Uranium Mill Tailings Radiation Control Act (UMTRCA)], the Act's legislative history, and the Commission's UMTRCA regulations. The petitioners indicated, with respect to the statutory language, that the Commission properly observed that Section 83a. imposes requirements on the NRC that apply only to source material licenses in effect on the effective date of section 83 or thereafter. However, the petitioners believe the Commission has not acknowledged that Section 81 and Section 84 of the … [Atomic Energy Act (AEA)] impose additional requirements on the Commission beyond those imposed by Section 83. Most notably, Section 84, in their view, requires the Commission to "insure that the management of any byproduct material, as defined in Section 11e.(2), is carried out in such a manner as … the Commission deems appropriate to protect the public health and safety … ." In light of this Section—as well as Section 81, which imposes prohibitions on unauthorized activities relating to any byproduct material—the Commission, in the view of the petitioners, is required to regulate FUSRAP mill tailings, notwithstanding the fact that the majority of those tailings are not covered by the requirements of Section 83a.

Background In 1997, Congress transferred cleanup authority over FUSRAP from the U.S. Department of Energy to the Army Corps of Engineers. (See *LLW Notes*, May 1999, pp. 38–39.) Prior to the transfer of authority, DOE generally sent FUSRAP waste to Envirocare's disposal facility in Utah or other similarly licensed facilities. The Corps, however, sought cheaper disposal options.

Accordingly, in early 1999, the Corps sent FUSRAP waste from New York to a hazardous waste disposal facility in California. The facility does not have a radioactive waste disposal license, but its hazardous waste disposal permit contains a provision specifically prohibiting the disposal of materials with greater than 2,000 picocuries per gram. (See *LLW Notes*, May 1999, pp. 1, 31–32.)

Thereafter, in early June 1999, the Corps' Kansas City district office awarded three five-year indefinite delivery/indefinite quantity contracts for the disposal of FUSRAP waste to Waste Control Specialists of Texas, Envirocare of Utah, and Envirosafe of Idaho. (See *LLW Notes*, June/July 1999, p. 26.) The contract awards followed a June 28 order by the U.S. Court of Federal Claims dismissing a lawsuit by Envirocare challenging the Corps' bidding and procurement process. (See *LLW Notes*, June/July 1999, pp. 16–18.)

—TDL

NRC Chair Provides Personal Views re FUSRAP Regulation

On October 22, 1999, Senator Robert Bennett (R-UT) wrote to U.S. Nuclear Regulatory Commission Chair Richard Meserve requesting his personal views concerning the commission's regulatory authority over certain uranium and thorium processed waste generated prior to 1978 and administered under the Formerly Utilized Sites Remedial Action Program (FUSRAP). Meserve responded by letter dated March 8, 2000.

The following excerpt from Meserve's letter identifies Bennett's questions and provides Meserve's responses.

1. Would you agree that the Commission should rethink its reluctance to regulate pre-1978 material?

In addition to your letter, the Commission has received a number of other inquiries relating to its position on the pre-1978 material. In light of the concerns expressed by the various stakeholders, the Commission is well aware of the differing views on this important issue. A legislative solution would be the most direct approach to clarifying the NRC's responsibilities under UMTRCA [Uranium Mill Tailings Radiation Control Act].

2. Would you agree that NRC licensing requirements for this materials are more protective of public health and the environment than RCRA [Resource Conservation and Recovery Act] requirements?

Both RCRA landfills and NRC-licensed disposal facilities are protective. In general, I believe that NRC-regulated and licensed disposal facilities, because they are subject to requirements that focus on protection of public health, safety, and the environment from radiological hazards, may afford more protection against radiological hazards.

3. Would you agree that the decision in Kerr-McGee v. NRC (903) F.2d 1, D.C. Cir. 1990) supports NRC regulating all FUSRAP waste?

Yes. I believe the decision in Kerr-McGee v. NRC does tend to support the NRC regulation of pre-1978 FUSRAP waste. However, this specific issue was not addressed by the court. Consequently, there is ambiguity as to the extent of the NRC's authority in this area. Thus, a legislative solution is the most direct approach to clarifying the NRC's responsibilities under UMTRCA.

4. Would you, as NRC Chairman, support legislation that would absolutely make clear that pre-1978 FUSRAP waste should be regulated and disposed in licensed sites?

If Congress believes that the NRC should regulate such waste, I stand ready to assist the Congress in amending UMTRCA. The NRC would need additional resources to regulate pre-1978 material.

Meserve's letter specifically states that the responses presented represent his personal views and not necessarily those of the commission.

—TDL

U.S. NRC (continued)

NRC Approves Recommendations re Source Material

On March 9, NRC Commissioners responded to a staff requirements memorandum (SECY 99-259) concerning the control of source material, thus approving the following staff recommendations:

- that NRC staff should initiate interaction with staff of the federal Environmental Protection Agency, Department of Energy, Department of the Interior, Department of Transportation, Army Corps of Engineers, Occupational Safety and Health Administration (OSHA), and the states "to explore the best approach to delineate the responsibilities of the NRC and those agencies with regard to low-level source material (as defined in 10 CFR Part 40) or materials containing less than 0.05 % uranium and/or thorium";

- that NRC staff should develop a proposed rule to amend 10 CFR Part 40 to require prior commission approval for transfers of unimportant quantities of source material to exempt persons, and

- that NRC staff should develop a rulemaking plan to improve the control of distribution of source material to exempt persons and to general licensees.

As part of its effort, the Commissioners directed the staff to evaluate existing and planned regulation of NORM, TENORM, low-level source material, and materials containing less than 0.05 percent uranium and/or thorium and to assess the willingness of other agencies to assume responsibilities for certain levels of source material and other material.

Staff are directed to provide the Commissioners, within 12 months of the date of the staff requirements memorandum, a status report on the staff's activities and a plan for how to proceed.

With regard to transfers of unimportant quantities of source material to exempt persons, the Commissioners directed that the statement of considerations accompanying the draft proposed rule should state the staff would

- expect to approve transfers under this provision if the individual radiation dose is not expected to exceed 1 millisievert (100 millirems) per year, and

- inform the Commissioners in cases where the individual dose is expected to exceed 0.25 millisieverts (25 millirems) per year.

—TDL

NRC Proposes Advance Notice to Tribes re Transportation of Waste

On April 6, the U.S. Nuclear Regulatory Commission reopened the comment period on a December 21, 1999 advance notice of proposed rulemaking (ANPR) that would "require licensees to notify Federally recognized Native American Tribes of shipments of certain types of high-level radioactive waste, including spent nuclear fuel, before the shipments are transported to or across the boundary of Tribal lands." (See *LLW Notes*, January/February 2000, p. 30.)

The comment period, which was originally set to expire on March 22, was extended in response to a March 1 request from the National Congress of American Indians (NCAI). In granting the extension, NRC stated that "[i]n view of the importance of the issues described in the ANPR and the information needed to resolve these issues, the amount of additional time that the NCAI requested to provide comments on behalf of its 210 constituent Tribal governments is reasonable."

NRC reopened the comment period for an additional 90 days, with the new deadline set for July 5, 2000. Comments may be submitted on the Internet at

http://ruleforum.llnl.gov

They may also be mailed to: The Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, Attention: Rulemakings and Adjudications Staff.

—TDL

For further information, contact Stephanie Bush-Goddard of the NRC Office of Nuclear Material Safety and Safeguards at (301)415-6257.

NRC Grants First License Extensions for Commercial Plants

On March 23, the U.S. Nuclear Regulatory Commission granted an early license renewal application for two units of the Calvert Cliffs Nuclear Power Plant—the first license extensions granted to a commercial nuclear power plant. The renewal allows the plants, which are located in Maryland, to operate for an additional 20 years past their current expiration dates of 2014 and 2016. Operating licenses for the Calvert Cliffs reactors are now set to expire in 2034 and 2036.

Background Baltimore Gas and Electric Company originally submitted license renewal applications for the Calvert Cliffs units in April 1998. As part of the review process, NRC conducted an environmental review and prepared a safety evaluation report. Copies of these documents and others relating to the license renewal are available on the NRC's web site at

http://www.nrc.gov/OPA/reports/renewal.htm.

A copy of the staff's recommendations on the renewal application and the license conditions can be obtained at the same web site or from the NRC Public Documents Room.

Other Renewal Applications NRC is currently reviewing license renewal applications for six other nuclear power plants:

- Duke Power Co.'s Oconee 1, 2, and 3 in Greenville, South Carolina;
- Entergy Operations' Arkansas Nuclear One, Unit 1 near Russelville, Arkansas; and
- Southern Nuclear Operating Co.'s Hatch 1 and 2 near Baxley, Georgia.

—TDL

U.S. Department of Interior

USGS Says Atlas Mill Tailings Pile Should Be Moved

Preliminary results of a new study by the U.S. Geological Survey (USGS) and the U.S. Fish and Wildlife Service (USFWS) "support the USFWS' Biological Opinion that the Atlas Mill Tailings Pile [in Moab, Utah] is a site-specific source of ammonia that is entering the Upper Colorado River via the groundwater." Early results indicate that ammonia levels in the groundwater around the mill tailings can reach orders of magnitude higher than that allowed in drinking water by the Utah Division of Water Quality.

The site's former-owner, Atlas Corporation, has proposed to leave the tailings pile where it is and cap it with sand and rock at a cost of approximately $20 million. In 1998, NRC approved the Atlas proposal to stabilize it in place with a tight cover which will prevent precipitation from moving down into the pile and becoming contaminated. Atlas went bankrupt, however, and Price-Waterhouse became trustee of the site in 1999. The trustee is going forward with the Atlas plan for stabilization in place. Separately, the trustee will prepare a revised plan to clean up existing contamination.

Representative Chris Cannon (R-UT) has proposed the removal of the tailings instead at a cost of up to $300 million. U.S. Department of Energy Secretary Bill Richardson has expressed support for Cannon's proposal. However, NRC, not DOE, has jurisdiction over the 10.5 million tons of uranium tailings.

—TDL

U.S. Department of Energy

DOE Issues Record of Decision re Waste Management Program

On February 25, the U.S. Department of Energy issued a record of decision (ROD) for its Waste Management Program, which includes the treatment and disposal of low-level and mixed radioactive waste (65 *Federal Register* 10062). The ROD states:

> For the management of low-level waste (LLW) analyzed in the Final Waste Management Programmatic Environmental Impact Statement (WM PEIS), the Department of Energy (DOE) has decided to perform minimum treatment at all sites and continue, to the extent practicable, disposal of on-site LLW at the Idaho National Engineering and Environmental Laboratory (INEEL), the Los Alamos National Laboratory (LANL) in New Mexico, the Oak Ridge Reservation (ORR) in Tennessee, and the Savannah River Site (SRS) in South Carolina. In addition, the Department has decided to make the Hanford Site in Washington and the Nevada Test Site (NTS) available to all DOE sites for LLW disposal. INEEL and SRS also will continue to dispose of LLW generated by the Naval Nuclear Propulsion Program. For the management of mixed low-level waste (MLLW) analyzed in the WM PEIS, the Department has decided to treat MLLW at the Hanford Site, INEEL, ORR and SRS, and to dispose of MLLW at the Hanford Site and NTS. The Department also has decided to amend its 1996 ROD for the NTS Environmental Impact Statement, to implement the Expanded Use Alternative for waste management activities at NTS.

The *Federal Register* notice acknowledges the impact that DOE's decision will have in the States of Nevada and Washington but explains that the decision will enable the Department to integrate waste management activities among sites to promote expeditious, compliant, and cost-effective cleanup.

Copies of the record of decision can be obtained from the Center for Environmental Management Information, P.O. Box 23769, Washington, D.C. 20026-3769 or by calling (800)736-3282.

—TDL

DOE Updates Cleanup Forecast

In April, the U.S. Department of Energy issued an update to *Paths to Closure*—the department's long-term plan for accelerating cleanup of its nuclear weapons complex. *Paths to Closure* was originally published in 1998. The update provides new forecasts of site closure schedules and new, higher funding estimates. According to the report, cleanup work through 2070 will require the expenditure of approximately $151 to $195 billion.

The report describes ongoing cleanup and closure efforts at sites such as the Fernald Environmental Project and the Miamisburg Environmental Project in Ohio and the Rocky Flats Environmental Technology site in Colorado. It also reviews remediation efforts at sites where cleanup work will continue for the long term, such as the Hanford site in Washington, the Idaho National Engineering and Environmental Laboratory, the Oak Ridge Reservation in Tennessee, and the Savannah River Site in South Carolina.

Copies of the report are available at

www.em.doe.gov/closure/

—TDL

To Obtain Federal Government Information

by telephone

- DOE Public Affairs/Press Office . . . . **(202)586-5806**
- DOE Distribution Center . . . . **(202)586-9642**
- DOE's National Low-Level Waste Management Program Document Center . . . . **(208)526-6927**
- EPA Information Resources Center . . . . **(202)260-5922**
- GAO Document Room . . . . **(202)512-6000**
- Government Printing Office (to order entire *Federal Register* notices) . . . . **(202)512-1800**
- NRC Public Document Room . . . . **(202)634-3273**
- Legislative Resource Center (to order U.S. House of Representatives documents) . . . . **(202)226-5200**
- U.S. Senate Document Room . . . . **(202)224-7860**

by internet

- NRC Reference Library • (NRC regulations, technical reports, information digests, and regulatory guides) . . . . **www.nrc.gov/NRC/reference**

- EPA Listserve Network • Contact Lockheed Martin EPA Technical Support at (800)334-2405 or e-mail (leave subject blank and type help in body of message) . . . . . **listserver@unixmail.rtpnc.epa.gov**

  EPA • (for programinformation, publications, laws and regulations) . . . . **www.epa.gov**

- U.S. Government Printing Office (GPO) (for the *Congressional Record*, *Federal Register*, congressional bills and other documents, and access to more than 70 government databases) . . . . **www.access.gpo.gov**

- DOE's National Low-Level Waste Management Program, Document Information **199.44.46.229/radwaste**

- GAO homepage (access to reports and testimony) . . . . **www.gao.gov**

To access a variety of documents through numerous links, visit the LLW Forum web site at www.afton.com/llwforum

Accessing LLW Forum Documents on the Web

LLW Notes, *LLW Forum Meeting Reports* 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. As of March 1998, *LLW Notes* and *LLW Forum Meeting Reports* are also available on the LLW Forum web site at www.afton.com/llwforum. The *Summary Report* and accompanying *Development Chart,* as well as LLW Forum *News Flashes,* have been available on the LLW Forum web site since January 1997.

As of March 1996, back issues of these publications are available from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, (703)605-6000.

Low-Level Radioactive Waste Disposal Compact Membership

Appalachian Compact
Delaware
Maryland
Pennsylvania *
West Virginia

Central Compact
Arkansas
Kansas
Louisiana
Nebraska *
Oklahoma

Central Midwest Compact
Illinois *
Kentucky

Midwest Compact
Indiana
Iowa
Minnesota
Missouri
Ohio
Wisconsin

Northwest Compact
Alaska
Hawaii
Idaho
Montana
Oregon
Utah
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
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
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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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