LLW notes

Volume 13, Number 1 February 1998

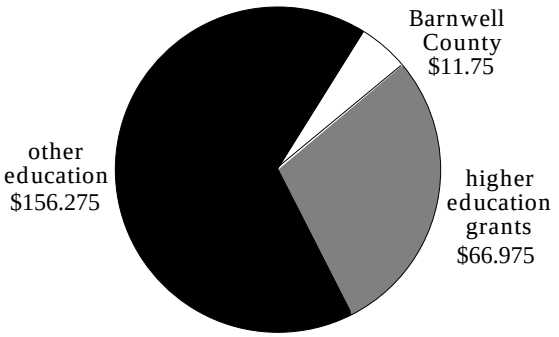
Chem-Nuclear Postpones Long-Term Plan for Barnwell

Operator Seeks to Avoid Short-Term Shortfall

By letter dated January 14, Chem-Nuclear Systems, L.L.C. informed its customers that it is delaying implementation of the company's long-term initiative for ensuring extended access to the low-level radioactive waste disposal facility in Barnwell, South Carolina. Chem-Nuclear explained the schedule change as follows:

> [I]t has become clear that many customers will require additional time to respond in a definitive manner to the initiative because of the significant financial commitment that would be required. Also, our discussions with members of the South Carolina General Assembly have indicated that they would like to have additional time to carefully study the proposed initiative and any related legislation.

Allocation of $235 Surcharge



higher education grants program 28.5%
other education assistance 66.5%
Barnwell County 5.0%

Although a revised schedule for the initiative has not been formally established, indications are that "commitment fees" from those purchasing disposal space may be due in late November 1998.

Short-Term Efforts

In the meantime, Chem-Nuclear is working with generators to meet South Carolina's requirements for funding of the state's Higher Education Scholarship Grants program. These grants are funded with a portion of the $235-per-cubic-foot surcharge that the state assesses on waste disposed of at Barnwell. State law mandates that Chem-Nuclear must pay any shortfall if the surcharges collected fall below prescribed levels. (See *LLW Notes*, August/September 1997, p. 7.) In order to avoid a shortfall for FY 1997-98, which ends June 30, Chem-Nuclear must collect $23 million—the equivalent of surcharges on 343,400 cubic feet of waste. As of December 31, 1997, approximately 239,000 cubic feet of waste were still needed to meet this goal.

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Low-Level Radioactive Waste 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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Prior Short-Term Proposal

In late December 1997 and early January 1998, Chem-Nuclear contacted selected generators and offered discounted disposal prices on waste shipped before the end of FY 1997-98. In exchange, generators were asked to respond by January 7 with commitments to dispose of specific volumes of waste by June 30. Discounts were contingent upon the company's receiving short-term commitments to dispose of at least 343,400 cubic feet. This initiative has been supplanted by discussions with generators.

Background: Long-Term Plan

In November 1997, Chem-Nuclear distributed preliminary documentation for a plan under which Chem-Nuclear would enter into agreements with generators or other entities, including states and compacts, to provide disposal capacity at Barnwell for up to 25 years based on a predetermined fee schedule. (See *LLW Notes*, Winter 1997, p. 1.) Customers would submit letters committing to purchase a specific amount of capacity, and would subsequently be charged a "commitment fee" ranging from $2.58 to $3.60 per cubic foot. Chem-Nuclear would then seek enactment of state legislation to exempt such customers from the $235 surcharge.

Instead, the state would receive a trust fund of at least $1,000,000,000 to be created from "disposal allotment charges" paid up front by the customers. After passage of such legislation, each customer would pay a one-time disposal allotment charge of $200 per cubic foot of reserved capacity. Customers would also make annual payments to cover Chem-Nuclear's fixed operating costs. An additional disposal fee would be due at the time of service, based on the volume and radioactive characteristics of the waste.

In December 1997, Chem-Nuclear released a "final" version of the documents summarizing the plan. Revisions included

- the imposition of a one-time tax payment to the state of $2 per cubic foot of reserved capacity;
- a change in the disposal fees to include a charge of $300 per curie for all isotopes, instead of $600 per curie for only long-lived isotopes;
- substitution of the Consumer Price Index for the 3.25 percent annual cost escalator previously included in the disposal fees and in the charges to cover Chem-Nuclear's fixed operating costs; and
- elimination of the minimum purchase requirement.

—CN

New Forum Participant for South Carolina

Douglas Novak has been appointed by South Carolina Governor David Beasley to serve as the state's Forum Participant. In this capacity, Novak replaces Elizabeth Partlow, an attorney now in private practice.

Novak currently serves as legal counsel to the Governor. Among his responsibilities is the oversight of all environmental issues within the state, which requires extensive dealings with the State Department of Health and Environmental Control and with the DOE concerning the Savannah River Site.

In addition to this new appointment, Novak represents the Governor on several boards and commissions in the environmental arena including the South Carolina Low-Level Waste Negotiating Committee, Southern States Energy Board, and the National Governors' Association.

Novak graduated with a bachelor's degree from the University of South Carolina and earned his Juris Doctor degree from Tulane University. Before being named legal counsel to the Governor, he served as an Assistant Solicitor in Aiken County, South Carolina.

—RTG

Southeast Compact/North Carolina

North Carolina Authority Votes to Begin Shutting Down LLRW Facility Development Project

At a meeting on December 19, 1997, the North Carolina Low-Level Radioactive Waste Management Authority resolved to "begin the orderly shutdown" of the project to develop a regional low-level radioactive waste disposal facility in Wake County, North Carolina. The Authority's decision is effective "pending the [Southeast] Compact's reversal of its funding position or receipt of other instructions from the North Carolina Legislature," which reconvenes in May 1998.

In a related resolution, the Authority voted to

- complete previously authorized work on facility development, including "maintaining a basic project team through the month of December 1997 and completing final revisions to the documentation and reports for Decision Point 1" of the Licensing Work Plan;
- "commence and complete the orderly collection of all outstanding project records and the archiving of said records … so that the records may be easily retrievable in the event that the project is restarted"; and
- "begin site restoration activities …"

All of the above are to be accomplished by no later than February 28, 1998.

Background: Facility Funding

On December 1, 1997, after providing over $78 million for facility development, the Southeast Low-Level Radioactive Waste Compact Commission notified the North Carolina Authority that the Authority had not met the commission's conditions for further funding. (See *LLW Notes*, Winter 1997, p. 4.) These conditions were established in resolutions of August and November 1997, which set a deadline of December 1 for the Authority to respond to a nonbinding Memorandum of Understanding (MOU) proposed by the commission and a group of utility generators in the Southeast Compact region. (See *LLW Notes*, August/September 1997, pp. 4–5.)

Since the compact commission discontinued funding, the Authority has used cash reserves to pay for consulting work associated with the project shutdown. Funding for the activities of the Authority itself is provided by legislative appropriation, which ends June 30, 1998.

Authority's Rationale

In a letter sent to Southeast Compact Commission Chair Richard Hodes on December 19, 1997, North Carolina Authority Chair Warren Corgan identified three reasons for the Authority's decision to terminate facility development.

> 1. The Compact Commission has cut off project funds even though the Authority has met its project targets and is making good technical progress. Funding cessation was based upon the Authority's failure to obtain alternative funding agreements or to agree on the MOU by 12/1/97, a date which was unrealistic as the Authority told the SECC on numerous occasions and specifically at its November 1997 meeting in Norfolk. The Compact has cut off funding despite the fact that it currently has enough unreserved money available to proceed with the Licensing Work Plan beyond what the Authority believes is the key decision point, where success or failure will be much more predictable.
>
> 2. The generators' group has refused to commit to provide additional project funding as a grant, even though that funding will not be needed until mid-1999, at which time development will be much further along and the generators would retain the right to decide not to fund at that time.
>
> 3. Present [Southeast] Compact law makes it virtually impossible to issue revenue bonds. For that reason the Authority agrees that a contract between it and the generators is required in order to get construction funding. The current MOU, however, contains requirements which would

also make it impossible to issue revenue bonds. While the Authority feels that it might be possible to develop an agreement which permits North Carolina to issue bonds and satisfies the needs of the generators, developing such an agreement will take time and could not have been done by 12/1/97.

Compact Maintains NC Responsible for Funding

On January 12, 1998, Southeast Compact Chair Hodes sent a brief reply to the Authority, stating in part as follows:

> I share your dismay that an agreement on future funding was not reached and I am greatly disturbed by the project shutdown. It is the stated position of the Commission that this constitutes a breach of the compact law by the State of North Carolina, which is obligated to proceed with the funding and the establishment of the facility.
>
> However, as I stated in my letter to you on December 1, 1997, the Commission remains dedicated to work with the Authority to develop a plan to share the cost for site development in North Carolina in order that North Carolina can fulfill its obligations under the law. We will meet at any time with the Authority and other parties to address the means to resolve the funding issue.

Background: Facility Licensing

Chem-Nuclear Systems submitted a license application for the proposed facility in December 1993, and state regulators determined the following month that the application was administratively complete. Since then, the application has undergone intensive technical review. In June 1996, a work plan for the remainder of the licensing process was jointly developed and approved by the North Carolina Authority and state regulators. (See *LLW Notes*, Winter 1997, p. 5.)

For additional information, contact Ted Buckner of the Southeast Compact Commission at (919)821-0500 or Andrew James of the North Carolina Authority at (919)733-0682.

—CN

NC Appoints Environmental Lobbyist to State Post

North Carolina Governor Jim Hunt recently appointed Bill Holman as Assistant Secretary for Environmental Protection in the North Carolina Department of Environment and Natural Resources (DENR), effective January 26, 1998. Holman, a former consultant for several conservation organizations including the Sierra Club and the Conservation Council of North Carolina, was recently described in the *Charlotte Observer* as "North Carolina's premier environmental lobbyist."

As the DENR Assistant Secretary for Environmental Protection, Holman will be responsible for the supervision of all of the agency's many regulatory divisions, including the Division of Radiation Protection, which is the licensing agency for the proposed regional low-level radioactive waste disposal facility in North Carolina. (See related story, this issue.) Approximately 1,300 employees work in the regulatory divisions that Holman supervises.

Holman graduated from North Carolina State University in 1978 with a degree in biology.

In a prepared statement regarding his appointment, Holman said:

> I'm excited about the opportunity to work to solve some of North Carolina's most pressing environmental problems. I've enjoyed working with local governments, business and industry and conservation groups to develop effective, consensus approaches to addressing environmental issues. I plan to continue to work closely with all of these diverse groups to support a healthy environment and strong economy.

—RTG

Southwestern Compact/California

DOI Approves Ward Valley Permit Application

Delays California DHS' Access to Ward Valley Site

In a January 16 press release, the U.S. Department of Interior (DOI) announced its approval of a California Department of Health Services' (DHS) permit application to conduct a study of rainfall infiltration at the site of the planned low-level radioactive waste disposal facility at Ward Valley. DOI also announced plans to conduct separate testing for tritium and related substances at the Ward Valley site and declared that DHS' testing can proceed upon completion of DOI's drilling activities.

The January 16 announcement noted that DOI's Bureau of Land Management (BLM) "intends to close the immediate area where tests will take place to all but authorized or permitted uses as a way to insure public safety and the integrity of the drilling."

California Governor Pete Wilson Criticizes Delay

In a January 16 press release, California Governor Pete Wilson criticized DOI's refusal to allow immediate access by California DHS to the Ward Valley site for testing purposes.

> Today's announcement by Interior is just another in a multi-year series of delays. The Ward Valley site has been one of the most environmentally studied pieces of real estate in California, and our state's efforts to comply with environmental review laws have been upheld in every court where challenged and confirmed by the National Academy of Sciences the General Accounting Office ...
>
> Once again, Interior is looking for ways to prolong their stated intent in order to wage a public relations campaign against California's efforts to comply with federal law ...
>
> It's time for the Clinton Administration to stop playing politics with the health and safety of Californians and allow the Ward Valley project to move forward.

Background: Ward Valley Testing

DOI has asserted that sampling and analysis of tritium and related substances, as recommended by a National Academy of Sciences (NAS) committee in May 1995, is a precondition to its approval of DHS' request to transfer the Ward Valley site to the State of California.

Although the state has repeatedly emphasized that the NAS committee did not recommend the testing as a precondition to the land transfer, California Governor Pete Wilson instructed DHS in January 1997 to begin conducting infiltration tests at the Ward Valley site. (See *LLW Notes*, March 1997, pp. 1, 16-20.) However, Ed Hastey, the State Director of BLM's California State Office, wrote to Carl Lischeske, Manager of DHS' Low-Level Radioactive Waste Management Program, in March 1997 claiming that DHS' proposed testing is outside the scope of permitted work at the site and "may not be carried out until a new permit is issued." (See *LLW Notes*, March 1997, p. 14.) The state disputed this interpretation.

In an April 1997 memo to Hastey, Interior Deputy Secretary John Garamendi preemptively directed him not to issue a permit to California DHS for testing at the Ward Valley site because the Interior Department preferred to conduct joint federal and state testing. (See *LLW Notes*, Winter 1997, p. 16.) At that time, the state had not yet filed a new permit application.

After several meetings and exchanges of correspondence, California officials and DOI officials were unable to reach agreement on the terms and conditions for joint testing. (See *LLW Notes*, May/June 1997, pp. 6-7.) In a September 1997 letter to Deputy Secretary Garamendi, George Dunn, Chief of Staff for California Governor Pete Wilson, stated that unless agreement was reached shortly on the terms and condition for joint testing, DHS would file a permit application with BLM to conduct testing. (See *LLW Notes*, Winter 1997, p. 16.) DHS submitted a permit application on September 5, 1997.

DOI Deputy Secretary Garamendi Reiterates Joint Testing Request

In a January 16 letter to Governor Wilson, Deputy Secretary Garamendi advised the Governor of DOI's approval of California DHS' testing upon completion of DOI's testing activities at the Ward Valley site. The letter states, in part:

> I wish to reiterate my often stated invitation to the State to participate with Interior as it carries out its testing program ... We intend to complete the testing and the [Supplemental Environmental Impact Statement] process as soon as possible.

Ward Valley Opponents Vow to Protest

In response to DOI's announcement of plans to proceed with testing at the Ward Valley site, opponents of the planned disposal facility issued a "Call to Action" to engage in "mass, nonviolent sustained direct action" to prevent the testing. Press releases denouncing the federal testing have been issued by a number of opponent organizations including the Bay Area Nuclear Waste Alliance, Greenaction, Greenpeace, and the Save Ward Valley Coalition. The Colorado River Native Nations Alliance—which comprises the Fort Mojave, Chemehuevi, Cocopah, Quechan and Colorado River Indian Tribes—has issued statements asking for protesters to gather at the Ward Valley site "to defend the land from the destruction and desecration resulting from test drilling by the DOI and the State of California."

BLM to Close Site on February 13

BLM issued a January 29 *Federal Register* notice announcing the temporary closure of the Ward Valley site. The notice states that "the existing protest encampment maintained by the Fort Mojave Tribe under BLM permit CA-37890 shall be relocated" and that "[n]o activities authorized by the encampment permit shall be undertaken outside [the area to which the protest encampment will be relocated] on any lands closed pursuant to this notice." The closure becomes effective on February 13 and remains effective for six months—until August 13—unless BLM issues an order reopening the site before then.

BLM is responsible for enforcing permit conditions upon land that it owns. State law enforcement personnel do not have jurisdiction on federal land unless state personnel or state-owned equipment are at risk, or the interstate highway is closed due to protest activities.

NRC Criticizes DOI Testing Protocols

In November 1997, BLM made available for public comment the protocols for DOI's proposed testing at the Ward Valley site. In a November 1997 letter to the BLM Needles Field Office, Carl Paperiello, Director of NRC's Office of Nuclear Material Safety and Safeguards, conveyed NRC's comments on DOI's protocols. Among other issues, the comments state that "[DOI's] testing may not be conclusive when measured against the protocol's objectives, and may not be relevant to determining the performance of the facility in isolating low-level radioactive waste ..." (See *LLW Notes*, Winter 1997, p. 17.) NRC had reviewed the protocols at the request of Interior Deputy Secretary Garamendi. At press time, BLM had not issued revised testing protocols.

For further information, contact Carl Lischeske of the California Department of Health Services at (916)323-3693.

—LAS

NJ Township Drops Talks with Siting Board

A New Jersey township that had been negotiating with the New Jersey Low-Level Radioactive Waste Disposal Facility Siting Board decided in late December 1997 not to enter an agreement to consider whether to host a disposal facility. On December 4, the Siting Board had authorized an agreement proposed by the Economic Development Commission of Carneys Point Township under which the board would have reimbursed the community for expenses to conduct a study of the advantages and disadvantages of hosting a facility. The township would also have received $750,000 in unrestricted funds. However, now that local officials have withdrawn their support for the project, the township is no longer being considered as a site.

—CN

Texas Compact/Texas

Project Evidentiary Hearings Begin in Texas

On January 21, the Texas State Office of Administrative Hearings conducted the first of several project evidentiary hearings to evaluate the Texas Low-Level Radioactive Waste Disposal Authority's application to construct and operate a regional waste disposal facility in Hudspeth County, Texas. The formal administrative hearings, which are being held in various locations throughout the State of Texas, are expected to last approximately eight weeks.

Parties and Procedure

The hearing process being used for evaluation of the authority's application is the most comprehensive and formal of the public participation procedures offered under Texas law. All members of the public have an opportunity to participate in the administrative hearings process—as a party, as a witnesses, or through public comment. In addition, any member of the public may provide written comments, whether or not he or she qualifies for party status.

Parties to the hearing were named in a procedural order issued by two administrative law judges from the State Office of Administrative Hearings on October 31, 1996. Most requests by individuals and entities to participate in the process were granted, but a few were denied. Twenty-five different individuals and entities are currently named as parties. These parties represent a wide range of interests, including facility supporters, individual opponents, U.S. and Mexican local governmental entities, and both U.S. and Mexican environmental and/or antinuclear organizations. Nineteen of the 25 parties named oppose the facility. (See *LLW Notes*, December 1996, pp. 1, 3–5.)

The hearings are presided over by two administrative law judges and conducted in a manner similar to civil trials in state district court. Parties have the right to present testimony, obtain evidence through a formal discovery process, cross-examine other parties' witnesses and object to the introduction of evidence. They may also file legal motions and make closing arguments.

Next Step

After hearing all the evidence, the two administrative judges will issue a formal recommendation, known as the "proposal for decision," to the Texas Natural Resource Conservation Commission—the agency charged with licensing the proposed facility. If any party to the hearing objects to the judges' proposal, that party may file written objections. Parties are also entitled to file replies to the objections.

The Texas Natural Resource Conservation Commission will then evaluate the judges' proposal and any objections and replies during a public meeting. The commission may then issue a final decision and order. This decision and order may be appealed to district court in Travis County by any of the parties to the hearings.

Background

As a precursor to the current administrative hearings, approximately 300 persons participated in a two-day public comment hearing in Sierra Blanca in August 1996. Participants included local area residents, public officials, Mexican officials, Advocates for Responsible Disposal in Texas (a radioactive materials users group), members of the Sierra Blanca Legal Defense Fund, Greenpeace, and other environmental and/or antinuclear organizations. Approximately 125 comments were received about the proposed facility. Procedures for becoming a party to the administrative hearings were explained at that time.

Two additional public comment hearings were held in El Paso and Alpine, Texas, in September 1996. More than 100 persons attended each of these hearings.

Spanish-English translators were provided at the public comment hearings.

For further information, contact the Texas Low-Level Radioactive Waste Disposal Authority at (512)451-5292.

—TDL

Central Compact/Nebraska

Nebraska Governor Supports Re-examination of Compact System

Report on Economics Cited

On December 3, 1997, Nebraska Governor E. Benjamin Nelson wrote to 49 Governors to express his belief that "the compact system should be re-examined and alternatives and options for LLRW disposal explored." In support of this view, he cited a report by F. Gregory Hayden, Nebraska's Commissioner on the Central Interstate Low-Level Radioactive Waste Commission, who is an economics professor at the University of Nebraska–Lincoln. Hayden's 43-page report, entitled *Excess Capacity for the Disposal of Low-Level Radioactive Waste in the United States Means New Compact Sites Are Not Needed*, and some material from the report's extensive appendices were distributed to the other Governors with Nelson's letter.

Governor Nelson has previously questioned the compact system, and he hosted a summit on this issue in August 1997. (See *LLW Notes*, August/September 1997, p. 3.) His December 1997 letter states that the Hayden report "and the activities and discussions occurring across the nation" confirm his position.

Draft Versions Previously Circulated

NCSL Presentation Prior to Governor Nelson's distribution of the final report, Hayden presented "highlights" of a draft version of his report at a meeting of the Low-Level Radioactive Waste Working Group of the National Conference of State Legislatures (NCSL) on November 5, 1997, in Washington, D.C.

Senator Feinstein's Request A ten-page version of the draft report, dated November 1997, also reached the office of Senator Dianne Feinstein (D-CA), who then sought a DOE analysis. In a letter dated November 12, 1997, Senator Feinstein wrote to DOE Secretary Federico Peña asking DOE to "evaluate the assumptions and conclusions" of the draft report.

Senator Feinstein wrote again to Secretary Peña on January 5, 1998, this time seeking an analysis of Hayden's final report. As of press time, the DOE response was not yet available.

Compacts, California Critique Hayden's Analysis

Hayden's report received extensive media coverage in the State of California after his appearance there on December 3, 1997, at a press conference with Dan Hirsh, President of Committee to Bridge the Gap, a group that opposes the planned low-level radioactive waste disposal facility in Ward Valley. The Southwestern Compact Commission subsequently sent a letter to the region's generators on December 19 to counteract Hayden's "misleading information about the economic viability of the Ward Valley project." Enclosed with the letter were comments from the California Department of Health Services criticizing Hayden's analysis.

The Midwest Interstate Low-Level Radioactive Waste Compact Commission also disputed some of Hayden's conclusions. The compact's comments were transmitted to Hayden in a letter dated January 20, 1998.

In addition, the Central Interstate Low-Level Radioactive Waste Commission staff directed the commission's contractor, US Ecology, to reevaluate its disposal rate costs taking into consideration Chem-Nuclear's long-term Barnwell initiative and Hayden's projections about the costs of disposal at the planned low-level radioactive waste facility in Boyd County, Nebraska. This rate study, conclusions of which were presented at a meeting of the commission in late January 1998, found that disposal costs at the Boyd County facility would actually be less than those at Barnwell under Chem-Nuclear's proposed long-term plan. (See related story, this issue.)

See pages 11–13 for excerpts from the "highlights" of Hayden's report and from the responses of the California Department of Health Services and the Midwest Compact.

continued on page 10

Central Compact/Nebraska (continued)

Nebraska Legislator Calls for Moratorium on Boyd County Facility

Following the release of Hayden's report, Nebraska Senator Chris Beutler, who chairs the Natural Resources Committee in the state Senate, issued a press release announcing a "proposed compromise" on the issue of low-level radioactive waste disposal in the state. Senator Beutler called for the licensing process to continue, but for the state to enact a ten-year moratorium on construction of a facility if a license is issued.

"With waste volumes dropping and projected disposal cost[s] climbing, it may no longer be economically feasible to build a number of regional compact disposal facilities," Beutler said. He also noted the apparent lack of support for the compact system at the NCSL Low-Level Radioactive Waste Working Group meeting in November, at which "nearly everyone expressed the belief that the regional compact system has not worked and we need to explore alternatives." Beutler, did, however, oppose proposed legislation to withdraw from the compact, asking, "Why expose Nebraska to potential liability of millions at this time?"

—CN

LLW Forum Corrects Hayden References

On January 29, Alternate Forum Convenor Kathryn Haynes wrote to F. Gregory Hayden to "correct two items related to LLW Forum activities mentioned in your recent report." Excerpts from that letter follow.

"Consensus Emerging ..." In this section, you characterize the purpose and content of a panel discussion held at the LLW Forum's October 1997 meeting. During this session, entitled "The Future of Low-Level Radioactive Waste Management," Forum Participants joined with representatives of nuclear power, medical, government and other generators, current and potential disposal operators, and other state organizations to discuss a wide range of issues. As subsequently noted in our meeting report, these issues included

- the relative importance of waste volumes and radioactive characteristics, including curie content, in making waste management decisions;
- how best to assure adequate disposal access, and the relative advantages of private-sector and government action in providing such access;
- what constitutes equity in waste disposal and how meritorious a goal it is;
- what the role of the compact system should be; and
- factors and circumstances that contribute to successful development of disposal capacity

There was no "special panel convened to discuss whether the Compact system was viable any more in light of the excess of existing capacity over demand." As evidenced by the published agenda for this portion of the meeting and the meeting report, the purpose of the session was quite different. In addition, this discussion was only one in a continuing series of sessions held by the LLW Forum which, as you note, will continue into 1998.

The session was intended to offer an opportunity for discussion, not to arrive at a consensus. In fact, neither Forum Participants nor others participating in the session endorsed any conclusion regarding the present management system and certainly not "that new sites were likely to be uneconomical" or "that the only driver for new sites is the Compact law, not demand."

"Barnwell" You state that "[a]ccording to *LLW Notes*, the remaining disposal capacity of Barnwell is now about 7.9 million cubic feet, and the expected annual volume to be received is less than 275,000 cubic feet." You go on to extrapolate for the next 29 years using these volume figures. However, what *LLW Notes* actually reported was that estimated volumes for fiscal years 1997-98 and 1998-99 "are currently less than 275,000 cubic feet." *LLW Notes* has been following the vagaries of low-level radioactive waste disposal volumes for over eleven years and would never attempt to use data from any two years—and these two in particular—to project annual disposal volumes. Historical records reflecting substantial fluctuations in annual volumes support the wisdom of this editorial policy.

Excerpts from *Report Highlights: Excess Capacity for the Disposal of Low-Level Radioactive Waste in the United States Means New Compact Sites Are Not Needed* by F. Gregory Hayden

The Low-Level Radioactive Waste Policy Act of 1980 encouraged states to join in Compacts to establish new radioactive waste sites serving the states in those Compacts. Since its enactment, such siting efforts have met with great public controversy. Not a single new site has opened in those 17 years under the Compact system.

While the controversies have raged publicly, market and technological forces have quietly; but dramatically altered the situation. Waste volumes have plummeted, mainly due to volume reduction techniques. Current volumes are a mere one-ninth of those in 1980. At the same time, there is now a significant excess of capacity at existing disposal facilities. Capacity outstrips demand; the three existing sites are competing aggressively for a persistently declining supply of waste; and there is just no room in the already strained market nor need for new Compact facilities, necessarily charging far higher prices and servicing only a small part of the market (the Compact).

The economic bottom line is that existing capacity for disposal exceeds the volume of waste needing disposal, without any change to the existing system. New disposal sites are no longer needed, nor would they be economically viable if built.

Main Findings

New Compact Sites Not Needed …Today there are still three commercial LLRW facilities, each with excess capacity, and the volume of waste has been reduced ninefold. A consensus has developed that in light of existing capacity exceeding demand, new Compact sites are not needed and would be uneconomical …

Decreasing LLRW Volumes The LLRW volumes generated for disposal have decreased precipitously since 1980 and are continuing to fall at a rapid rate…

Excess Capacity There is currently an excess capacity for LLRW disposal …

Technological Factors and Market Forces The steady volume reduction is due to technological factors and market forces … Shippers are sending the same amount of radioactivity in fewer packages, dramatically reducing volume and extending capacity of existing disposal facilities. These trends are likely to continue.

Waste is Not Accumulating in On-Site Storage … While volumes have fallen steeply, the amount of radioactivity shipped has actually increased. showing that waste is not being held back but rather merely is being more greatly compressed …

The California Case Examining the California situation, where the assertion of "waste piling up" for lack of disposal capacity or supposed concerns about Barnwell has been most aggressively advanced, demonstrates empirically that it is not the case … There has been no reduction in total radioactivity of waste shipped for disposal, demonstrating that no measurable waste is being held back in on-site storage …

Vicious Financial Cycle The current commercial facilities are caught in a vicious financial cycle … All three existing disposal facilities are aggressively trying to find more business because their current capabilities are much greater than the falling volume of waste … The vicious cycle would only be made worse were there new Compact sites competing with the three existing facilities.

New Sites Would Not Be Viable … A new Compact site would not be viable for three reasons. First, cost for any new facility is far higher than the costs at current facilities. Second, since there is not enough waste at Barnwell when it draws waste from 49 states, there certainly is not going to be an adequate volume of waste from 3, 4, or 5 states in a Compact. Finally, the small volume of waste available for any new site would not allow the facility to take advantage of economies of scale … Beyond new disposal sites not being economically viable, their existence could, in addition, bring down the existing system which is meeting current demand and can continue to do so for decades.

Compact Law, Not Demand, Is Driver For New Sites The only driver for new sites has been the Compact law, not demand …

Excerpts from a letter letter dated January 20, 1998, from Gregg Larson, Executive Director of the Midwest Interstate Low-Level Radioactive Waste Compact Commission, to F. Gregory Hayden

Following a review of your report, entitled "Excess Capacity for the Disposal of Low-Level Radioactive Waste in the United States Means New Compact Sites Are Not Needed," I would like to offer the following comments on its discussions of the Midwest Compact's recent cessation of development activities and national disposal policy:

1) In addressing the Midwest Compact's decision to cease development of a regional disposal facility, our Commission has been very careful to always indicate that the decision was based on circumstances that were specific to our Compact. Compacts and states widely differ in their siting approaches, environment, politics, waste volumes, development progress, financial resources, sunk costs, and many other characteristics … These different characteristics preclude inferences or conclusions that the action taken by the Commission in June, 1997, would be similarly appropriate in another compact or unaffiliated state …

2) The section on economic viability focuses on supply and demand, and the resultant price and volume impacts, but gives short shrift to the compacts' role as a monopoly supplier of disposal capacity (page 21). It dismisses any impact arising from this characteristic by arguing that demand is elastic, and price increases will inevitably result in revenue shortfalls. However, the political dimensions of waste issues in general, and national low-level radioactive waste disposal policy in particular, cannot be ignored and will probably play an important role in the future. If politics and equity considerations continue to discourage an "open market," technological impediments and cost/benefit thresholds may finally limit further significant declines in disposal volume … especially where no substitutes are readily available for the use of radioactive material.

3) The report quotes an Associated Press report that the Midwest Compact's action "... marked the failure of the low-Level Radioactive Waste Policy Act of 1980" (page 8). This cite is surprising because the Associated Press has never been a particularly authoritative or accurate source of information on national low-level radioactive waste policy. Moreover, new disposal sites are not the only measure of the success or failure of the Act. For example, since 1980, access to disposal capacity has been maintained, despite the initial intent of the sited states to close existing disposal facilities or limit access, and generators have substantially reduced the volume of waste disposed. In addition, efforts to implement the Act have resulted in more safe and stable waste forms, more complete waste characterization, minimization of mixed waste … and better waste manifesting and tracking systems.

4) The report's conclusion frequently refers to equity in the context of 12 new disposal facilities (pp. 24-26). The creation of 12 new disposal sites, however, was neither an original idea in 1980 (p. 24), nor intended as an outcome of the Low-Level Radioactive Waste Policy Act. Even though the subsequent compact/state alignments could have theoretically produced 12 or more new facilities, most observers, including those actively involved in the development of new disposal capacity, never expected that 12 new facilities would result …. The current federal law is silent on the number of new facilities that would be needed to fulfill any state equity considerations, but is flexible enough to accommodate a wide variety of outcomes.

Excerpts from the California Department of Health Services' analysis of F. Gregory Hayden's report entitled *Excess Capacity for the Disposal of Low-Level Radioactive Waste in the United States Means New Compact Sites Are Not Needed*

Hayden's thesis is that declining low-level radioactive waste (LLRW) volumes have resulted in excess disposal capacity at existing facilities, making the development of new facilities unnecessary. His report has the following flaws, however, that undermine the validity of his analysis:

1) He misplaces the focus of the LLRW debate. The principle issue has never been the capacity of existing disposal facilities; rather, it is reliable access to such facilities. In this regard, he ignores the instability of the existing system and the tenuous nature of access to existing sites … The same political forces that threatened to close existing LLRW disposal facilities in 1979 are still in effect today, and it would be foolish to ignore them.

2) He fails to take into account the commercial LLRW disposed of at Envirocare, thereby grossly exaggerating the reduction in LLRW volume. The reason is as follows: the national figures he cites on LLRW shipped to commercial facilities do not include waste shipped to Envirocare …

3) His waste volume projections fail to take into account decommissioning waste from nuclear power reactors, which will add a total of about 25 million cubic feet of LLRW to the national waste stream over the next 20-30 years …

4) He uses a table showing the activity of LLRW shipped from California to argue that LLRW is not being held in storage. The table, however, shows a dramatic decline in activity in 1994 and 1995, the two most recent years for which records exist. The data, therefore, do not support his assertion; rather, they indicate exactly the opposite! In addition, several California institutions have come forward with photographs of long-lived waste currently being stored. His rough analysis was, apparently, done without any field work to substantiate his finding.

5) He argues that new sites will not be economically viable because the two facilities that currently accept waste from the entire nation are on such tentative economic footing that any new competition will cause them to fail. This is inaccurate. The Envirocare facility is not struggling; in fact, its business is so good that a number of other companies are attempting to enter the market and provide similar services. While the operator of the Barnwell facility is, in fact, seeking more waste for disposal, it is doing so because the State of South Carolina has made the company responsible for any shortfall in the tax-supported scholarship fund. The operator estimates this shortfall to be $7-10 million per year at present volumes. Were it not for the $235 per cubic foot state tax and the obligation to maintain the scholarship fund at a fixed level, the operator would now be receiving sufficient waste to be economically viable. Hayden simply ignores factors unique to South Carolina that affect the economic viability of the Barnwell site …

State and Compact Events

February	Event	Location/Contact
Central Compact/ Nebraska	Facility Review Committee meeting	Lincoln, NE Contact: Don Rabbe (402)476-8247
Central Midwest Compact/ Illinois	Illinois LLRW Task Group meeting: presentation regarding the availability of other facilities; discussion on economic factors affecting decisions to build a facility	Bloomington, IL Contact: Helen Adorjan (217)528-0538
Northeast Compact/ Connecticut/ New Jersey	Connecticut LLRW Advisory Committee meeting Connecticut Hazardous Waste Management Service Board of Directors meeting New Jersey LLRW Disposal Facility Siting Board meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007 Hartford, CT Contact: Ron Gingerich Trenton, NJ Contact: John Weingart (609)777-4247
Southwestern Compact/ California	Southwestern LLRW Commission meeting: discussion of exportation issues, waste classification, and current legislation	San Bernardino, CA Contact: Don Womeldorf (916)323-3019
Texas Compact/ Texas	Texas LLRW Disposal Authority quarterly meeting Texas State Office of Administrative Hearings (SOAH): evidentiary hearings on the proposed LLRW disposal facility in Sierra Blanca, Texas; the hearings, which began in January in Sierra Blanca, will continue throughout the month. At the conclusion of the hearings, SOAH will make a recommendation to the regulator (TNRCC) on whether or not to issue a license.	Austin, TX Contact: Lee Mathews (512)451-5292 El Paso & Austin, TX Contact: Lee Mathews
Massachusetts	LLRW Management Board meeting	Boston, MA Contact: Carol Amick (617)727-6018

State and Compact Events *continued*

March	Event	Location/Contact
Appalachian Compact/ Pennsylvania	Pennsylvania LLRW Advisory Committee meeting	Harrisburg, PA Contact: Rich Janati (717)787-2163
Northeast Compact/ Connecticut/ New Jersey	Connecticut Hazardous Waste Management Service Board of Directors meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007
Northwest Compact/Washington	Northwest Interstate LLRW Compact Commission meeting	Portland, OR Contact: Mike Garner (360)407-7102
Rocky Mountain Compact	Rocky Mountain LLRW Board meeting	Santa Fe, NM Contact: Tracie Archibold (303)825-1912
Southwestern Compact/ California	Southwestern LLRW Commission-sponsored workshop on waste streams and available waste treatment technologies, to be presented by the National LLW Management Program	Ontario, CA Contact: Don Womeldorf (916)323-3019
Massachusetts	LLRW Management Board-sponsored meeting for radioactive materials users	Boston, MA Contact: Paul Mayo (617)727-6018
April	**Event**	**Location/Contact**
Northeast Compact/ Connecticut/ New Jersey	Connecticut Hazardous Waste Management Service Board of Directors meeting	Hartford, CT Contact: Ron Gingerich
Southwestern Compact/ California	Southwestern LLRW Commission-sponsored workshop on waste streams and available waste treatment technologies, to be presented by the National LLW Management Program	Concord, CA Contact: Don Womeldorf
Massachusetts	LLRW Management Board public forum on the transportation of radioactive materials and radioactive waste	Springfield, MA Contact: Paul Mayo

States and Compacts

Midwest Compact Following the Midwest Interstate Low-Level Radioactive Waste Commission's June 1997 announcement that it will cease development of a regional disposal facility in Ohio, the commission determined to distribute to regional utilities about $10.2 million in proceeds from the dissolution of its Export Fee Fund. The commission had planned to distribute the funds by December 31, 1997. However, distribution has been delayed by the submission of a claim asserting entitlement to a portion of the funds by three Michigan utilities. The commission has responded to the Michigan utilities by summarizing the financial, administrative, and legal history associated with the export fee assessments that were paid by the Michigan utilities and the transfer of these monies to the State of Michigan during the time that it served as the compact's host state. Based on this history, the commission has concluded that no export fees that were paid by the Michigan utilities remain in the current balance in the Export Fee Fund.

—TDL

Northwest Compact/Washington The Utah Department of Environmental Quality's (DEQ) Division of Radiation Control is currently reviewing a Siting Plan Application for a low-level radioactive waste disposal facility that was submitted by Laidlaw Environmental Services in the summer of 1997. The proposed facility would be co-located with an existing commercial hazardous and toxic waste disposal facility and would use an existing, unused landfill cell. The Utah Radiation Control Board has issued a preliminary decision that the proposed facility meets state siting criteria. That decision and a draft Siting Evaluation Investigation Report are currently available for public review and comment. In addition, public hearings on the proposal will be held on Tuesday, March 3. Although DEQ has not received a formal license application yet, staff report that Laidlaw has indicated that they plan to accept NARM and low-level radioactive waste within Class A limits similar to that which is accepted at the Envirocare facility.

—TDL

Federal Agencies and Committees

U.S. Department of Energy In a letter dated December 3, 1997, DOE's Assistant Secretary for Environmental Management, Alvin Alm, stated that, "the Department does not believe a discussion related to DOE's acceptance of commercial low-level radioactive waste would be productive at this time." This letter was sent to Dana Mount, Chair of the Southwestern Low-Level Radioactive Waste Commission, in response to Mount's letter of October 23 asking DOE to discuss the potential for accepting commercial low-level radioactive waste from the Southwestern Compact, on an interim basis, at the federal disposal facilities in the States of Nevada and Washington.

—RTG

U.S. Department of Energy Dan Reicher has been appointed as DOE's new Assistant Secretary for Energy Efficiency and Renewable Energy. Prior to this appointment, Reicher served as Senior Policy Advisor to Secretary of Energy Federico Peña. Reicher has nearly 20 years of experience with environmental and energy policy and law, including several other positions within DOE as well as employment as a Senior Attorney for the Natural Resources Defense Council. At DOE, he has been engaged in policy development and implementation particularly in environmental cleanup, nuclear waste management, and nuclear power.

—RTG

"Rocketdyne" Study on Radiation Risk

A recently released epidemiological study by researchers at the University of California–Los Angeles finds that exposure to internal and external radiation appears to have increased the risk of death to laboratory workers from certain cancers. However, mortality rates from all causes and from heart disease in particular were lower for the workers than for either the general U.S. population or for other worker cohorts.

The study, entitled "Epidemiological Study to Determine Possible Adverse Effects to Rocketdyne/Atomics International Workers from Exposure to Ionizing Radiation," was based on data for 4,563 Rocketdyne/Atomics International employees. These employees worked at the Santa Susana Field Laboratory in Ventura County, California, between 1950 and 1993. They conducted research activities ranging from nuclear reactor operation to rocket engine testing under a DOE contract.

UCLA researchers performed a statistical analysis of death certificate data through December 31, 1994. Company employment and radiation monitoring records were also examined to determine the number of smokers, ages of the sample, and to estimate some toxic chemical exposures based on job descriptions.

The impetus for the study was the surrounding community's concern. In 1991, under a grant from DOE, the California Department of Health Services (DHS) investigated the incidence of cancer deaths in the community but, due to a small sample size, the study was inconclusive. This gave rise to the current study and a similar upcoming study, to determine the possible adverse effects from exposure to toxic chemicals.

Epidemiological Findings

The study found that exposure to external radiation appears to have increased the risk of lung cancer. Confounding effects of smoking, asbestos, hydrazine exposures or other unmeasured risks from other chemical exposure could not be ruled out, however. In addition, exposure to internal radiation appears to have increased the risk of cancers of the upper-aerodigestive tract, although limitations existed in measuring workers' internal dose. Again, confounding effects could not be ruled out.

The study also determined that an association between cumulative external dose and total cancer mortality was observed indicating a risk 6 to 8 times greater than allowed by the current standard for exposures to low doses of radiation. The results suggest that the health effects of low levels of radiation exposure may vary according to age at exposure, but the statistical power for measuring such an effect was low.

Oversight Panel Recommendations

An oversight panel for the Rocketdyne study has called for a re-examination of the standard for exposures to low doses of radiation. The panel is composed of five representatives from the surrounding community selected by local legislators and seven members selected by California DHS. The panel is co-chaired by Daniel Hirsch of Committee to Bridge the Gap and David Michaels of the Department of Community Health and Social Medicine at the City University of New York Medical School.

Besides recommending that regulatory bodies revisit their standards, the oversight panel recommended that the second study on health effects due to toxic chemical exposure be completed as soon as possible. In addition, the panel suggested that Rocketdyne workers continue to be monitored since only a fraction of the work force has died, and long-latency exposure effects may yet emerge. The panel also recommended that a comparable study of the neighboring community be carried out under the oversight of the panel. *—RTG*

HPS President Critiques Study

The President of the Health Physics Society, Otto Raabe, has strongly criticized the manner in which the study was conducted.

> Overall, the statistical power of this study is weak. The cancers that they pull out of the data as showing radiation trends are very selective. The "upper-aerodigestive tract" cancer association with radiation exposure suggests a random observation since that strange grouping of cancers is not known to be a mark of radiation exposure. It is a mark of tobacco use, alcohol consumption, and excessive consumption of spicy food. None of these possibilties can be ruled out by this study. In addition, they do not appear to have shown a dose-response relationship for those effects

Committee to Bridge the Gap v. Babbitt

CBG Seeks to Enjoin California Land Transfer

On December 19, 1997, Committee to Bridge the Gap and three private citizens filed a motion in the U.S. District Court for the Northern District of California seeking to enjoin federal officials from transferring land at Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility based upon a 1993 record of decision issued by then-Secretary of the Interior Manuel Lujan. The motion was filed in a lawsuit initiated in January 1993 that has been on inactive status for several years following the entry of a stipulation amongst the parties. Under the terms of the stipulation, the federal defendants agreed to rescind Lujan's issuance of the record of decision, as well as other actions relating to the proposed land transfer.

The following parties are listed as defendants to the action: the U.S. Interior Department (DOI) and DOI Secretary Bruce Babbitt; DOI's Bureau of Land Management; and the U.S. Environmental Protection Agency and its Administrator, Carol Browner.

Argument

New Litigation On January 30, 1997, US Ecology filed suit in the U.S. Court of Federal Claims against the United States of America for breach of a contract to sell 1,000 acres of federal land in Ward Valley, California, to the state. The action seeks reimbursement for US Ecology's past costs, lost future profits, and lost opportunity costs related to the planned low-level radioactive waste disposal facility at Ward Valley. (See related story, this issue.)

Subsequently, on February 24, 1997, US Ecology filed suit in the U.S. District Court for the District of Columbia against DOI, Babbitt, and the Bureau of Land Management. This suit seeks to compel the Interior Department to transfer Ward Valley to the State of California. (See *LLW Notes*, April 1997, pp. 18–21.) It is similar to an action filed in the district court by the California Department of Health Services (DHS) and DHS Director S. Kimberly Belshé, on January 31, 1997. (See *LLW Notes*, March 1997, pp. 1, 16–20.)

Impact on Prior Agreements and Rulings The plaintiffs argue that the new lawsuits constitute an attempt by US Ecology and DHS to circumvent the stipulation and court order in *Committee to Bridge the Gap v. Babbitt* because the new suits are based upon the theory that Lujan's Record of Decision is valid—a theory which the plaintiffs assert directly conflicts with the stipulation and court order entered into earlier. The plaintiffs complain that they may be irreparably injured if, as a result of the new litigation, Babbitt is ordered to transfer the Ward Valley land to the state on the basis of Lujan's 1993 record of decision. To avoid such injury, the plaintiffs are requesting that the court issue an order enforcing both the terms of the stipulation and the court's previous order by enjoining Babbitt from transferring the land.

> The present litigation was brought to challenge the validity of Secretary Lujan's illegal actions. If any doubt still exists about the legality of those actions, about the validity of the Stipulation in this case, or about any action Secretary Babbitt took to rescind the Record of Decision, they should be resolved in this Court. The Court must act to enforce its own order in this case, to preserve its jurisdiction, and to block the State and US Ecology's "end-run" around the Court.

In support of their position, the plaintiffs assert that "the court unquestionably has the power to issue an injunction in aid of the stipulation and its prior order, and it must do so to preserve its jurisdiction." They allege that the prior stipulation did not end the instant case, but rather committed the Interior Secretary to undertake a new legal review of the land transfer. Moreover, the plaintiffs argue that when the case was initially placed on inactive status, the court specifically reserved to the plaintiffs the right to revisit the court for further relief if necessary.

Background

On January 7, 1993—just prior to a change in administrations—then-Interior Secretary Manuel Lujan announced his intention to sell the Ward Valley site. (See *LLW Notes*, January 1993, p. 1.) Immediately thereafter, several opposition groups and individuals filed a lawsuit—*Desert Tortoise v. Lujan*—in the U.S. District Court for the Northern District of California seeking to prevent the land transfer until federal agencies have complied with the Endangered Species Act by designating critical habitat for the desert tortoise. On January 8, 1993, the district court issued an order temporarily restraining federal agencies and their departmental heads from selling the land. (See *LLW Notes*, January 1993, p. 8.) *Committee to Bridge the Gap* was filed a few weeks later—on January 19, 1993. It seeks to postpone the land transfer until alleged violations of the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act have been remedied.

On January 19 , 1993, then-Secretary Lujan signed a record of decision for the Ward Valley land transfer. However, incoming Interior Secretary Bruce Babbitt rescinded the record of decision on February 19, 1993. (See *LLW Notes*, February 1993, pp. 16–17.) Babbitt then instructed the Interior Department to reevaluate recent aspects of the Ward Valley land transfer process under NEPA. (See *LLW Notes*, March 1993, p. 11.)

On March 3, 1993, all parties to *Committee to Bridge the Gap* agreed to suspend all court actions in the case, pending review of the transfer by Secretary Babbitt. In addition, Interior and the Bureau of Land Management agreed to rescind certain actions, including the signing of the record of decision, the rejection of an indemnity selection application concerning Ward Valley, the decision to treat the supplemental environmental impact statement as an environmental assessment, and the issuance of a final supplemental environmental impact statement. The stipulation provides for at least thirty days' advance notice prior to transfer of the land. (See *LLW Notes*, April 1993, p. 8.) The case was subsequently placed on inactive status.

On February 8, 1994, the U.S. Fish and Wildlife Service designated 6.4 million acres of critical habitat for the desert tortoise—including Ward Valley. (See *LLW Notes*, February/March 1994, p. 17.) The Desert Tortoise action was subsequently dismissed.

—TDL

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

Summary Judgment Motions Filed in California Breach of Contract Action

On November 21, 1997, attorneys for the United States of America filed a motion for summary judgment in a lawsuit initiated by US Ecology and the California Department of Health Services in January 1997 in the U.S. Court of Federal Claims. The suit alleges that the federal government breached a contract to sell 1,000 acres of land in Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility.(See *LLW Notes*, April 1997, pp. 18–21.) The United States' motion was accompanied by a memorandum of points and authorities in support thereof and in opposition to a motion for partial summary judgment previously filed by the plaintiffs on September 15, 1997. In that motion, the plaintiffs had requested summary judgment on two issues: the existence of and the breach of an express contract between the U.S. Department of Interior and the State of California to sell Ward Valley. (See *LLW Notes*, August/September 1997, p. 21.)

The plaintiffs responded to the federal government's filings with a memorandum of points and authorities in opposition to the defendant's motion for summary judgment and in reply to the defendant's opposition to the plaintiffs' motion for partial summary judgment. The plaintiffs' memorandum was dated December 29, 1997.

Following is a brief summary of the arguments and analysis used by the parties in their filings to the court. Persons interested in a detailed review are directed to the documents themselves.

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US Ecology v. USA
California DHS v. USA (continued)

Defendant's Memorandum

Lack of a Contract The United States argues that no contract to sell the Ward Valley site was ever created. In the first place, the government asserts that Manuel Lujan—the Secretary of the Department of the Interior (DOI) at the time of the signing of the Record of Decision (ROD) to sell the Ward Valley site—was enjoined from so doing by order of the U.S. District Court for the Northern District of California. (See related story, this issue.) Moreover, the defendant asserts that Lujan, as a matter of law, did not have the power to obligate the United States to sell the land prior to the conclusion of the environmental review process under the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA).

> While the ROD must precede agency action, the ROD does not itself constitute the planned agency action ... Rather, it documents the conclusion of the environmental review process required by Congress in NEPA. A ROD is merely an internal agency decision document that establishes no rights and imposes no obligations ... It cannot be construed as an offer or acceptance in pursuit of formation of a contract. A validly issued ROD would have been the point from which BLM [the Bureau of Land Management] could have pursued sale of the site pursuant to the regulations. However, in this case, DOI could not proceed to form a contract in compliance with the regulations since it was enjoined from taking any action in connection with the proposed sale.

The United States also argues that, as a matter of law at the time of the alleged contract, the site was not available for direct sale because two years had not expired since the filing of an indemnity selection application by the State Lands Commission. (See *LLW Notes*,, October 1992, p. 5.) The government argues that federal law prohibits sale of lands for two years after the filing of an indemnity selection application.

In addition, the United States asserts that no legally enforceable contract to sell the Ward Valley site was created because the parties had not met all applicable laws and regulations.

No Implied-in-Fact Contract was Created The government also disputes the plaintiffs' claim that an implied-in-fact contract to sell the land was created. The defendant argues that a direct sale of public lands must be done by written contract, and, therefore, an implied-in-fact contract cannot form the legal basis for the Ward Valley land transfer. Moreover, the United States asserts that even if a written agreement requirement did not exist, the facts outlined in the plaintiffs' complaint do not support the existence of an implied-in-fact contract. In addition, the United States maintains that even if an express or an implied-in-fact contract exists between it and the State of California, US Ecology is not a third-party beneficiary.

> None of the documents or actions which US Ecology asserts constitute a contract for a transfer of ownership of the Ward Valley site from the United States to California contain any evidence of an intent on the part of the Government to directly benefit US Ecology. The fact that the transfer of the Ward Valley site to California would advance the process of US Ecology building and operating a LLRW disposal facility on the site, or that US Ecology would profit, is not sufficient to show that US Ecology was an intended third-party beneficiary.

If a Contract Existed, the United States Has Not Breached It The government affirms that even if the court were to find that a contract to sell Ward Valley existed, the United States has not breached it. The defendant claims that any such contract contained no provisions relating to the time of transfer and that any required transfer is not late given that review of the land sale is continuing under FLPMA and NEPA and that the California Department of Health Services has applied for a permit to conduct additional tests at the site.

Issues of Material Fact Prevent the Granting of Plaintiffs' Motion for Partial Summary Judgment The United States concludes its memorandum by arguing that, even if the court finds that this matter is not resolved by the controlling principles of statutory and contract law cited by the government, the plaintiffs' motion for partial summary judgment cannot be granted because issues of material fact remain in dispute. The defendant asserts that, in such a case, "discovery of [the] Plaintiffs' declarants would be necessary to resolve the blatant inconsistencies in their statements and contradictions with documents generated" at the time of the issuance of the Record of Decision on the Ward Valley land transfer.

Plaintiffs' Memorandum

U.S. Does Not Deny Facts Showing Contract's Existence The plaintiffs argue that it would be appropriate for the court to award them partial summary judgment because the United States does not controvert any of the material facts that demonstrate the existence of all essential elements of a contract to sell the Ward Valley site, nor—they claim—does the government dispute the facts which establish the breach of that contract.

Lujan Was Not Precluded by Law from Entering into a Contract The plaintiffs challenge the government's position that Lujan did not have the legal authority to enter into a contract for the sale of Ward Valley. In the first place, they assert that the January 8, 1993 temporary restraining order from the U.S. District Court for the Northern District of California did not purport to deprive Secretary Lujan of the power to enter into a binding contract, but rather merely proscribed the transfer of the Ward Valley land—an event that would not occur until issuance of a patent. Moreover, the plaintiffs contend that, had the court tried to interfere with the Secretary's power to contract, such action on the part of the court would have constituted an illegal violation of the principles of the U.S. Constitution that prescribe separation of powers. The plaintiffs also point out that, even if the January 8, 1993, temporary restraining order could be construed as prohibiting the Secretary from contracting for the sale of the Ward Valley site, it expired on January 18, 1993 by operation of law—the day before Lujan signed the record of decision. And the plaintiffs assert that, in any event, the temporary restraining order was void because the court that issued it lacked jurisdiction over the subject matter of the underlying dispute.

The plaintiffs also challenge the government's assertion that any contract to sell Ward Valley was defective in that it failed to comply with FLPMA and NEPA. They argue that existing law and prior court precedent make clear that a "failure to comply with every jot and tittle of governing regulations will not render a federal contract void." They also point out that both the former Interior Secretary and former BLM Director believe that the Ward Valley sale complied with all applicable laws and statutes—a point they find noteworthy given the considerable deference that courts must afford to an agency's interpretation of its own regulations.

Finally, the plaintiffs contest the government's assertion that the Secretary was precluded from selling Ward Valley due to the filing of the indemnity selection application. They assert, among other things, that any two-year limitation on the sale of lands after the filing of an indemnity selection application is not applicable to the instant case and that, in any event, the application may be void as a matter of law for failure to follow California regulatory requirements.

An Implied-in-Fact Contract Was Created The plaintiffs also contest the government's denial that an implied-in-fact contract was created between Interior and California. In the first place, the plaintiffs assert that a specific writing is not required under FLPMA for such transactions, but rather only a "written acceptance" of a purchase offer. The plaintiffs argue that they have provided ample evidence of writings evidencing a mutual intent to contract between the parties to meet the requirements of federal law. Moreover, the plaintiffs protest that the government has not disputed the material facts that demonstrate the existence of all essential elements of an implied-in-fact contract to sell the Ward Valley site.

US Ecology Was a Third-Party Beneficiary The plaintiffs also challenge the government's claim that, if a contract were found to exist, US Ecology was not a third-party beneficiary.

> The sole purpose for California's acquisition of the Ward Valley Site was to allow US Ecology, as the State's licensee, to construct and operate the proposed LLRW disposal facility and thereby satisfy the State's obligations under the federal Low-Level Radioactive Waste Policy Act of 1980 ... and the Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act ... Because applicable federal and State law mandated that any LLRW disposal facility be built on land in either federal or State ownership ... and because federal policy prohibited siting the facility on BLM land, California sought to obtain land for the facility from the United States. The United States was fully aware that California intended to use the Site for this purpose, and that US Ecology was the State's license-designee to construct and operate the facility, since at least 1987.

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Stilp v. Hafer

Challenge of PA's Siting Law Appealed to Higher Court

On December 8, the petitioners in a case challenging the passage of Act 12 of 1988, known as the Pennsylvania Low-Level Radioactive Waste Regional Disposal Facility Act, filed a notice of appeal to the Supreme Court of the Commonwealth of Pennsylvania. The petitioners are contesting the November 7, 1997 decision of the Commonwealth Court of Pennsylvania to grant the respondents' motion for summary judgment in the action.

Petitioners in the action are three individuals living in the Commonwealth of Pennsylvania. Respondents are the Commonwealth of Pennsylvania, Pennsylvania Governor Thomas Ridge, and Pennsylvania Treasurer Barbara Hafer.

As of press time, a briefing schedule had not been established by the court.

Lower Court's Decision

In granting summary judgment to the respondents, the Commonwealth Court of Pennsylvania held that the action is barred by the doctrine of laches.

> *The Doctrine of Laches*
>
> This doctrine "bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another ... In order to prevail on an assertion of laches, respondents must establish: (1) a delay arising from petitioners' failure to exercise due diligence; and (2) prejudice to the respondents resulting from the delay."

Whereas the respondents argued that the petitioners did not act diligently in filing their complaint since they waited eight years to do so, the petitioners contended that they were not aware of the unconstitutionality of the processes used to pass the statute until a recent court decision was issued in another case striking down the use of similar procedures in the passage of an appropriations bill. The court, however, found that the petitioners earlier had all of the information necessary to bring the action, given that the processes used to pass the bill were public and published at the time of its enactment, and given that the constitutional provisions that the petitioners claim were violated have remained largely unchanged for over 100 years.

The court also found that the petitioners' delay in bringing the action has prejudiced the respondents because they have, pursuant to the mandates of Act 12, promulgated regulations, entered into contracts, held public hearings, and prepared reports for the General Assembly. Such compliance, the court noted, has cost millions of dollars. (See *LLW Notes*, Winter 1997, pp. 22–23.)

Issues on Appeal

The petitioners have presented two issues for the court to review:

- May the affirmative defense of laches preempt the constitutional requirements for the passage of legislation?
- May the affirmative defense of laches be applied when the defendant has failed to carry out its burden of proof on the questions of unreasonable delay and prejudice?

Background

The petitioners contended that Act 12 was passed in violation of the Pennsylvania Constitution because

- it was altered or amended during its passage through the General Assembly in such a manner as to change its original purpose;
- neither the House nor the Senate referred the bill to committee after its original purpose was changed; and
- the bill was not considered on three days in either the House or the Senate after its original purpose was changed.

continued on page 25

United States of America v. Wilson

Appellate Court Finds Certain Army Corps Regulations re Wetlands to be Invalid

On December 23, 1997, the U.S. Court of Appeals for the Fourth Circuit issued a decision in a case challenging the validity of federal regulations concerning, among other things, the performance of certain activities on wetlands. The court concluded that the regulations are not authorized by the Clean Water Act and are therefore invalid.

Background

The defendants—Interstate General Company; its CEO and Chair, James Wilson; and St. Charles Associates—were involved in the development of land in Charles County, Maryland, into a planned community of some 80,000 residents. The community was created under the New Communities Act of 1968 and was being developed pursuant to a partnership agreement with the U.S. Department of Housing and Urban Development. The project agreement provided, among other things, for the preservation of 75 acres of wetlands.

Despite the agreement's provisions concerning wetlands, the defendants were accused of performing certain actions on the wetlands in violation of federal law—including digging ditches to drain them and depositing fill dirt and gravel in them without obtaining permits from the Army Corps of Engineers. They were subsequently prosecuted and convicted of knowingly discharging fill material and excavated dirt into wetlands on four separate parcels without a permit, in violation of the Clean Water Act.

Issues/Holding

The defendants appealed their conviction challenging, among other things,

- the validity of federal regulations purporting to regulate activities that "could affect" interstate commerce, and

- the district court's application of the Clean Water Act to wetlands that do not have a "direct or indirect surface connection to other waters of the United States."

Validity of Regulations re Activities that "Could Affect" Interstate Commerce The Clean Water Act regulates "navigable waters," which are defined within the act as "the waters of the United States." The disputed regulation defines "waters of the United States" in such a manner as to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or deconstruction of such waters could affect interstate commerce. The defendants challenge the authority of the regulations to extend jurisdiction of the Clean Water Act to the four parcels in question simply because they are deemed wetlands.

In addressing the issue, the appellate court held as follows:

> Absent a clear indication to the contrary, we should not lightly presume that merely by defining "navigable waters" as "the waters of the United States" ... Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters. When viewed in light of its statutory authority, [the contested regulation] ... expands the statutory phrase "waters of the United States" beyond its definitional limit.
>
> Accordingly, we believe that in promulgating ... [the regulation], the Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and that, for this reason, ... [the regulation] is invalid.

continued on page 24

United States of America v. Wilson (continued)

Application of Act to Wetlands Not Having a Surface Connection to Other Waters The defendants also assert that the district court, in instructing the jury on the relationship between wetlands and interstate waters, improperly extended the jurisdiction of the Clean Water Act to wetlands that have no "direct or indirect surface connection" to interstate waters.

In addressing the issue, the appellate court held as follows:

> The instruction intolerably stretches the ordinary meaning of the word "adjacent" and the phrase "waters of the United States" to include wetlands remote from any interstate or navigable waters. The magnitude of this extension is particularly highlighted when recognizing that the Army Corps of Engineers' statutory mandate extends not to the regulation of "wetlands adjacent to waters of the United States," but only to the regulation of "waters of the United States," and that the Corps regulation of such wetlands is based solely on its definition of wetlands as "waters of the United States." Furthermore, as noted above, we should interpret the Clean Water Act in light of the constitutional difficulties that would arise by extending the Act's coverage to waters that are connected closely to neither interstate nor navigable waters, and which do not otherwise substantially affect interstate commerce. It was thus error for the district court to have instructed the jury to extend the jurisdiction of the Clean Water Act to wetlands that lack any "direct or indirect surface connection" to interstate waters, navigable waters, or interstate commerce.

—TDL

General Electric Company v. Joiner

Supreme Court: Judges Can Bar "Junk Science"

On December 15, 1997, the U.S. Supreme Court issued an opinion that strengthens the power of trial judges to bar controversial scientific evidence from being admitted during a trial. Ruling in the case of a man who claims that he got cancer from exposure to chemicals, the Court held that "abuse of discretion" is the proper standard by which to review a district court's decision on the admission or exclusion of expert scientific evidence. The ruling effectively orders appellate courts to exercise restraint before second-guessing trial judges who exclude scientific evidence.

Background

The respondents, Robert Joiner and his wife, filed suit against General Electric, Westinghouse Electric, and Monsanto in Georgia state court after Joiner was diagnosed with small-cell lung cancer. They claimed that the disease was "promoted" by Joiner's workplace exposure to chemical PCBs and derivative furans and dioxins that were manufactured by, or present in materials manufactured by, the petitioners.

The petitioners removed the case to federal court and filed a motion for summary judgment. In response, Joiner presented the depositions of expert witnesses who testified that PCBs, furans, and dioxins can promote cancer and were likely responsible for Joiner's condition. The district court granted summary judgment because it found that (1) there was no genuine issue as to whether Joiner had been exposed to furans and dioxins, and (2) the testimony of Joiner's experts failed to establish a link between exposure to PCBs and small-cell lung cancer and was therefore inadmissible because it did not rise above "subjective belief or unsupported speculation."

The respondents appealed the district court's grant of summary judgment to the U.S. Court of Appeals for the Eleventh Circuit. The appellate court reversed the lower court's decision, applying "a particularly stringent standard of review" to hold that the district court had erred in excluding the expert testimony.

The U.S. Supreme Court granted certiorari on the question of what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony.

US Ecology v. USA
California DHS v. USA (continued from page 21)

U.S. Has Breached Contract The plaintiffs term as "frivolous" the government's argument that even if a contract existed, it has not been breached. They assert that Babbitt's rescission of Lujan's January 19, 1993, record of decision constituted a total breach of the contract to sell Ward Valley to the state. Moreover, the plaintiffs contend that the United States has also breached its implied-in-fact contract to deal fairly with the state on this issue.

—TDL

Stilp v. Hafer (continued from page 22)

They also argued that the State Treasurer cannot legally disburse funds from the State Treasury unless the law is constitutionally passed. They asked the court to declare Act 12 to be unconstitutionally enacted and to enjoin the respondents from enforcing any provisions of the act or making any expenditure under its authority. (See *LLW Notes,* May 1996, pp. 18–19.)

The respondents denied that Act 12 violates the Pennsylvania Constitution or that it is procedurally defective. Moreover, they argued that the petitioners' claims are barred by the doctrine of laches. (See *LLW Notes,* August/September 1996, pp. 16-17.)

—TDL

Arguments

The petitioners challenge the standard applied by the appellate court in reviewing the district court's decision to exclude the scientific testimony offered by respondents' experts. They argue that the appellate court should have applied the traditional "abuse of discretion" standard.

The respondents agree that abuse of discretion is the proper standard, but argue that the appellate court did, in fact, apply such a standard in this case. According to the respondents, the phrase "particularly stringent" did not mean that the appellate court was applying a different standard of review, but was rather a simple acknowledgement that an appellate court can and will devote greater resources to analyzing lower court decisions that are dispositive of an entire suit.

Abuse of Discretion

Abuse of discretion is a strict legal term indicating a failure to exercise a sound, reasonable, and legal discretion. It does not imply intentional wrong, bad faith, or misconduct.

Abuse of discretion by a trial court is "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to matter submitted."

Court's Holding

The Court held that the appellate court erred in applying an overly "stringent" standard to its review of the exclusion of Joiner's experts' testimony. In so doing, the Court determined, the appellate court "failed to give the trial court the deference that is the hallmark of abuse of discretion review."

In particular, the Court concluded that "abuse of discretion" is the proper standard by which to review a district court's decision on whether or not to admit scientific evidence and that a more intense standard may not be applied merely because the decision determines the outcome of the case.

> [W]hile the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony ... they leave in place the "gatekeeper" role of the trial judge in screening such evidence. A court of appeals applying "abuse of discretion" review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it ... [We] reject respondents' argument that because the granting of summary judgment in this case was "outcome determinative," it should have been subjected to a more searching standard of review.

—TDL

Court Calendar

Case Name	Description	Court	Date	Action
California Department of Health Services v. Babbitt and *US Ecology v. U.S. Department of the Interior* (See *LLW Notes*, March 1997, pp. 1, 16–20.)	Seeks to compel the U.S. Interior Department to transfer land at Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility and to issue the patent approved by DOI four years ago.	United States District Court for the District of Columbia	November 21, 1997 December, 29, 1997	The United States filed a motion for summary judgment and a memorandum of points and authorities in support thereof and in opposition to the plaintiff's motion for partial summary judgment. Plaintiffs filed a memorandum of points and authorities in opposition to the defendant's motion for summary judgment and in reply to the defendant's opposition to the plaintiff's motion for partial summary judgment.
Chester Residents Concerned for Quality Living v. Pennsylvania Department of Environmental Protection (See related story, this issue.)	Alleges that the Pennsylvania Department of Environmental Protection has engaged in unlawful discrimination under Title VI of the 1964 Civil Rights Act by concentrating waste treatment facilities in a predominantly black community.	United States Court of Appeals for the Third Circuit	December 30, 1997	The appellate court reversed a lower court ruling dismissing the suit for a lack of intentional discrimination on the part of the Pennsylvania Department of Environmental Protection and remanded the case to the lower court for further consideration.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Committee to Bridge the Gap v. Babbitt (See *LLW Notes*, April 1993, p. 8.)	Seeks to postpone the Ward Valley land transfer until alleged violations of the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act have been remedied.	United States District Court for the Northern District of California	December 19, 1997	Plaintiffs filed a motion for a preliminary injunction and a memorandum of points and authorities in support thereof.
General Electric Co. v. Joiner (See related story, this issue.)	Seeks to determine the proper standard by which to review a district court's decision on the admission or exclusion of expert scientific evidence.	Supreme Court of the United States	December 15, 1997	The Supreme Court ruled that a lower court decision pertaining to the exclusion of certain scientific evidence can be overruled only upon a finding that the trial judge clearly abused his or her discretion.
Santini v. Connecticut Hazardous Waste Management Service (See *LLW Notes*, October 1994, p. 9.)	Involves a claim that the service's site designation prevented the plaintiffs from completing property development.	Connecticut Superior Court, Judicial District of Hartford/New Britain at Hartford	September 18, 1997 February 19, 1998	The defendants withdrew their motion for summary judgment. The trial is scheduled to begin.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Stilp v. Hafer (See *LLW Notes,* Winter 1997, p. 22–23.)	Challenges the legislative procedures used in Pennsylvania to pass Act 12 of 1988, otherwise known as the Low-Level Radioactive Waste Disposal Regional Facility Act.	Supreme Court of the Commonwealth of Pennsylvania	December 18, 1997	Notice of Appeal was filed in the Supreme Court of the Commonwealth of Pennsylvania.
United States of America v. Wilson (See related story, this issue.)	Challenges (1) the validity of federal regulations purporting to regulate activities that "could affect" interstate commerce and (2) the application of the Clean Water Act to wetlands that do not have a "direct or indirect surface connection to other waters of the United States."	United States Court of Appeals for the Fourth Circuit	December 23, 1997	The court held that (1) the contested regulations are invalid as the Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and (2) the act does not apply to wetlands that lack any "direct or indirect surface connection to other waters of the United States."
Waste Control Specialists, LLC v. U.S. Department of Energy (See *LLW Notes,* December 1997, p. 2–3.)	Alleges that senior DOE officials have not carefully or reasonably considered a WCS proposal to dispose of DOE radioactive waste at the company's Andrews County site.	United States Court of Appeals for the Fifth Circuit	December 19, 1997 January 19, 1998	DOE filed (1) a motion to expedite briefing, argument, and disposition of the appeal and (2) a brief appealing the district court's preliminary injunction. WCS filed a brief responding to DOE's appeal of the district court's ruling.

International Nuclear Regulators Association Holds Second Meeting

In early January, the International Nuclear Regulators Association held its second meeting on the West Coast of the United States. Top officials from nuclear regulatory agencies in the United States, Canada, France, Germany, Japan, Spain, Sweden, and the United Kingdom attended the meeting, which began at the U.S. Nuclear Regulatory Commission's West Coast office and included a field trip to the Lawrence Livermore National Laboratory and the proposed Yucca Mountain high-level radioactive waste disposal site in Nevada. The agenda covered many topics, including the effect that utility deregulation and other energy trends will have on nuclear power plants, and differing national approaches to regulating nuclear reactors and materials.

The association was formed at a two-day meeting in Paris in May 1997. Its stated purpose, among other things, is "to influence and enhance nuclear safety, from the regulatory perspective, among its members as well as worldwide." Its members plan to meet at least annually. NRC Chairman Shirley Ann Jackson has been elected to serve a two-year term as the association's first Chairman.

For additional background information, see LLW Notes, May/June 1997, p. 32.

—TDL

New IAEA Director Appointed

At its 41st regular session, the General Conference of the International Atomic Energy Agency (IAEA) approved the appointment of Mohamed ElBaradei as the next director of the agency. ElBaradei, who currently serves as Ambassador in the Egyptian Foreign Service, has been a senior member of the IAEA Secretariat since 1984. He is currently Assistant Director General for External Regulations.

—TDL

Companies Seek NRC License to Import LLRW From Taiwan and Canada

Taiwan In the last year, Chem-Nuclear Systems, Alaron Corporation, and Allied Technology Group have all filed license applications with the U.S. Nuclear Regulatory Commission to import low-level radioactive waste from a nuclear power plant in Taiwan. Alaron, however, recently requested to withdraw its application without explanation by letter dated January 13, 1997. The applications of Chem-Nuclear and Allied Technology Group are still pending.

The waste to be imported consists of radioactively contaminated condenser tubing that would be decontaminated and recycled. The applications cover waste management activities for approximately a two-year period. Chem-Nuclear's application states that the waste would be taken to its consolidation facility in Barnwell, South Carolina, and later transferred to the Manufacturing Sciences Corporation in Oak Ridge, Tennessee. Waste imported by Allied Technology Group would be sent to its facility in Richland, Washington.

Canada In addition, DSSI has submitted a license application to import waste fluids from Canada; incinerate them at its industrial boiler facility in Kingston, Tennessee; and then return the ash to Canada. That application is currently pending.

Regulations NRC regulations require that persons interested in importing or exporting radioactive waste, including mixed waste, obtain a license from the commission. The procedures for doing so are contained in NRC's import/export rule, which was published in the *Federal Register* on July 21, 1995 (60 *Federal Register* 37,556).

—TDL

Chester Residents Concerned for Quality Living v. James Seif

Appellate Court Finds Private Right of Action Under Section 602 of Title VI of the Civil Rights Act

On December 30, 1997, the U.S. Court of Appeals for the Third Circuit reversed the dismissal of a lawsuit accusing the Pennsylvania Department of Environmental Protection of discrimination by concentrating waste facilities in a predominantly black community. The appellate court found that a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964. It remanded the case to the U.S. District Court for the Eastern District of Pennsylvania for further proceedings in accordance with its finding, including the consideration of remaining grounds for dismissal contained in the defendants' motion to dismiss.

Background

The Complaint Chester Residents Concerned for Quality Living (CRCQL)—a non-profit corporation—and 18 individuals filed suit against the Pennsylvania Department of Environmental Protection (DEP) and its Secretary, James Seif, as well as the Southeast Region of DEP and its Director, Carol Collier. The action challenges DEP's issuance of a permit to Soil Remediation Services, Inc. to operate a facility in the City of Chester. The plaintiffs argue that DEP's issuance of the permit violates section 601 of Title VI of the Civil Rights Act of 1964, the Environmental Protection Agency's civil rights regulations, and DEP's assurance pursuant to the regulations that it would comply with them. The City of Chester is located in Delaware County, Pennsylvania. Approximately 65 percent of Chester's population is black and 32 percent is white, whereas approximately 6.2 percent of Delaware County's population is black and 91 percent is white.

Specifically, CRCQL alleges that since 1987 DEP has granted five waste facility permits for sites in Chester, while granting only two permits for sites in the rest of Delaware County. CRCQL further asserts that Chester facilities have a total permit capacity of 2.1 million tons of waste per year, whereas the other Delaware County facilities have a total permit capacity of only 1,400 tons of waste per year.

DEP receives federal funding from the EPA to operate the Commonwealth of Pennsylvania's waste programs pursuant to the Resource Conservation and Recovery Act and other federal regulations. Title VI and the EPA's civil rights regulations condition the receipt of such federal funds on DEP's assurance of compliance. These regulations, in part, prohibit recipients of federal funding from using "criteria or methods ... which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex ..."

Title VI of the Civil Rights Act of 1964

Section 601: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 602: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 200d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

Issues and Lower Court Holding It is established law that a private right of action exists under section 601 of Title VI of the Civil Rights Act of 1964. However, this right only applies in instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact.

EPA has promulgated regulations pursuant to Section 602, which section authorizes agencies that distribute federal funds to promulgate regulations implementing section 601. EPA's implementing regulations provide in part as follows:

> A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

While it is clear that this regulation incorporates a discriminatory effect standard, the United States Supreme Court has validated the promulgation of regulations incorporating this standard by agencies. The question arises, however, as to whether a private party can proceed against a governmental authority under this regulatory standard, rather than under the more stringent standard required by section 601. CRCQL asserts that it can. The district court disagreed, however, dismissing the plaintiffs' action. In so doing, the court determined that a private right of action could not be maintained under a discriminatory effect regulation promulgated by the EPA pursuant to section 602 of Title VI.

The Appellate Court's Decision

The appellate court applied a three-prong test to determine whether it is appropriate to imply a private right of action to enforce EPA's regulations. The test requires a court to inquire

> (1) whether the agency rule is properly within the scope of the enabling statute;
>
> (2) whether the statute under which the rule was promulgated properly permits the implication of a private right of action; and
>
> (3) whether implying a private right of action will further the purpose of the enabling statute.

In so doing, the court determined that the EPA's discriminatory effect regulation satisfies all three prongs.

According to the court, the first prong is clearly satisfied pursuant to the U.S. Supreme Court's decision in *Alexander v. Choate*. In that case, the Court's unanimous opinion makes clear that "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI."

The court found that the second prong is satisfied because the legislative history provides some indication of an intent to create a private right of action and because the implication of such a right would be consistent with the legislative scheme of Title VI.

In regard to the third prong, the court determined that "to the extent that a private right of action will increase enforcement, the implication of that right will further the dual purposes of Title VI." Accordingly, the court found that the third prong of the test is also satisfied.

The court then held as follows:

> Applying ... [the] three-prong test, we hold that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964.

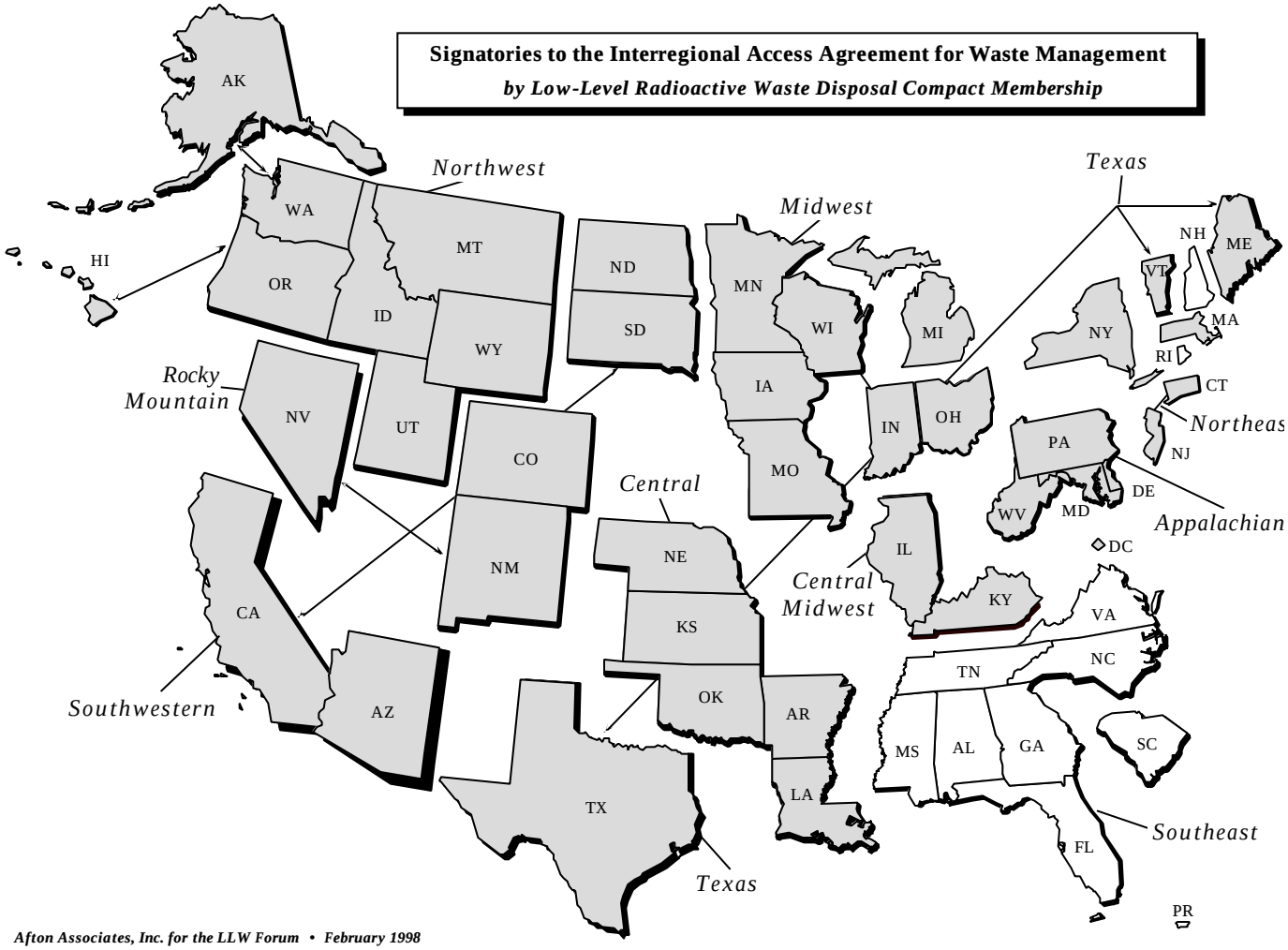
In so holding, the court noted that although no other court of appeals has rendered a decision on the precise issue presented in this appeal, the decisions of other courts of appeals indicate support for the court's reasoning in this case.

Based on its holding, the court reversed the district court's decision and remanded the case for further proceedings, including consideration of the remaining grounds for dismissal contained in the defendants' motion to dismiss.

For background information regarding environmental justice, see LLW Notes Supplement, July 1997.

—TDL

Interregional Access Agreement for Waste Management



The Interregional Access Agreement for Waste Management is intended to establish a nationally uniform approach regarding access to treatment/processing facilities. Under the agreement, compacts and unaffiliated states agree not to impede the return of radioactive waste that originated in their region or state. The agreement is a legally binding contract. At its fall 1992 meeting, the LLW Forum passed a resolution stating in part that "the Low-Level Radioactive Waste Forum recommend[s] that compacts and unaffiliated states enter into the interregional access agreement."

Central Midwest Commission Signs Agreement

On November 4, the Central Midwest Interstate Low-Level Radioactive Waste Commission unanimously passed the following motion:

> That the Central Midwest Interstate Low-Level Radioactive Waste Commission become a party to the national Interregional Access Agreement for Waste Management (October 23, 1992), and that the Chairman be authorized to execute any necessary documents to enter into the national agreement. The Commission considers execution of the national agreement to be an authorization for the import of waste into the region for treatment and storage. The Commission does not consider the national agreement to supersede the interregional access agreements which the Commission has previously entered and which are currently in effect.

—TDL

Interregional Access Agreement for Waste Management Signatories

Entity	Date Signed	Signatory
Appalachian States Low-Level Radioactive Waste Commission	April 13, 1993	Arthur Davis Chair
Central Interstate Low-Level Radioactive Waste Commission	January 29, 1993	Greta Dicus Chair
Central Midwest Interstate Low-Level Radioactive Waste Commission	November 7, 1997	Edward Ford Chair
Midwest Interstate Low-Level Radioactive Waste Compact Commission	November 23, 1992	Teresa Hay Chair
Northeast Interstate Low-Level Radioactive Waste Commission	November 12, 1992	Kevin McCarthy Chair
Northwest Interstate Compact on Low-Level Radioactive Waste Management	December 10, 1992	Roger Stanley Chair
Rocky Mountain Low-Level Radioactive Waste Board	November 16, 1992	Jerry Griepentrog Carlin Chair
Southwestern Low-Level Radioactive Waste Compact Commission	December 18, 1992	Don Womeldorf Executive Director
District of Columbia	January 12, 1994	James Murphy Administrator, Service Facility Regulation Administration, Department of Consumer and Regulatory Affairs
State of Maine	November 23, 1992	Donald Hoxie Director, Division of Health Engineering
Commonwealth of Massachusetts	January 13, 1993	Carol Amick Executive Director, Low-Level Radioactive Waste Management Board
State of Michigan	November 18, 1992	Dennis Schornack Acting Commissioner for Low-Level Radioactive Waste, Low-Level Radioactive Waste Authority
State of New York	March 24, 1993	Eugene Gleason Deputy Commissioner for Operations, New York State Energy Office
State of Texas	June 11, 1993	Lawrence Jacobi, Jr. General Manager, Texas Low-Level Radioactive Waste Disposal Authority
State of Vermont	May 12, 1993	Diane Conrad Director, Vermont Radioactive Waste Management Program

U.S. Department of Energy (DOE)

DOE Rejects Utility Proposal to Cease Payments to HLW Fund

On January 12, the U.S. Department of Energy rejected a request by 27 utilities that the department authorize them to stop making payments to the Nuclear Waste Fund. DOE's rejection letter, however, repeated the department's prior position that individual utilities can petition for special relief if they can provide proof of financial harm from having to store spent nuclear fuel themselves.

The utilities' request had been made in response to the department's statements that it would not be able to accept spent nuclear fuel for disposal by the statutory deadline of January 31, 1998. As a result of DOE's failure to meet its deadline, spent nuclear fuel is currently stored at 73 sites around the country.

Next Step What further action the utilities will take is unclear at this time. They have already sued the department in federal court. Although the court ruled that DOE is still legally obligated to take the utilities' spent nuclear fuel, the court refused to order the department to actually begin accepting waste by the statutory deadline, finding instead that the "Standard Contract" between DOE and the utilities provides a potentially adequate remedy. (See *LLW Notes*, Winter 1997, pp. 27–29.) Conceivably, the utilities could go back to the court for further relief, or they could go to the department's equivalent of an administrative law judge.

Background The Nuclear Waste Policy Act requires DOE to site, develop, license, and operate a deep geologic repository for the nuclear industry's spent fuel. Under the terms of the act, nuclear utilities and DOE are to enter into contracts whereby the utilities agree to make payments to the Nuclear Waste Fund to cover the cost of the federal disposal program in exchange for DOE's provision of a repository for the utilities' waste. In 1983, DOE developed a "standard contract" for this purpose. The act also provides that utilities have the primary responsibility for the interim storage of spent fuel until it is accepted by DOE in accordance with the act's provisions.

—TDL

Antinuclear and Environmental Groups Seek Contempt Order Against DOE and Its Officials

On January 26, a coalition of almost forty antinuclear and environmental groups filed a motion in federal court seeking an order holding the U.S. Department of Energy, its Secretary—Federico Peña—and other senior agency officials in contempt for allegedly failing to honor a previous court order directing the department to complete a thorough analysis of the U.S. nuclear weapons cleanup program.

The motion specifically seeks the imprisonment of Peña and two top deputies until DOE produces a binding schedule for preparing and issuing a Programmatic Environmental Impact Statement (PEIS) on the agency's Environmental Restoration and Waste Management program. It also seeks more than $5 million in punitive fines and a penalty of $5,000 per day if DOE fails to complete the PEIS within one year. DOE had agreed to perform the PEIS in a stipulation entered in October 1990 to settle a lawsuit initiated by many of the same groups currently seeking the contempt order.

In addition, the motion requests an order directing DOE to withdraw its recent decisions on the Waste Isolation Pilot Plant and policies for treating and storing transuranic wastes. The plaintiffs argue that such decisions and policies are invalid because they are not based on a complete analysis of environmental impacts and alternatives.

As of press time, the court had not ruled on the motion.

—TDL

Governor of Washington and Arkansas Senator Weigh In On DOE Use of Commercial Facilities

Washington State Correspondence

On December 4, State of Washington Governor Gary Locke (D) and Attorney General Christine Gregoire sent a letter to U.S. Department of Energy Secretary Federico Peña conveying their concern over "a legal issue, which, if not appropriately resolved could significantly undermine state regulation of commercial radioactive waste disposal facilities." Citing the recent decision of the U.S. District Court for the Northern District of Texas in *Waste Control Specialists, LLC v. U.S. Department of Energy*, Locke and Gregoire listed several potential problems with proposals being considered by the department for its use of commercial facilities absent regulatory oversight by states or the U.S. Nuclear Regulatory Commission. (See *LLW Notes*, August/September 1997, pp. 15–17.)

> We appreciate DOE efforts to reduce its cleanup costs through competitive use of commercial waste treatment and disposal facilities. However, the Court's ruling in this case, if broadly interpreted, would create a confusing, duplicative, inefficient, and potentially dangerous regulatory environment for commercial radioactive waste treatment and disposal facilities. It would clearly jeopardize our efforts and those of other states hosting DOE and commercial radioactive waste facilities to put in place effective and credible regulatory programs to protect workers, the public, and the environment. Moreover, this finding is clearly contrary to DOE's announced intention to end years of questionable "self-regulation" and move toward external regulation.

Locke and Gregoire concluded their letter by urging Peña "to take whatever action is necessary and appropriate to reaffirm DOE's commitment to external regulation and to ensure that DOE use of commercial treatment and waste disposal facilities will not interfere with or jeopardize existing state and NRC regulatory processes."

Correspondence from Arkansas Senator

U.S. Senator Dale Bumpers (D-AR), the ranking minority member on the Senate Energy and Natural Resources Committee, also recently registered his concerns over issues related to DOE use of commercial facilities. In separate letters to Peña and NRC Chairman Shirley Ann Jackson, Bumpers expressed apprehensions about legal and policy issues associated with the proposal by Waste Control Specialists' (WCS) to dispose of DOE waste absent state and NRC regulation.

Letter to Peña In a strongly worded letter dated December 9, Bumpers urged Peña "not to take any action to implement any self-regulatory scheme for WCS or any other waste disposal contractor or make any commitments to do so" without first informing the Energy and Natural Resources Committee.

> I understand that your staff believes that the Department has the legal authority to implement the WCS proposal. My own staff has reached the opposite conclusion. I would appreciate your reviewing the enclosed memorandum and either rethinking your position or explaining to me where mine is wrong. I would also like to know how you square the WCS proposal with current efforts to bring the Department's nuclear activities under NRC regulation.
>
> While I appreciate your efforts to encourage competition in the Department's waste disposal business, more competition must not come at the expense of public safety, state participation, and compliance with existing law.

Letter to Jackson Bumpers' letter to Jackson expressed serious misgivings about the implications of WCS' proposal on external regulation of DOE facilities. Bumpers complained that the proposal is an attempt to extend DOE's self-regulatory authority "to shield commercial low-level waste disposal firms from NRC or agreement state licensing. Bumpers' correspondence to Jackson also included the staff memorandum referenced in the Peña letter, as well as a list of 10 questions to which he requested responses.

—TDL

U.S. DOE (continued)

Acting DOE Assistant Secretary for Environmental Management Named

On January 30, Energy Secretary Federico Peña announced the appointment of James Owendoff as Acting Assistant Secretary for Environmental Management. Owendoff replaces Alvin Alm, who made known his impending resignation last October. (See *LLW Notes*, Winter 1997, p. 20.)

Owendoff arrived at DOE in 1995 and has served in a number of senior positions, including Deputy Assistant Secretary for Environmental Restoration and Acting Principal Deputy Assistant Secretary in the Office of Environmental Management. Previously, he served in the Office of the Deputy Under Secretary of Defense for Environmental Security and Chief of the Air Force Environmental Restoration Division. Prior to those assignments, Owendoff was a career Air Force officer.

The permanent position of Assistant Secretary for Environmental Management requires appointment by the President and confirmation by the U.S. Senate.

In a prepared statement, Energy Secretary Federico Peña commented:

> This is a critical time for the Office of Environmental Management. Environmental restoration efforts at our different sites are accelerating, and public and Congressional expectations about the quality of our cleanup efforts are higher than ever. I am confident that Mr. Owendoff brings the right set of skills and talents to help the Department continue to meet these important goals.

—LAS

DOE Unveils $18–Billion Budget Request For FY 1999

On February 2, 1998, U.S. Department of Energy Secretary Federico Peña unveiled the department's $18-billion budget request for FY 1999—approximately a nine-percent increase over this year's $16.5 billion budget. According to Peña, the increase is concentrated in three major areas:

- DOE's various energy research and development programs,
- DOE's scientific capabilities, and
- the Comprehensive Test Ban Treaty and DOE's anti-proliferation programs.

Some areas of interest in the DOE budget are as follows:

Environmental Management DOE is seeking $6.1 billion for environmental management. Projects within this area were classified according to the department's 2006 accelerated cleanup plan.

Privatization DOE's privatization initiative received a significant boost in the budget request. DOE is requesting $517 million for the initiative in FY 1999 as opposed to $200 million this year.

Yucca Mountain DOE is seeking $380 million in funding for its civilian radioactive waste management program, which includes funding for work on the proposed commercial high-level radioactive waste repository at Yucca Mountain, Nevada. This constitutes a $34-million increase over the current funding level.

—TDL

U.S. Nuclear Regulatory Commission (NRC)

NRC Holds Prehearing Conference on Goshute Spent Fuel Proposal

Utah Governor Continues Opposition to Plan

In late January 1998, the U.S. Nuclear Regulatory Commission held a prehearing conference on an application by Private Fuel Storage (PFS) Limited Liability Company to construct an above-ground facility for temporary storage of spent nuclear fuel on a Native American reservation in Tooele County, Utah. PFS is a consortium of seven nuclear utility companies led by Northern States Power Company. The proposed location for the facility is on land belonging to the Skull Valley Band of Goshutes.

Utah Governor Michael Leavitt (R) has opposed the storage of high-level radioactive waste in the state since 1993 and continues to do so. In December 1997, Leavitt sought and received state control of the only road leading to the proposed site on the Goshute's reservation. Such control may give the state leverage in blocking shipments to the site.

NRC Prehearing Conference

The prehearing conference, which was held in Utah, was open to the public for observation. During the conference, the licensing board heard arguments on whether persons seeking a hearing on the application have formal legal standing to do so and whether the contentions that they are raising are admissible. Issues to be considered by the NRC include

- the nature of each petitioner's right to be made a party to the proceeding pursuant to the Atomic Energy Act;
- the nature and extent of each petitioner's property, financial, or other interest in the proceeding; and
- the possible effect, if any, that an order entered in the proceeding may have on each petitioner's interests.

If any of the petitioners is found to have standing and to have submitted an admissible contention, the board will conduct a hearing. Such a hearing would include an opportunity for the submission of written public comments or brief oral presentations by the public.

Background

Private Fuel Storage Limited Liability Company submitted its spent fuel storage application to the U.S. Nuclear Regulatory Commission on June 25, 1997. Under the terms of the application, the facility would hold up to 40,000 metric tons of waste in 4,000 metal containers.

PFS is seeking to build the facility due to the federal government's refusal to take spent nuclear fuel by early 1998, as originally contemplated in the Nuclear Waste Policy Act of 1982. (See *LLW Notes*, April 1997, pp. 26–27.) Eight utility companies, including Southern California Edison, are members of the consortium.

Control of the Road Leading to the Reservation

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 on the Goshute reservation. Tooele County officials, who have been negotiating with PFS, objected strongly to the redesignation of the road. However, an attorney for the Goshute tribe suggested that the redesignation may not impact the spent fuel proposal, arguing that the fuel rod shipments would be protected by the Interstate Commerce Act.

For additional background information, see LLW Notes, July 1997, pp. 34–35.

—TDL

U.S. NRC (continued)

NRC Asks Envirocare to Amend its Employment Policies

Envirocare Issues Response to NRDC Allegations

In late December 1997, Envirocare of Utah President Charles Judd responded to allegations of misconduct and unfair business practices that had earlier been lodged against the company by the Natural Resources Defense Council (NRDC). The allegations were contained in both a formal petition for enforcement action filed with the U.S. Nuclear Regulatory Commission on December 12 pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR 2.206) and in a letter to the NRC Office of the Inspector General dated December 2. (See *LLW Notes*, December 1997, pp. 19, 21.)

NRC staff also responded to the allegations, denying NRDC's request for immediate action concerning Envirocare's NRC license by letter dated January 16, 1998. NRC is, however, considering NRDC's request for an investigation and for the suspension of Envirocare's license pursuant to 10 CFR 2.206. In that vein, a notice of the petition was published in the *Federal Register* on January 29, 1998 (63 *Federal Register* 4501).

In addition, NRC has conducted a limited review of Envirocare's policies, programs, and employment agreement. In so doing, the commission found that some of the company's employment policies are inconsistent with federal law. Accordingly, NRC requested that Envirocare amend its policies and submit them to the commission for further review. Envirocare complied with NRC's request and submitted amended policies on January 21, 1998. The amended policy is being reviewed by NRC staff.

Envirocare Responds to NRDC Allegations

On December 23, 1997, Judd sent a letter to the NRC Inspector General responding to some of the allegations against Envirocare contained in NRDC's letter of December 2. Judd specifically stated that he would not address all of the NRDC's allegations "since most of them have absolutely no merit."

In his letter, Judd asserted the following:

- NRDC has made the same allegations against Envirocare in previous letters and complaints filed with NRC and the U.S. Department of Energy. NRDC has not contacted Envirocare directly about any of these claims.
- The issues raised by NRDC do not involve health, safety, the environment, or the law. Envirocare is fully regulated by both state and federal agencies and has been closely scrutinized and audited over the past year.
- NRDC's attacks against Envirocare effectively promote the commercial interests of the company's primary competitor, Waste Control Specialists (WCS), and the NRDC's allegations closely track those promoted by WCS.
- Contrary to NRDC's assertions, Envirocare has never "admitted ... to complicity in a corrupt scheme of apparent bribery or extortion in connection with receiving its approvals ..."
- DOE determined that NRDC's allegations, including claims related to the National Environmental Policy Act (NEPA), were without merit.
- There is no evidence suggesting that any official of Envirocare has ever threatened any other person, nor is there any basis in fact for NRDC's allegations relating to "falsified records."
- NRDC's allegations regarding "whistleblower complaints made to NRC" in 1991 omit any reference to the Utah Bureau of Radiation Control's investigation into the matter or the bureau's report to the NRC. Envirocare has been working with NRC staff to ensure that its whistleblower protection policy meets and exceeds the commission's requirements.

NRC Writes to Envirocare re Employment Policies and NRDC Allegations

December 8 Letter On December 8, 1997, Carl Paperiello—the Director of NRC's Office of Nuclear Material Safety and Safeguards—sent a letter to Judd concerning NRC's review of Envirocare's whistleblower protection policy, environmental compliance program, and employment agreement. Paperiello explained that the review determined that some of the company's policies are inconsistent with the Energy Reorganization Act (ERA) and therefore requested that Envirocare amend the policies as described and submit the amended policies to NRC staff for further review.

NRC specifically noted the following problems with Envirocare's policies, programs, and employment agreements:

- While Envirocare's policy affords its employees protection from retaliation for providing the employer or NRC with information about alleged violations of state or federal environmental laws, it does not afford employees raising nuclear safety concerns these same protections.

- Envirocare's policy appears to protect employees only from discrimination for notifying regulatory officials of "substantial" safety hazards or other violations of state or federal environmental laws. However, the ERA and other similar laws do not require that the alleged safety hazard or violation be "substantial."

- Envirocare's policy seems to require that employees abstain from notifying appropriate governmental officials unless the employee "has not received an appropriate response" from the company. The ERA, however, allows employees to bypass management and refer their concerns directly to government officials.

- Envirocare's environmental compliance program needs to be expanded to include procedures applicable to NRC-covered activities.

- Envirocare's employment agreement contains restrictions on the disclosure of confidential or proprietary information. NRC believes that such restrictions could be interpreted to preclude, in violation of federal law, the disclosure to NRC or other governmental bodies of data in support of a nuclear safety concern. Language must be added to the agreement to explain what rights employees have under the laws, including the right to raise nuclear safety concerns or to provide nuclear safety information to the NRC or other federal or state government agencies.

December 31 Letter NRC followed up its December 8 letter to Envirocare with another, dated December 31, in which it requested additional information from the company to assist the commission in its review of NRDC's December 12 petition. Specifically, NRC requested that Envirocare (1) respond to each of the allegations raised in the petition, and (2) notify the commission as to whether the company plans to enforce its employment agreement against current and former employees who have engaged, or do engage, in protected activities. If the company does not plan to enforce its agreement, NRC requested that it advise the commission of what actions, if any, it has taken or plans to take to notify employees of this decision.

Envirocare Responds to NRC Requests

On January 21, 1998, Judd sent a letter to Paperiello replying to NRC's letters of December 8 and 31. Judd's letter was accompanied by his affidavit, sworn under oath, and separate copies of Envirocare's revised whistleblower protection policy, revised environmental and nuclear safety compliance program, and revised employment agreement.

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U.S. NRC (continued)

Judd's letter states, in part, as follows:

> Envirocare encourages employees to raise and report environmental compliance and nuclear safety concerns. Envirocare has never threatened a current or former employee with any kind of retaliatory or other action for advising anyone of such concerns. Envirocare has had copies of the NRC's Form 3 conspicuously posted at our site so that employees are aware of their rights to communicate nuclear safety concerns. Nothing in our Employment Agreement or in our Environmental Compliance Program was intended to prevent, and they do not prevent, an employee or former employee from advising any person, entity or agency of safety concerns at Envirocare's facilities or from engaging in any protected activities cognizable under Section 211 of the Energy Reorganization Act or any other employee protection statute. Envirocare has not claimed or asserted in the past, and does not intend to claim or assert in the future, that any current or former employee who has engaged in any such protected activity was in violation of the Employment Agreement. The confidentiality provision in our Employment Agreement was simply intended to protect confidential business information such as pricing, market analysis, trade secrets, etc.
>
> Further, Envirocare never has taken any enforcement action, or threatened to take any enforcement action, against any employee or former employee, to prevent such protected activity, or to recover damages or obtain other relief as a result of such protected activity based upon any alleged violation of the Employment Agreement or otherwise. Nevertheless, we have amended our Employment Agreement to insure that there is no misunderstanding regarding the meaning of the confidentiality provision contained therein and to specifically address your suggestions about providing additional awareness to employees of their rights to raise nuclear safety concerns and to provide nuclear safety information to NRC officials as a part of their whistleblower protection.

In his letter, Judd announced that

- Envirocare has prepared an Employment Agreement Acknowledgement form to be completed by all employees to make them aware of the meaning, intent, and coverage of the confidentiality provision;
- Envirocare is advising all of its employees about clarifications to its policies and programs and providing them with copies thereof;
- Envirocare is providing its employees with copies of NRC's whistleblower policy statement; and
- Envirocare is making reasonable efforts to contact past employees to clarify the companies' policies, programs, and agreements.

—TDL

NRC Allows Disposal of Off-Site 11e.(2) Byproduct Material at New Mexico Mill Tailings Site

NRC has approved a license amendment authorizing the disposal of 11e.(2) byproduct material from off-site generators at the Ambrosia Lake Uranium Mill Tailings Site in New Mexico. The amendment, which was issued on May 16, 1997, limits the annual disposal total of byproduct material to 2.7 million cubic feet—whether the material is produced on site or obtained from off-site generators. The amendment also provides that off-site 11e.(2) byproduct material that is disposed of at the site must be similar in physical, chemical, and radiological characteristics to the waste already there.

The Ambrosia site is operated by Quivira Mining Corporation, a subsidiary of Rio Algom Corp. and an indirect subsidiary of Rio Algom, Ltd. of Canada. It was originally the location of a uranium mill that has been on stand-by for almost 10 years. Currently, Quivira conducts reclamation activities at the site.

On May 28, 1997, Envirocare of Utah petitioned NRC challenging the license amendment. Envirocare argued that Quivira was not required to follow the same environmental rules. The petition was referred to an administrative law judge who subsequently rejected it. Envirocare appealed the administrative law judge's decision to the commission. That appeal is pending.

—TDL

New Materials and Publications

Document Distribution Key	
P Forum Participants	D LLW Forum Document Recipients
A Alternate Forum Participants	N *LLW Notes* and *Meeting Report* Recipients
E Forum Federal Liaisons	M Meeting Packet Recipients
L Forum Federal Alternates	

LLW Forum

N *Summary Report: Low-Level Radioactive Waste Management Activities in the States and Compacts*. Afton Associates, Inc. January 1998. Includes information regarding current waste management; regulatory, program, and siting responsibility; disposal technology; siting; licensing; and development costs.

DM *Meeting Packet:* LLW Forum meeting, February 10-13, 1998.

— *LLW Forum Meeting Agenda.* Afton Associates, Inc. February 1998.

— *LLW Forum Meetings-at-a-Glance Schedule*. Afton Associates, Inc. February 1998.

— *LLW Forum Meeting Preattendance List*. Afton Associates, Inc. February 1998.

— *Status of Technical Assistance*. DOE's National Low-Level Waste Management Program. February 1998.

— *Official Radioactive Waste Management Policy.* Environment and Energy and Transportation Committees, National Conference of State Legislatures. November 9, 1997.

— *Excess Capacity for the Disposal of Low-Level Radioactive Waste in the United States Means New Compact Sites are Not Needed* (Report Highlights). F. Gregory Hayden, Nebraska Commissioner, Central Interstate Low-Level Radioactive Waste Compact Commission. December 1997. To obtain a copy of the full report, fax a request to (402)472-9700. Please include a mailing address with the request.

— Memo from Don Womeldorf, Executive Director, Southwestern Low-Level Radioactive Waste Commission, to low-level radioactive waste generators in the southwestern region regarding the Hayden report and the "misleading information about the economic viability of the Ward Valley project." Included as an attachment is an analysis of the Hayden report prepared by California's Department of Health Services. December 23, 1997.

— Letter from Gregg Larson, Executive Director, Midwest Interstate Low-Level Radioactive Waste Commission, to F. Gregory Hayden, Nebraska Commissioner, Central Interstate Low-Level Radioactive Waste Compact Commission, providing comments on Hayden's report.

— Letter from Kathryn Haynes, Alternate Forum Convenor, to F. Gregory Hayden, Nebraska Commissioner, Central Interstate Low-Level Radioactive Waste Compact Commission, correcting specific statements regarding the LLW Forum in Hayden's report. January 29, 1998.

— *NGA Policy: Environmental Compliance at Federal Facilities.* (NR-8.) This Natural Resources policy was revised at NGA's 1997 annual meeting and is effective through its 1999 annual meeting.

— Letter from Shirley Ann Jackson, Chairman, NRC, to Carol Browner, Administrator, Environmental Protection Agency, regarding NRC's concerns with EPA's guidance that would establish protective cleanup levels for radioactive contamination at Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) sites. December 12, 1997.

States and Compacts

Central Midwest Compact/ Illinois

Illinois Department of Nuclear Safety 1996 Annual Survey Report. December 1997. Illinois Department of Nuclear Safety. Summary of survey forms submitted by generators and brokers of low-level radioactive waste in Illinois. To obtain a copy, contact Vera Small of the Illinois Department of Nuclear Safety at (217)524-6309.

Midwest Compact

Ohio Low-Level Radioactive Waste Facility Development Authority Annual Report. November 1997. Ohio Low-Level Radioactive Waste Facility Development Authority. Includes information about the Midwest Compact's resolution calling for cessation of development activities, along with a financial statement for FY '97. To obtain a copy, contact the Midwest Compact Commission at (612)293-0126.

Northeast Compact/Connecticut

Low-Level Radioactive Waste Management in Connecticut-1996. December 1997. Connecticut Hazardous Waste Management Services, Low-Level Radioactive Waste Program. Summary of low-level radioactive waste management by the state's generators. To obtain a copy, contact Ronald Gingerich of the Connecticut Low-Level Radioactive Waste Program at (860)244-2007.

Federal Agencies and Committees

Department of Energy (DOE)

Letter from Alvin Alm, Assistant Secretary for Environmental Management, DOE, to Dana Mount, Chair, Southwestern Low-Level Radioactive Waste Commission, regarding DOE's decision not to enter into discussions regarding the acceptance of commercial low-level radioactive waste from the Southwestern Compact at the DOE's federal facilities in the States of Nevada and Washington. December 3, 1997.

Nuclear Regulatory Commission (NRC)

Letter from Carl Paperiello, Director, Office of Nuclear Material Safety and Safeguards, NRC, to Charles Judd, President, Envirocare of Utah, Inc. requesting that Envirocare amend its Whistleblower Protection Policy, the Environmental Compliance Program that is referenced in that policy, and Envirocare's Employment Agreement to ensure compliance with Section 211 of the Energy Reorganization Act, 42 U.S.C. 5851 and 10 CFR 40.7. December 8, 1997.

Letter from Carl Paperiello, Director, Office of Nuclear Material Safety and Safeguards, NRC, to Charles Judd, President, Envirocare of Utah, Inc. requesting Envirocare to respond to the allegations made by the Natural Resources Defense Council (NRDC) in its petition to NRC alleging that Envirocare has violated Section 211 of the Energy Reorganization Act and 10 CFR 19.6, 19.20 and 40.7. December 31, 1997.

Letter from Charles Judd, President, Envirocare of Utah, Inc., to Carl Paperiello, Director, Office of Nuclear Material Safety and Safeguards, stating that Envirocare has revised its Whistleblower Protection Policy, Environmental and Nuclear Safety Compliance Program and Employment Agreement, consistent with NRC's recommendations noted in the previously listed letters. January 21, 1998.

Letter from Charles Judd, President, Envirocare of Utah, Inc., to Hubert Bell, Inspector General, NRC refuting, "numerous false and misleading claims about Envirocare of Utah, Inc." made by Thomas Cochran, Natural Resources Defense Council (NRDC) in a letter dated December 2, 1997. December 23, 1997.

—RTG

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

- EPA Listserve Network • Contact Terri Dickson at (202)260-9581 or e-mail (leave subject blank and type help in body of message) . . . . . .listserver@unixmail.rtpnc.epa.gov

- U.S. Government Printing Office (GPO) (for the *Congressional Record*, *Federal Register*, congressional bills and other documents and access to more than70 government databases) . .http://www.gpo.gov/su_docs/

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

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

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

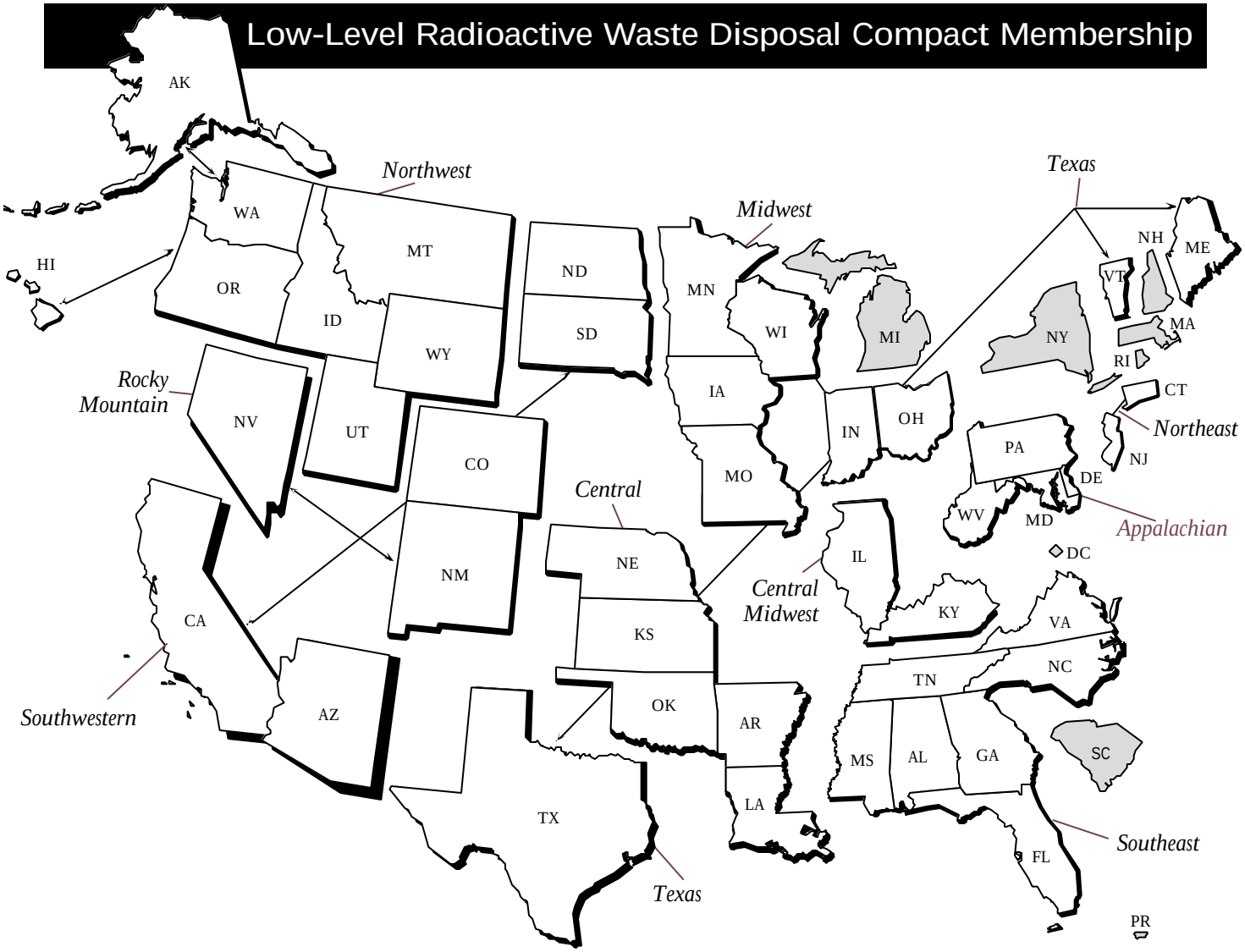
Receiving *LLW Notes* **by Mail**

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

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

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

Low-Level Radioactive Waste Disposal Compact Membership



Appalachian Compact
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
North Carolina *
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
Vermont

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

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

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