LLW notes

Volume 14, Number 3 April 1999

North Carolina Authority Recommends "Decay in Storage" Facility Study

At a meeting on March 14, the North Carolina Low-Level Radioactive Waste Authority voted to make development of a hybrid "decay in storage" (DIS) and disposal complex its top recommendation to the state legislature. Under this waste management strategy—which the Authority has described as "the best approach for managing the LLRW and providing the funding to accomplish this task"—the Authority and its contractors would first build a long-term DIS facility. Revenues from operation of that facility would then be used to finance eventual construction of a small disposal facility on the same site.

Two other waste management options were also recommended to the legislature by the Authority in diminishing level of priority:

- appropriation of $10 million to cover the funding shortfall for completion of the Licensing Work Plan for the Authority's application for a disposal facility, or

- consideration of a proposal by the Southeast Compact Generators' Group to lend funds to the Authority for implementation of the Licensing Work Plan under certain conditions described in a nonbinding memorandum of understanding. (See *LLW Notes*, Winter 1997, p. 5 and *LLW Notes*, August/September 1997, pp. 4–5.)

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Southeast Compact Finds North Carolina in Violation of Obligations

On April 21, the Southeast Compact Commission for Low-Level Radioactive Waste Management voted to notify North Carolina Governor Jim Hunt (D) and the state legislative leadership that the state has not met its legal obligations as the compact's host state.

The action took place on the second day of a two-day meeting of the commission in Raleigh, North Carolina. A resolution adopted by the commission declares that North Carolina "stands in violation of the compact law, threatening the health and safety and economic well-being of the citizens of seven states by failing to proceed with the process of providing for the disposal of the region's low-level radioactive waste." The resolution asks the elected officials to provide the commission with a written plan and schedule for returning to compliance and, ultimately, providing for disposal.

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In This Issue

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Low-Level Radioactive Waste Forum

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

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LLW FORUM

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Key to Abbreviations

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

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Northwest Compact

Comment Sought on Envirocare License Amendments

In a recent public notice, the Utah Radiation Control Board solicited public comment regarding an initial decision to amend Envirocare of Utah's radioactive material license. The decision grants three requests submitted by Envirocare in the first quarter of 1999.

According to state regulators, the most significant changes proposed by the company pertain to the acceptance of special nuclear material (SNM). The amended license would allow Envirocare to dispose of limited concentrations of the following additional radionuclides, which may be present in SNM:

- uranium 232 (74,000 pCi/gram)
- plutonium 236 (500 pCi/gram)
- curium 237 (500 pCi/gram)
- plutonium 244 (500 pCi/gram)

Envirocare would also be able to accept higher concentrations of uranium 235 (up to 2,100 pCi/gram instead of 1,700 pCi/gram).

These changes are being made in anticipation of an NRC action to grant Envirocare an exemption from the 350-gram possession limit for SNM. (See *LLW Forum Meeting Report: February 9–12, 1999*, p. 3.) NRC's issuance of the exemption will depend upon the state's establishment of adequate controls through concentration limits.

In addition to the changes concerning SNM, the amended license contains revised requirements for staff qualifications, organizational procedures, and waste management procedures.

A thirty-day public comment period on the amendments began on April 15. Written comments are due by May 15.

—CN

For further information, contact William Sinclair of the Radiation Control Board at (801)536-4250, eqrad.bsinclai@email.state.ut.us or Tim Harris of NRC at (301)415-6613, teh@nrc.gov

Much of the preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates via e-mail on April 12.

Southeast Compact/North Carolina (continued from page 1)

Prior to the commission's adoption of the resolution, representatives of the North Carolina Authority reported on the Authority's recent recommendations to the state legislature regarding waste management options such as development of a facility for decay in storage. (See related story, this issue.)

Response from North Carolina

Sean Walsh, a spokesperson for Governor Hunt, said that the Governor "believes North Carolina is living up to its responsibility to the compact while making public health and safety of our people the top priority."

Background

Development of a regional disposal facility in North Carolina has been at an impasse since December 1997, when the Authority resolved to "begin the orderly shutdown" of the project following a funding dispute with the Southeast Compact Commission. (See *LLW Note*s, February 1998, pp. 4–5.) Generators and the commission have jointly provided approximately $80 million for site development over the past 11 years, and the state has spent about $32 million.

—CN

For further information, contact Kathryn Haynes or Ted Buckner of the Southeast Compact Commission at (919)821-0500.

Southeast Compact/North Carolina (continued from page 1)

In the event that the legislature selects the latter option, the Authority requested direction on which of the proposed conditions would be acceptable.

Technical Committee's Actions

The Authority's technical committee and staff have studied decay in storage, as well as other waste management options, since December 1997.

On April 5, 1999, the Technical Committee adopted a resolution recommending that

> the General Assembly consider that the problem of the storage of low-level radioactive waste is of sufficient concern, specifically regarding public health and safety, that the Legislature may wish to consider enacting permanent or temporary rules with regard to licensing a Decay in Storage facility which would dramatically reduce the time frame for enactment of rules for the licensure of such a facility.

The Authority has forwarded this resolution to the legislature along with suggested statutory changes and other documents supporting its recommendations.

Schedule

The Authority estimates that licensing and construction of a DIS facility could be completed in 38 months, assuming no delays from factors such as third-party litigation. However, the Authority notes in its recommendations that state regulators have indicated an additional 24 months would be required for the rulemaking process preceding the licensing. The Authority and the Technical Committee have recommended legislative intervention to expedite this process.

Cost and Funding Implications

According to the Authority, development costs for a DIS facility should be "substantially less" than for a permanent disposal facility. Operational costs would also be reduced, although long-term maintenance costs would be "somewhat increased."

The Authority estimates that an initial expenditure of approximately $6 million would be required to purchase the land for the DIS facility and to pay for the Authority's licensing contractor to prepare the license application. The Authority envisions that these moneys would be supplied by the Southeast Compact Commission, while the State of North Carolina would fund the activities of the Authority and the state's licensing agency.

Projections indicate that construction of storage and support buildings adequate to provide two years' capacity would cost an additional $20 million. The Authority's licensing contractor has offered to forward the funds for these costs. Revenues from storage fees would be used as surety for the debt and to pay for facility operations and expansion. Ultimately, ongoing receipts from fees would be used for development of a disposal facility, repayment of project development funds provided by the state, and satisfaction of other financial obligations.

Suggested Compact Changes

The Authority has recommended that the state legislature make pursuit of any facility conditional on receiving the following commitments from the Southeast Compact Commission:

A. That all Compact states change their compact enabling laws to prevent withdrawal from the Compact prior to starting construction of the DIS facility;

B. That the Southeast Compact Commission commit available unreserved funds to the DIS licensing effort; and

C. That the Compact Commission adopt rules to disallow export of waste for storage or disposal to a site other than the Compact's site, or give the host state veto power over export once the DIS facility is opened.

—CN

For further information, contact Andrew James of the North Carolina Authority at (919)733-0682.

Waste Management at a DIS Facility

A DIS facility, as described by the Authority, would consist of both waste storage buildings and ancillary buildings. Each storage building would consist of a "warehouse-type structure" made of steel-reinforced concrete. Aisle space would be provided to allow periodic inspection of all packages.

For each package of **class A waste** accepted at the facility, a release date would be calculated based on its known characteristics. Waste packages would be stored in proximity to other packages with similar release dates. At their scheduled release dates, waste packages would be moved to an ancillary building for inspection. Waste within the release limits would then be sent for recycling or for disposal as non-radioactive or very low activity waste. According to the Authority, "[s]ome wastes could be removed from the facility after only a few years, whereas most of the wastes would have to be stored for over 100 years."

Class B and class C wastes would also be accepted at the facility, but only for temporary storage until a suitable disposal facility is available. It is anticipated that much of this waste would decay to class A levels over the course of the storage period.

The Authority's recommendations to the legislature concerning low-level radioactive waste management cite the following advantages and disadvantages of a DIS facility. (Exact quotations are used.)

Advantages:

1. May shorten the period of time required to develop a facility that can start accepting waste since the Decay In Storage facility would not have to be the type of heavily engineered disposal facility envisioned in current regulations for waste disposal (providing the N.C. Legislature enacts enabling legislation that provides for licensing without an extensive rulemaking process);

2. Concentrates waste that is now stored in some 90 different storage areas around the state into one well-designed and monitored facility;

3. Reduces some of the licensing cost and the construction of the traditional disposal facility due to the reduction in the area needing characterization and the size of the final disposal facility;

4. Provides the generators with an economical place to dispose of the waste;

5. Generates funds from storage fees for licensing and construction of the disposal facility;

6. Fulfills the State Legislature's mandate to provide a disposal facility for the wastes generated within the state and region;

7. Provides N.C. with a site at least cost since we would be utilizing Compact funds, provided they agree, to license the storage facility and funds to continue licensing the disposal facility would be generated from DIS operating revenues;

8. The Authority has an offer from its licensing contractor to fund construction and startup of the DIS portion of the facility which would eliminate the need to raise additional capital (Authority bonds) to finance construction; and

9. Could be a less costly option since inventory and nature of waste requiring disposal would be known before any disposal facility design and construction commenced.

Disadvantages

1. Rules under which the storage facility would operate are unknown at this time and could require additional rulemaking that could cause significant delay;

2. DIS requires much longer active monitoring period than if waste were disposed of at receipt; and

3. Would require change to the Authority's General Statute.

Southwestern Compact/California

Governors Support Southwestern Compact

In March, the Governors of two of the Southwestern Low-Level Radioactive Waste Compact's four member states wrote to California Governor Gray Davis (D) to express continued support for development of a regional disposal facility.

Arizona Governor Jane Dee Hull (R)

In correspondence dated March 8, Governor Hull wrote as follows.

> Since the signing of the Compact, public and private sector entities in Arizona, and in the other party states, have attempted to factor in the availability of the Compact to meet the long-term low-level radioactive waste disposal needs of the partnership. Timely access to the disposal facility remains extremely important to our common region's universities, medical research institutions, biotechnology industry, and electric utilities.
>
> I continue to support the Compact and the commitments on the party states that it contains. I appreciate that California is continuing to pursue the federal land transfer required to develop and operate the disposal site at Ward Valley. While I am optimistic that this policy will not be altered, should a shift in policy be contemplated, as a party to the Compact I would appreciate the opportunity to have meaningful input prior to your administration reaching any final decision.

South Dakota Governor William Janklow (R)

Governor Janklow reinforced Governor Hull's views in a letter dated March 23.

> Since entering into the compact in 1989, the State of South Dakota has offered its support to the timely development of a long-term low-level radioactive waste disposal facility to meet the shared needs of compact members. Our obligations to meet these needs are reflected not only in the Southwestern Compact, but also through contracts entered into between the member states and other parties. I am encouraged that California is continuing to pursue the land transfer relative to the proposed Ward Valley facility. I share Governor Hull's concern that departures from our mutually determined plans should be considered in consultation with the other member states.

—CN

The preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates via facsimile transmission in a News Flash on April 13, 1999.

Entergy Arkansas v. State of Nebraska

District Court Determines Nebraska License Denial May Have Been "Politically Preordained"

On April 16, the U.S. District Court for the District of Nebraska issued a preliminary injunction against the State of Nebraska 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.

The preliminary injunction, which basically extends a temporary restraining order granted by the same court on March 8, 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 Compact Commission, or US Ecology.

The court cautioned, however, that the facts are complex, the litigation is in an early stage, and "a 13-hour evidentiary hearing on a motion for preliminary injunction is no substitute for a trial."

The court's order, while focusing on the specifics of the case before it, involves an analysis of the interrelationship between a compact and its host state that may be of interest to Forum Participants and Alternates. The court specifically cautioned its readers to keep in mind that this case is not about the "parochial interests" of Nebraska or its politicians, but rather about "serious questions regarding the supremacy of federal law and the national problem of low-level radioactive waste."

In explaining its decision, the court stated:

> The defendants took eight years to say "no" to an application to construct a low-level radioactive waste disposal site. In the process, they required the plaintiffs to spend more than $74 million. A large portion of that huge sum went directly to Nebraska. There is good reason to think that the license denial was politically preordained.
>
> In what may be the ultimate expression of "chutzpah," the defendants want millions more from the plaintiffs to defend this lawsuit. They also seek to force some of the plaintiffs to participate in and fund an administrative hearing. The defendants make this demand though those plaintiffs, as the parties entitled to the review, do not wish to go on with or pay for that hearing. The plaintiffs assert that I should maintain the status quo until deciding the fundamental question of whether Nebraska has violated its federal obligation under an interstate compact to exercise good faith when dealing with the waste disposal application.
>
> Agreeing with the plaintiffs, I now issue a preliminary injunction against the defendants. In short, the defendants will have to pay for their own defense, and the administrative hearing will be stayed, until the much broader and more fundamental question of good faith can be answered.

Court's Decision to Grant Injunctive Relief

The Law The U.S. Court of Appeals for the Eighth Circuit has identified four factors to consider in evaluating a motion for preliminary injunctive relief:

- the threat of irreparable harm to the moving party;
- the state of balance between the threat of harm to the movant and injury that may be inflicted on other litigants if injunctive relief is granted;
- the likelihood that the moving party will succeed on the merits; and
- the public interest.

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Entergy Arkansas v. State of Nebraska (cont.)

Threat of Irreparable Harm The court determined that, absent injunctive relief, the plaintiffs would be exposed to the possibility of irreparable harm in the form of financial loss and preclusion from judicial relief.

On financial issues, the court noted that the loss of money is not normally indicative of irreparable injury. However, the court found that the threat of financial loss constitutes irreparable harm in this case due to Nebraska's claim that the Eleventh Amendment prohibits the court from awarding damages against the state—meaning that the plaintiffs may never be able to recoup the $7.5 million estimated cost of a contested case hearing which the state seeks to charge against them. Regarding Nebraska's intent to use utility money to defend against the present suit, the court commented that "by shifting the defendants' fees to the [plaintiffs], the defendants enable themselves to spend any money they want in order to defeat this suit knowing that the [Central Compact] Commission will be required to foot the bill."

The preclusion concern involves the question of whether a decision in the contested case hearing, or an appeal of that decision to a state district judge, would preclude a federal court from reviewing such decisions. The court indicated that such review may be necessary due to the nature of the hearing process, which calls for a decision on the contested case to be made by the same department heads who made the original licensing decision. The court stated that its concerns are exacerbated by the fact that the hearing officer has stated in advance that he will not consider the plaintiffs' claims that the state acted in bad faith—claims which the court found to be supported by strong evidence. "Since Nebraska will not allow the Commission to pursue the question of bad faith in the contested case, it is inconceivable that the Commission['s] 'good faith' rights under the Compact can be protected."

Balance of Harm The court determined that granting injunctive relief will not cause any harm whatsoever to the defendants, but rather will merely preserve the status quo.

> As noted, the license will remain denied and the litigants in this court will pay their own fees. As far as delay is concerned, it took Nebraska eight years to arrive at a decision to deny the application. The defendants are in no position to complain about a little more time.

Likelihood of Success on the Merits The court held that there is strong evidence that the plaintiffs may succeed on the merits. (See "There Has Been A Substantial Showing of Bad Faith," pp. 10-12.)

Interrelation Between State Law and the Compact

In addressing Nebraska's argument that the state's contested case law and regulations limit the plaintiffs' ability to pursue claims of bad faith and political influence in a contested case hearing, the court indicated that such restrictions violate the compact and constitute a basis for invalidating state law and regulations. The court opted, however, not to void Nebraska's contested case structure and instead to merely stay the proceedings.

> I reject Nebraska's argument that "offers of proof" and the possibility of limited impeachment evidence are adequate substitutes for the Commission's substantive claim that the denial must be overturned because it was issued as a pretext for politics. The Compact gives to the Commission the right to enforce Nebraska's obligation of good faith, and Nebraska has no right to dilute the Compact's requirement of good faith by use of a stunted procedural mechanism.
>
> Because of this point, I could declare Nebraska's "contested case" law and regulations invalid under the Compact because they are inconsistent with it. The Compact declares that "[n]o party state shall pass or enforce any law or regulation which is inconsistent with this compact." Also "all laws and regulations or parts thereof of any party state which are inconsistent with this compact are hereby declared null and void for purposes of this compact." A stay of the proceeding is surely preferable to a declaration that Nebraska's "contested case" scheme is inconsistent with the Compact's "good faith" requirement. (citations omitted)

Public Interest The court found that the public interest supports the granting of injunctive relief.

> The public interest includes not only the citizens of Nebraska who oppose the waste disposal facility but also the citizens of Kansas, Oklahoma, Arkansas, and Louisiana. Under the Compact, all of these states, and their citizens, had an explicit right to expect that Nebraska would exercise good faith. Congress also expected that Nebraska would act in good faith when it consented to the Compact. Preserving the status quo until the good faith issue can be litigated will further the public interest.

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Application of State Immunity, Exhaustion and Abstention Doctrines, and the Anti-Injunction Statute

In considering the plaintiffs' likelihood of success, the court addressed several affirmative defenses that could be raised against their claims.

State Immunity The court determined that, upon signing the compact, Nebraska at least in part expressly waived its Eleventh Amendment immunity against suit.

> Among other things, the Commission requests prospective equitable relief including the appointment of an independent impartial decision maker to decide the license denial question. That relief is clearly and expressly contemplated by the Compact when it obligates ("shall") the Commission to "[r]equire all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action" in a court (specifically including a federal court). Likewise, Nebraska has an explicit duty and obligation to exercise "good faith." ("Each party state has the right to rely on the good faith performance of each other party state."). Reading these two provisions together, Article IV of the Compact specifically gives the Commission the authority to enforce the Article III "good faith" promise as a "duty and obligation" of a member state. To this extent, Nebraska has expressly waived its Eleventh Amendment immunity when it signed the Compact. (citations omitted)

Exhaustion Doctrine Although litigants are normally required to exhaust administrative remedies before taking their case to court, such a requirement does not apply in this case according to the court because the plaintiffs' need for immediate judicial review outweighs the government's interest in efficiency or administrative autonomy. Moreover, the court found that "there is no authority that suggests when Congress adopted the Compact it intended to require the Commission to exhaust state administrative remedies as a condition for bringing a suit to enforce the good faith provisions of the Compact."

Abstention Doctrine The abstention doctrine provides a federal court with the discretion to relinquish jurisdiction in order to avoid conflict with the administration by a state of its own affairs. The court, however, held that the doctrine does not apply "[w]here, as in this case, there has been a substantial showing that the state proceeding is infected by bad faith and there is a similar showing of irreparable injury."

Anti-Injunction Statute The anti-injunction statute generally limits a federal court from granting injunctive relief to stay proceedings in a state court. The district court, however, held that the statute does not apply to an administrative licensing hearing, particularly since the hearing officer does not make an actual decision but rather issues recommendations. "[T]he anti-injunction statute does not apply to what is no more than a continuation of the licensing process."

Entergy Arkansas v. State of Nebraska (continued)

"There Has Been A Substantial Showing of Bad Faith"

In support of its finding that the plaintiffs have a substantial likelihood of succeeding on the merits and as a basis for its decision to grant injunctive relief, the court detailed various events that it determined constitute "strong evidence of bad faith" on the part of Nebraska during the license review process. The following is a brief summary of some of those events, as characterized by the court.

Persons interested in a more detailed explanation are directed to the court's opinion, as well as to other court filings.

Nelson Campaign Promises and Actions by State Officials During the 1990 election campaign, former Nebraska Governor Benjamin Nelson stated, "If I am elected governor, it is not likely that there will be a nuclear dump in Boyd County or in Nebraska." The sentiment was echoed in a Nelson staff member's memorandum of December 1990, entitled "Campaign Promises," which stated "[u]pon taking office [you] will order a moratorium on further development of the facility/the current plan …" Moreover, in what the court describes as "an apparent effort to assure that [Nelson's] political promise would be carried out," his subordinates altered the licensing process after his election, discontinuing regular exchanges of information between US Ecology and the state's license application reviewers and refusing to accept the developer's responses to the state's technical review comments and questions until all responses were completed—actions which the court found significantly extended the length and cost of the license review process.

Disregard of Auditor's Recommendations re Budget and Timetable Despite a July 1992 state audit that found that the license review program of the Nebraska Department of Environmental Quality (NDEQ) needed to adopt a budget and timetable, the court found that the department failed to do so "potentially resulting in the waste of eight years of work and more than $74 million." The court noted that the auditor specifically pointed out that NRC guidelines indicate that a license review should be completed within a 15-month time frame utilizing approximately 16,640 person hours.

Disregard of Legal Opinions re Wetlands and 1993 Notice of Intent to Deny In October 1991, a private law firm hired by the State of Nebraska produced a lengthy legal opinion in response to NDEQ's concern that the existence of wetlands and flood plains near the proposed site would violate the state's site suitability requirements. The opinion determined that "[b]ased on an analysis of the language and intent of the applicable regulation, it appears that Nebraska's site suitability requirements would not be violated if US Ecology's disposal facility were to be located as proposed." Nonetheless, in January 1993, a Notice of Intent to Deny the license application was issued based on an alleged nonconformance with site suitability requirements, including the presence of wetlands within the disposal site boundaries. (See *LLW Notes*, September 1993, p. 5.)

Regulatory Slowdown In March 1995, following a dispute between NDEQ and the Central Commission over the distribution of 1993 DOE surcharge rebate funds, NDEQ directed a 25-percent reduction in all billings for license review activities by the state's primary contractor. The court indicated that the slowdown was inappropriate. Moreover, the court expressed dismay at its finding that "the Nelson administration used a part of the rebate funds to pay the salaries of Nelson staffers who worked against the license application."

Inconsistency Between 1998 Decision to Deny and Prior Regulatory Positions In August 1998, NDEQ and the Nebraska Department of Health and Human Services Regulation and Licensure—formerly known as the Nebraska Department of Health (NDOH)—announced that they intended to deny US Ecology's license application. Five negative findings related to groundwater conditions at the proposed site were cited as a basis for the intent to deny. (See *LLW Notes*, August/September 1998, p. 3.) However, the court, while acknowledging the technical complexity of the matter, found that the negative findings were all contradicted by earlier findings in the draft safety and environmental reports issued in 1997. The court concluded, therefore, that "[s]uch conditions were known to the State in 1993 or sooner" and that "there is strong evidence that the change in position may have been a pretext." The court was particularly troubled by the departments' decision to stop using a computer model to decide whether groundwater would flow

to the surface as they had done in the draft safety report. According to the court, "in the 1998 report, [the departments] simply 'eye-balled' the data and concluded, without using the computer model they had previously employed in 1997, that groundwater could discharge to the surface." NDEQ's director argued at the preliminary injunction hearing that the discontinuation of use of the computer model was justified, but the court was apparently not persuaded, stating that "[t]he failure to follow a consistent methodology is problematic at best, and evidence of bad faith at worst."

Inclusion of NDOH in the Decisionmaking Process NDOH was an active participant in the decisionmaking process. However, in February 1998, the District Court of Lancaster County, Nebraska, held among other things that the State Low-Level Radioactive Waste Disposal Act provides for only one agency to review the license application and that NDEQ is the appropriate agency to do so. The court rejected the state's argument that a memorandum of understanding between the agencies conferred authority over the license application to NDOH, holding that any such agreement may not expand the agency's authority beyond that which is lawfully delegated to it by statute. (See *LLW Notes*, March 1998, pp. 19–21.) An appeal by Nebraska of the court's decision is currently pending before the Supreme Court of the State of Nebraska.

Failure to Meet Licensing Deadline In September 1996, the Central Commission passed a resolution setting a schedule for timely completion of the technical license review process. Nebraska subsequently failed to meet that schedule and sued the commission in federal district court to void the schedule. (See *LLW Notes*, February 1997, pp. 14–16.) The court, however, held in October 1998 that the commission had the authority to impose a license review deadline and that the deadline imposed by the commission was reasonable. (See *LLW Notes*, December 1998, pp. 19–20.) An appeal by Nebraska of the court's decision is currently pending before the U.S. Court of Appeals for the Eighth Circuit.

Repeated Litigation The court noted that six separate lawsuits over the proposed facility that have been filed against the Central Commission or US Ecology by the State of Nebraska or a closely related political subdivision warrant discussion.

> In general, all the suits lacked merit. In one case, Nebraska's suit was so lacking in merit that [the court] concluded "the motion for sanctions is generally meritorious." In another case, [the court] observed that "Governor Nelson, the State of Nebraska and Plaintiffs [Boyd County Local Monitoring Committee] in this case were so 'closely related' " that there appeared to be "a coordinated litigation strategy" and "the State of Nebraska and its constituent political bodies … are not entitled to wage what might be characterized as hit-and-run guerrilla warfare by filing multiple lawsuits on the same claim in order to frustrate performance of the Compact." (citations omitted)

Political Influence The court expressed great concern that there is evidence of improper political influence in the license review and decision and in the process for holding a contested case hearing. Among the concerns cited by the court are the following:

- The court found that "there is disturbing evidence that political influence was in fact visited upon the directors of the two departments who denied the license application" and that "the directors made a political decision, rather than a good faith regulatory decision, to deny the license application." Among other things, the court noted that despite testimony by the former director of NDEQ that no one ever tried to influence him, the director admitted that he conferred privately with then-Governor Nelson before announcing any important decision on the license application. "For example, he conferred with Nelson before the January, 1993, tentative denial decision was announced, before the tentative denial decision was announced in August of 1998, and before the final denial decision was announced in December of 1998. Going 'by the book' would require that these discussions not take place prior to the decision being made public."

- The court found that "[t]here is evidence that Governor Nelson and the [Boyd County] Local Monitoring Committee were closely allied and worked together to defeat the license application." Evidence cited by the court includes (1) the filing of nearly identical lawsuits by the Governor and the monitoring committee, (2) an e-mail from a Nelson staffer to her superiors encouraging Nelson to meet with the the local monitoring committee and reminding them that the committee "can still

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be used by the Governor to do things he cannot do directly," and (3) the inclusion of funds related to the holding of a contested case hearing in the local monitoring committee's 1999 budget—which budget was submitted to NDEQ's Director one month prior to denial of the license application.

- Prior to the issuance of the 1993 Notice of Intent to Deny, the Nebraska Attorney General was requested to provide a legal opinion to settle a dispute between NDOH and NDEQ over whether US Ecology could engineer around site suitability problems. NDEQ took the position that US Ecology could engineer around the problems, whereas NDOH argued that they could not. The court found that there is preliminary evidence that a Nelson staffer "pulled the plug" on issuance of the legal opinion upon learning that it concluded that there is a legal basis for NDEQ's position.

- The court indicated that it is distressed that the two state regulatory agencies are being represented in the contested case hearing by a private law firm in which former Governor Nelson is "of counsel" and that the hearing officer has tentatively agreed with the state that Nelson should not be subject to discovery or testimony.

Next Step

As of press time, the State of Nebraska had not yet determined whether to appeal the court's decisions to enjoin the state from holding a contested case hearing and from collecting or expending additional funds from the generators. The state has 30 days from the issuance of the court's order, or until May 17, in which to file a notice of appeal.

A trial on the lawsuit has been tentatively scheduled for February 2001. At that time, the court will make a final decision on the holding of the contested case hearing and on use of utility funds, as well as on the plaintiffs' request for financial damages and for the removal of Nebraska from the licensing process.

—TDL

The preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates via facsimile transmission in a News Flash on April 22, 1999.

Reaction to Court's Order

Nebraska Governor Mike Johanns

> Based upon the arguments in the case during last Saturday's hearing, this decision was not unexpected. I will be working with Attorney General Don Stenberg to evaluate legal options and, as has always been the case, prepare to defend Nebraska's interests vigorously.

Nebraska Attorney General Don Stenberg

The Attorney General issued a press release stating that he will be consulting with the Governor concerning the possibility of an appeal of the preliminary injunction. In addition, the Attorney General made the following statement:

> I am very concerned about the precedent of a federal court enjoining an ongoing state administrative process. Such action by a federal court is highly unusual and nearly unprecedented. In my opinion, there should be a greater respect for state sovereignty.

Laura Mack Gilson, Chair, Central Interstate Low-Level Radioactive Waste Commission

> I'm glad that the judge understands the position that we've been in. I'm just sorry that we're having to pursue remedies in federal court.

Jack Lemley, Chair and Chief Executive Officer of American Ecology

> US Ecology and compact members have invested tremendous effort and tens of millions of dollars to meet the states' obligations under the law, and now Nebraska's motives in denying the effort are revealed.

Loren Sieh, Chair, Boyd County Local Monitoring Committee

> Truthfully, in my opinion, the judge believed everything the compact and companies said. He showed total bias against the State of Nebraska.

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 (NDEQ) and Nebraska Department of Health and Human Services Regulation and Licensure were named as defendants to the action, as were several of the departments' employees, contractors, and subcontractors. The Central Interstate Low-Level Radioactive Waste Commission was also originally named as a defendant in the suit, due to its nature as a necessary party, 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 the Nebraska Department of Health and Human Services Regulation and Licensure. 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 other than the Central Commission 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.

Other Litigation To date, at least 14 separate lawsuits have been filed regarding the proposed low-level radioactive waste disposal facility in Boyd County, Nebraska. One was resolved by a state district court in favor of the facility proponents. Ten others—including four that were heard by the federal judge presiding over the current action—were resolved by a federal district court in favor of facility proponents. One was settled out of court after the same judge refused to grant cross-motions for summary judgment upon a finding that the "good faith" of Nebraska was a material issue. Two others—including one with the same judge—remain pending before lower courts.

Of the 11 suits in which a district court decision was issued, five were never appealed, three were affirmed by the U.S. Court of Appeals for the Eighth Circuit, two are currently pending on appeal to the U.S. Court of Appeals for the Eighth Circuit, and one is pending on appeal to the State Supreme Court.

California Department of Health Services v. Babbitt
US Ecology v. Babbitt

Federal Court Declines to Order Ward Valley Land Transfer

Breach of Contract Action Still Pending

On March 31, the U.S. District Court for the District of Columbia issued an order in favor of the federal government in consolidated lawsuits concerning the site for the proposed low-level radioactive waste disposal facility in Ward Valley, California. The actions, which were filed by the State of California and US Ecology in January 1997, sought to compel the U.S. Department of Interior to transfer the federal land on which the site is located to the state. (See *LLW Notes*, March 1997, pp. 1, 16–20.) The court, however, declined to order the federal government to perform the transfer.

Separate lawsuits concerning the site remain pending before the U.S. Court of Federal Claims. In these suits, the State of California and US Ecology are pursuing financial relief for breach of contract claims related to the land transfer request. It is not clear when a court decision on the cases will be made. (See *LLW Notes*, April 1997, pp. 18–20.)

Issues and the Law

The court determined that two issues needed to be addressed in order to respond to the plaintiffs' claims seeking to compel transfer of the site:

- whether Interior Secretary Bruce Babbitt's decision to rescind former-Interior Secretary Manuel Lujan's issuance of a Record of Decision (ROD) approving direct sale of the Ward Valley site to the State of California was arbitrary and capricious under the Administrative Procedure Act, and

- whether the plaintiffs were entitled to mandamus relief, i.e., a court order commanding a public official to perform a purely ministerial duty imposed by law.

The court noted, however, that in reviewing whether an agency's action is arbitrary and capricious, a court is required to give deference to the agency. The standard for determining arbitrary and capricious behavior is a narrow one, and the court may not substitute its own judgment for that of the agency.

The court also noted that "[n]o regulations preclude the Secretary of the Interior from rescinding or withdrawing a ROD after it has been issued."

Analysis of Rescission Decision

Impact of Actions to Extend Existing Temporary Restraining Order In reviewing Secretary Babbitt's rescission decision, the court first focused on actions taken in a case before the U.S. District Court for the Northern District of California on January 19, 1993—the same day that Lujan issued the Record of Decision. The court in that case, *Desert Tortoise v. Lujan*, issued a temporary restraining order (TRO) that prevented Lujan from transferring the Ward Valley site. (See *LLW Notes*, February 1993, p. 14.)

The TRO expired on January 19. On the morning of January 19, however, the court held a hearing during which the judge orally indicated an intent to extend the TRO due to, among other things, a concern that the court would be unable to undo a transfer should it occur. At some point thereafter, Lujan signed the ROD. The court then entered an order at 9:26 p.m. EST holding that Lujan was "temporarily restrained and enjoined … from executing any document or taking any other action [on the Ward Valley land transfer], including but not limited to signing any patent."

The plaintiffs argued that the ROD did not violate the TRO order for two reasons:

- at the time the ROD was signed, a written order had not yet been entered extending the TRO and specifically explaining what actions by Lujan were prohibited, and
- the ROD did not pass legal title but rather only equitable title to the land. (Legal title refers to that which is cognizable or enforceable in a court of law, whereas equitable title refers to a beneficial interest in the property.)

The court, however, rejected the plaintiffs' arguments as follows:

> As to the plaintiffs' first contention, while it is true that a TRO must provide fair notice of what it is enjoining … plaintiffs cannot seriously contend that Secretary Lujan did not have fair notice of what he was enjoined from doing, especially in light of the [Assistant U.S. Attorney's] representations to Judge Patel that the Secretary had not yet signed the ROD on advice that signing the ROD might violate the TRO, and that depending upon the outcome of the hearing, the Secretary wanted to sign the ROD. The clear inference is that the Secretary's understanding of the TRO was that it would be okay to sign the ROD only if Judge Patel did not extend the TRO. Judge Patel did, however, extend the TRO. Furthermore, even under the narrow interpretation of "transfer" urged by plaintiffs, Secretary Lujan was on notice that he should not do anything regarding making a decision to convey the land … As to the plaintiffs' second contention, the Court cannot find tenable plaintiffs' distinction between equitable and legal title given plaintiffs' position that the passing of equitable title bound Secretary Lujan's successor.

Lujan's Changing Position As part of its review, the court also looked at Lujan's historical position concerning the land transfer and his administrative actions prior to signing the ROD. In particular, the court noted that "[a]s late as the end of December 1992, Secretary Lujan's position was that the land transfer would not be completed before the end of the Bush Administration."

Within a month, however, Lujan transformed a supplemental environmental impact statement (SEIS) that was being completed on the transfer into an environmental assessment (EA)—thereby cutting off the public comment period. The SEIS, however, merely addressed a change in the method of transfer. The EA contained a finding of no significant impact (FONSI) on the change in transfer methodology.

Based on these facts, the court determined that Secretary Babbitt had a reasonable basis on which to rescind the ROD because he was aware that Lujan was under a TRO to refrain from taking any action on the land transfer and because Lujan's decision cut off the public comment period without addressing the majority of comments received.

> [W]hen Secretary Lujan reversed his earlier position that the transfer would not be completed before the end of the Bush Administration, and transformed the final SEIS into an EA, he removed the issue from public comment in the middle of the public comment period … [A]t the time Secretary Lujan made his decision, he only addressed six of the approximately 200 protests received in response to the [Notice of Realty Action]. Secretary Babbitt's decision merely restored the status quo ante to the date of the close of the public comment period on the SEIS. Under these circumstances, the Court cannot say that Secretary Babbitt's decision was arbitrary and capricious.

Since the court found that Babbitt's decision was valid based on the outstanding TRO and Lujan's administrative actions, the court determined that it need not address the question of Lujan's legal authority to redesignate the SEIS as an EA.

continued on page 16

California Department of Health Services v. Babbitt
US Ecology v. Babbitt (continued)

Claim for Mandamus Relief

Plaintiffs' Position While acknowledging that the Federal Land Policy and Management Act (FLPMA) entrusts the Interior Secretary with discretion concerning the transfer of federal lands, the plaintiffs argued that Lujan's signing of the ROD constituted final agency action. Accordingly, they asserted that the Secretary's discretion terminated with the signing of the ROD and that Babbitt had a ministerial duty to transfer the land patent. Since Babbitt failed to transfer the patent, the plaintiffs argued that they are entitled to mandamus relief unless there is illegality or fraud.

Defendants' Position The defendants, on the other hand, asserted that the signing of the ROD only constituted the starting point in making a decision on the land transfer request under FLPMA. Accordingly, they asserted that the Secretary maintained the discretion to refuse to transfer the land even after the signing of the ROD, despite any finding that the transfer is in the public interest. Since, according to this argument, a sale is not mandated under FLPMA, the defendants claimed that there is no entitlement that would compel mandamus relief.

Court's Conclusions In announcing its conclusions, the court highlighted language contained in the FLPMA which states that "[a] tract of public lands … may be sold under this Act" if the Secretary determines that the sale meets certain criteria, including serving important public objectives.

> This statutory language and these regulations make clear that the ROD neither gave plaintiffs a clear right to the patent, nor required Babbitt to deliver the patent. First, the ROD announced a decision regarding the manner in which the land would be conveyed. In addition to announcing that his decision to convey the land by direct sale would result in no adverse environmental consequences, Secretary Lujan also made the finding under FLPMA that the sale of the land would serve important public objectives. Under the FLPMA, there is no requirement that once this finding is made, the Secretary is required to proceed with the sale. Rather, the statute states that a "tract of public lands … ***may*** be sold under this Act where… the Secretary determines that the sale of such tract will serve important public objectives." (emphasis supplied). Therefore, neither Secretary Lujan nor Secretary Babbitt's discretion to proceed with the direct sale of the land ended with the issuance of the ROD. Accordingly, plaintiffs are not entitled to mandamus relief. (citations omitted)

The court noted that at the motions hearing and in supplemental filings the defendants have asserted that the California Department of Health Services has neither legal authority to purchase the Ward Valley site nor a legitimate source of funds with which to do so. (See *LLW Notes*, May 1998, pp. 6–8.) However, since the court found that mandamus relief is not warranted, the court determined that addressing the issue of the department's legal authority to acquire title to the Ward Valley site is unnecessary.

—TDL

A complete copy of the district court's decision can be obtained on line at

www.dcd.uscourts.gov

For background information on the lawsuits, see LLW Notes, March 1997, pp. 1, 16–20 and April 1997, pp. 20–21.

The preceding information was distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates via facsimile transmission in a News Flash on April 13, 1999.

US Ecology and Cal Rad Forum React to District Court Decision

US Ecology

In response to the court's March 31 order, American Ecology Corporation—US Ecology's parent company—reiterated its intention to "continue to work toward repeal of the Low-Level Radioactive Waste Policy Act." However, the company acknowledged the need for US Ecology and others to meet legal and contractual obligations in the meantime. American Ecology Chair and Chief Executive Officer Jack Lemley made the following remarks in a prepared statement:

> The district court's ruling focuses the need for all of the parties involved to discuss how we can fulfill what is required of each of us under the law and under the contracts we hold. We are seeking to carry out those discussions.

Cal Rad Forum

David Krueger, Chair of the California Radioactive Materials Management (Cal Rad) Forum, expressed regret over the court's ruling, but noted that the State of California's legal obligation to provide disposal capacity for its generators remains intact.

> Judge Sullivan's ruling is a disappointment, but it doesn't change the fact that California is still bound by state and federal laws to provide access to permanent waste disposal capacity for its own waste and for low-level waste generated in the other Southwestern Compact states … We are looking to Governor Davis to provide the leadership needed to get the project back on track, since building the facility at the already-licensed Ward Valley site is far and away California's best opportunity to fulfill its contractual and legal obligations.

Alan Pasternak, Cal Rad Forum's Technical Director, added that the court's ruling does not prohibit Interior from transferring the land to the State of California; it simply declines to order the federal government to do so.

Court Calendar

Case Name	Description	Court	Date	Action
California Department of Health Services v. Babbitt and *U.S. Ecology v. U.S. Department of the Interior* (See *LLW Notes*, June/July 1998, p. 28.)	Seeks to compel the Interior Department to transfer land to the state for use in siting a LLRW disposal facility and to issue the patent approved by DOI over five years ago.	United States District Court for the District of Columbia	March 31, 1999 May 30, 1999	The court issued a final decision declining to order the Interior Department to perform the land transfer. Deadline to file a notice of appeal.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Entergy Arkansas v. Nebraska (See related story, this issue.)	Challenges actions taken by Nebraska in reviewing US Ecology's license application to build and operate a LLRW facility in Boyd County.	United States District Court for the District of Nebraska	April 16, 1999 May 17, 1999	The court granted a motion to enjoin Nebraska from collecting or expending utility funds, and from taking any action on a contested case proceeding. Deadline to file a notice of appeal.
Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (See *LLW Notes*, December 1998, pp. 19-20.)	Challenges actions by the commission to impose deadlines on the state for processing a LLRW disposal facility license application filed by US Ecology.	United States Court of Appeals for the Eighth Circuit	March 26, 1999	Nebraska filed its reply to the commission's responsive brief on appeal.
Nebraska v. Central Interstate Low-Level Radioactive Waste Commission (See *LLW Notes*, December 1998, pp. 16-17.)	Questions whether Nebraska may exercise veto authority over applications to export LLRW from the region.	United States Court of Appeals for the Eighth Circuit	April 26, 1999 May 10, 1999	The Commission filed its responsive brief on appeal. Nebraska's reply brief is due.
Northern States Power Co. v. United States (See *LLW Notes*, June/July 1998, pp. 30-31.)	The lead case in a series of separate lawsuits filed by major utilities seeking more than $4.5 billion from DOE for failing to meet a contractual deadline to begin disposing of their spent fuel.	United States Court of Federal Claims	April 6, 1999 June 7, 1999	The court dismissed the case on the ground that the utility failed to exhaust administrative remedies. Deadline to file a notice of appeal.

U. S. Nuclear Regulatory Commission (NRC)

Utah Seeks to Block Spent Fuel Access to Goshute Reservation

On March 1, by a vote of 27 to 0, the Utah Senate approved S.B. 164—legislation allowing the state to take control of roadways encircling the reservation of the Skull Valley Band of Goshutes and to designate the roads as "public safety interest highways." The House subsequently approved the measure by a 38-to-37 vote. The legislation was signed into law by Utah Governor Mike Leavitt (R) on March 18, 1999. The new law provides the state with the authority to control traffic on the roads and to bar the construction of railroads that would intersect with them.

The legislation is widely regarded as an attempt by the state to defeat a plan to construct an above-ground temporary storage facility for spent nuclear fuel on the Goshute reservation. An application for a license to construct such a facility has been filed with the U.S. Nuclear Regulatory Commission by Private Fuel Storage (PFS) Limited Liability Company—a consortium of seven nuclear utility companies which is led by Minneapolis-based Northern States Power Company. None of the consortium's member utilities is located in the State of Utah. (See *LLW Notes*, July 1997, pp. 33–34.)

S.B. 164 is not the state's first attempt to block the Goshute plan. In April 1997, Governor Leavitt (R) created a multi-agency task force to research and communicate all risks surrounding the proposed facility and to coordinate state opposition to it. (See *LLW Notes*, July 1997, p. 34.) Then on December 4, 1997, in response to a request from Governor Leavitt, the Utah Transportation Commission voted 5 to 1 to give the state control over the only road leading to the proposed disposal site. (See *LLW Notes*, February 1998, p. 37.)

More recently, it has been reported that Governor Leavitt obtained a commitment from state legislators to introduce a bill shortly that would exchange state lands for those owned by the federal government near the Goshute reservation—reportedly in an attempt to prevent a proposed 32-mile rail spur to the site. Governor Leavitt is also seeking wilderness designations for federal land near the Goshute reservation as an alternative means of blocking the proposed rail spur should the land-exchange plan fail. In addition, a bill was recently signed into law that eliminates limited liability legal protections for any company that engages in nuclear waste storage. That bill, S.B. 177, was passed by the Senate by a 28-to-0 vote and the House by a 55-to-12 vote. It was signed into law on March 18, 1999.

—TDL

For information on the Clinton Administration's policy position on the storage of spent nuclear fuel, see related story, this issue.

Study Finds Goshute Reservation to be Suitable for Spent Fuel Storage

In late February, proponents of a proposal to construct an above-ground temporary storage facility for spent nuclear fuel on the Utah reservation of the Skull Valley Band of Goshutes announced the results of a new study finding no significant problems with the site's geology despite active faults. In announcing the results, project manager Scott Northard said that the study "has confirmed our conclusion that this site is safe and suitable for a temporary storage facility."

The study identified several faults on the Skull Valley reservation, including two small faults running directly through the proposed storage area and three other small faults within a couple of thousand feet. However, the study concluded that none of the faults was likely to produce enough damage to cause serious problems for the proposed storage facility.

—TDL

HLRW Bills Considered by Congress

Various bills concerning the management, storage, and disposal of commercial spent nuclear fuel and other high-level radioactive wastes are currently being considered by both chambers of Congress. To date, none of the bills has been voted upon by the full House or Senate.

Bills re Interim Storage

Legislation has been introduced in both chambers of Congress that would amend the Nuclear Waste Policy Act of 1982 by instructing the U.S. Department of Energy to site, develop, and begin operating an interim storage facility for spent fuel and other high-level wastes by June 30, 2003. The bills, entitled the Nuclear Waste Policy Act of 1999, provide that the interim storage facility would be located on land adjacent to Yucca Mountain, Nevada—the proposed site for a permanent high-level radioactive waste repository. The bills further require that the permanent repository would commence operations no later than January 17, 2010. The legislation faces strong opposition from the Nevada delegation, and the administration has already stated its intention to veto.

Senate Version

S. 608 was introduced by Senate Energy and Natural Resources Committee Chair Frank Murkowski (R-AL) on March 15. Six Senators are cosponsoring the bill: Majority Leader Trent Lott (R-MS), Larry Craig (R-ID), Michael Crapo (R-ID), Pete Domenici (R-NM), Rod Grams (R-MN), and Sam Brownback (R-KS). The bill is presently before the Senate Energy and Natural Resources Committee.

House Version

Representatives Fred Upton (R-MI) and Edolphus Towns (D-NY) introduced similar legislation, H.R. 45, in the U.S. House of Representatives on January 6. The bill, which has 133 cosponsors, was referred to the Committee on Resources and to the Committee on Transportation and Infrastructure. It remains pending before both committees. It was also referred to the Commerce Committee, which recently passed a variation of the legislation by a vote of 39 to 6. The Commerce Committee's version includes a provision that essentially codifies a proposal made by Energy Secretary Bill Richardson whereby DOE would take ownership of spent nuclear fuel currently stored on site at nuclear utilities. In return for DOE's assumption of all costs and liability associated with on-site storage, the utilities would waive all legal claims against the department for its failure to meet a January 1998 contractual deadline to remove their spent fuel to a permanent repository. (See *LLW Notes*, June/July 1998, pp. 30-31.)

Commercial Low-Level Radioactive Waste Provisions

Section 506 of each bill speaks exclusively to closure of low-level radioactive waste disposal facilities.

One provision instructs the U.S. Nuclear Regulatory Commission (NRC) to promulgate rules requiring persons and entities licensed to dispose of low-level radioactive waste to post a bond, arrange for surety, or develop some other financial arrangement sufficient to cover all costs associated with decontamination, decommissioning, site closure, site reclamation, and long-term maintenance and monitoring.

A second provision grants authority to DOE to assume title to and custody of such facilities at the owner's request provided that

- all NRC post-closure requirements have been met,
- transferring title will result in zero cost to the federal government, and
- federal management of such sites is necessary to protect public health.

The language contained in these sections is identical to that of section 151 of the Nuclear Waste Policy Act of 1982.

Other HLRW Legisation

Bill re Suspension of HLRW Payments

On March 23, Senator Richard Bryan (D-NV) introduced S. 683, a bill to amend the Nuclear Waste Policy Act of 1982 by allowing commercial nuclear utilities to receive credits to compensate them for costs associated with storing their spent nuclear fuel. The bill, entitled the Independent Spent Nuclear Fuel Storage Act of 1999, would allow all standard contract holders currently storing their spent nuclear fuel on site to deduct associated costs from future remittances into the Nuclear Waste Fund. Senator Harry Reid (D-NV) is cosponsoring the bill, which has been referred to the Senate Energy and Natural Resources Committee. As of press time, no hearings have been scheduled by the committee.

Bill re Funding Spent Fuel Storage

On March 25, Representative Merrill Cook (R-UT) introduced legislation, H.R. 1309, authorizing the U.S. Department of Energy to provide compensation to utilities for the on-site storage of commercial spent nuclear fuel and other high-level radioactive wastes. In addition, the legislation forbids the transportation of such wastes until DOE commences operation of a permanent repository. Entitled the Nuclear Waste Protection and Responsible Compensation Act, H.R. 1309 is currently before the House Subcommittee on Energy and Power. Representative Juanita Mellinder-McDonald (D-CA) is cosponsoring the bill.

The Administration's View

The administration has recently issued a statement detailing those features of the bills it finds unacceptable. Among other things, the administration contends that the bills prejudge the suitability of the Yucca Mountain site. The administration also maintains that implementing the legislation would violate spending caps set by the most recently approved budget resolution.

—JW

Background

Standard Contract The Nuclear Waste Policy Act of 1982 requires DOE to site, develop, license, and operate a deep geologic repository for the nuclear industry's spent fuel. Pursuant to the act, commercial nuclear utilities and DOE entered into contracts whereby the utilities make payments into the Nuclear Waste Fund to cover the cost of a federal disposal program. In exchange, DOE was obligated to provide a repository for the utilities' waste by January 31, 1998. The act, however, also provides that utilities exercise primary responsibility for interim storage of spent fuel until such time as it is properly accepted by DOE. The specific terms of the agreement were laid out in a "standard contract" developed by DOE and signed by the commercial utilities.

Utility Requests On December 17, 1996, DOE sent a letter to signatories of the standard contract notifying them that the agency would be unable to meet the statutory deadline to accept commercial spent fuel. Since that time, the agency has twice rejected petitions by commercial utilities requesting that they be relieved of their duty to continue making payments into the Nuclear Waste Fund. (See related stories, *LLW Notes*, December 1998, p. 34; *LLW Notes*, February 1998, p. 34.) Passage of S. 683 would effectively force the agency to honor these requests.

Legal Action/Decisions Several lawsuits have been filed over DOE's failure to meet the statutory deadline for acceptance of commercial spent fuel. Late last year, the U.S. Court of Federal Claims issued decisions in three separate lawsuits holding the Energy Department liable for this failure. (See *LLW Notes*, December 1998, p. 25.) In all three cases, the plaintiffs' facilities were already shutdown and they were therefore no longer making payments into the Nuclear Waste Fund. Although the utilities are claiming a total of $288 million in damages, the court has not yet set an award amount. More recently, however, the court declined to hold DOE financially liable for its failure to begin accepting spent fuel in a case brought by a utility with an operating reactor, holding instead that there were other remedies available to the plaintiff utility. Similar cases by other utilities remain pending before the court.

New Materials and Publications

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Federal Agencies and Committees

Department of Energy (DOE)

National Low-Level Waste Management Program Radionuclide Report Series; Volume 17: Plutonium-239. March 1999. DOE's National Low-Level Waste Management Program at Idaho National Engineering and Environmental Laboratory. Includes 1) the physical, chemical, and radiological characteristics of plutonium-239, 2) isotope production and waste disposal data, and 3) the behavior of plutonium in the environment, in the human body, and in animals. To obtain a copy, contact DOE's National Low-Level Waste Management Program Document Center, or download it at

www.asksam.com/radwaste/inelsearch.htm.

Nuclear Regulatory Commission (NRC)

Notice of denial of Natural Resources Defense Council's petition requesting that NRC exert authority to ensure that the U.S. Army Corps of Engineers' handling of radioactive materials in connection with the Formerly Utilized Sites Remedial Action Program (FUSRAP) is effected in accord with properly issued licenses and all other applicable requirements. (64 *Federal Register* 16504) April 5, 1999. To obtain a copy, call the Government Printing Office, or download it from the GPO web site.

"Radiological Assessments for Clearance of Equipment and Materials from Nuclear Facilities." (NUREG-1640) December 1998. Documents the technical basis used by the NRC for developing regulatory standards for clearing equipment and materials with residual radioactivity from nuclear facilities. To obtain a copy, call the NRC Public Documents Room, or download it from the NRC Reference Library.

Notice of intent to prepare an environmental impact statement (EIS) and notice of a public scoping meeting on an application by Private Fuel Storage, L.L.C. to construct and operate a facility to store spent fuel on the Goshute reservation in Toole County, Utah. (64 *Federal Register* 18451). To obtain a copy, call the Government Printing Office, or download it from the GPO web site.

U.S. Congress

Strategy Needed to Regulate Safety Using Information on Risk. (RCED-99-95) March 19, 1999. Examines the NRC proposal to move from a traditional regulatory approach to risk-informed regulation and whether such a risk-informed approach will reduce costs to deregulated utilities without reducing safety. To obtain a copy, contact the GAO document room, or download it from the GAO web site.

—JW

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 program information, 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 home page (access to reports and testimony) . . . . . **www.gao.gov**

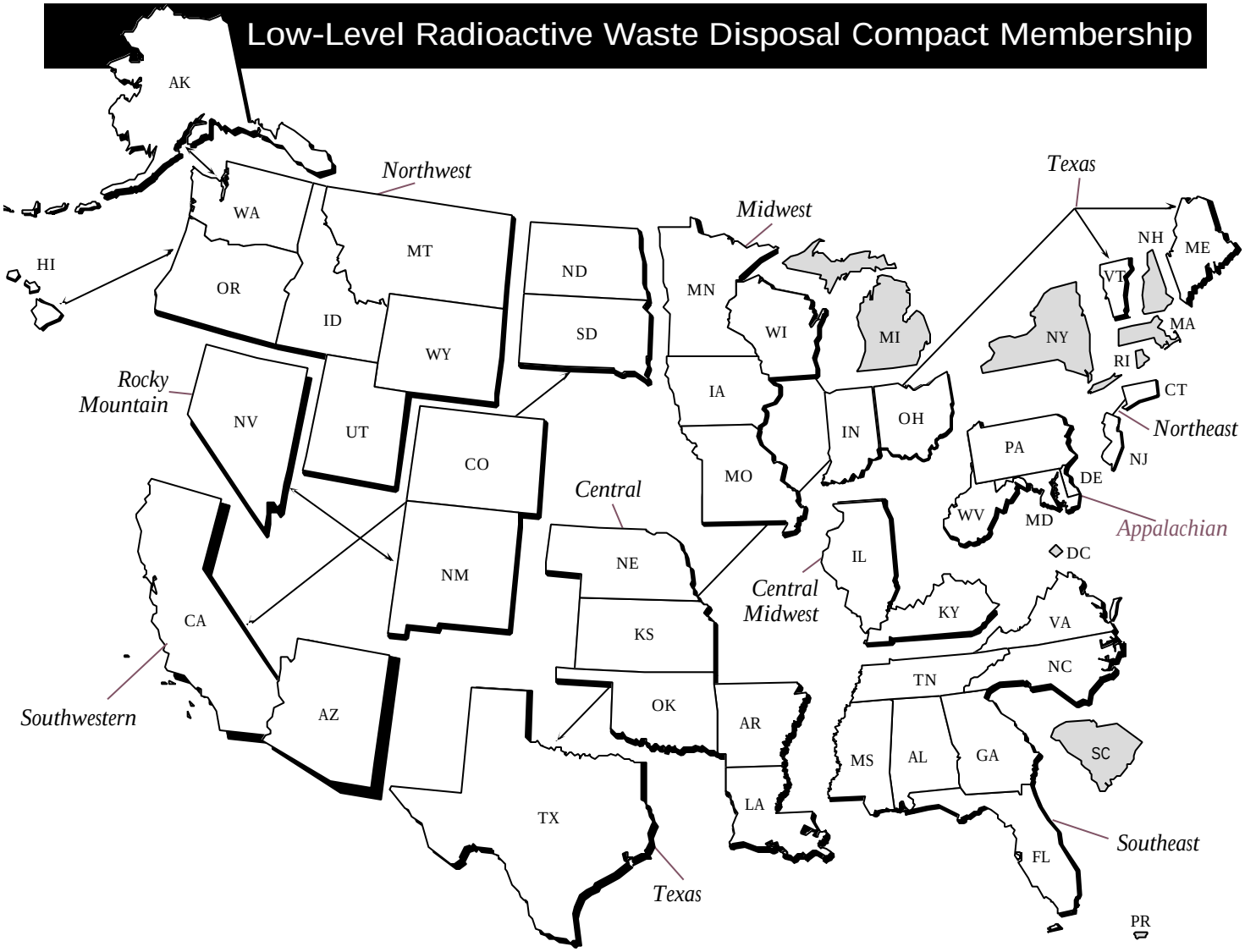
To access a variety of documents through numerous links, visit the LLW Forum web site at www.afton.com/llwforum

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
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Pennsylvania *
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Nebraska *
Oklahoma

Central Midwest Compact
Illinois *
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Midwest Compact
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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
North Carolina *
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
Vermont

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

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

Graphic by Afton Associates, Inc. for the LLW Forum. September 1998.