LLW notes

Volume 16, Number 4 July/August 2001

Nebraska v. Central Interstate Low-Level Radioactive Waste Commission

Nebraska Petitions Supreme Court re Sovereign Immunity: Central Commission Files Brief in Opposition

Twelve States File Amici Curiae Brief on Sovereign Immunity

On July 16, the State of Nebraska petitioned the U.S. Supreme Court for a writ of certiorari in a lawsuit initiated by the Central Interstate Low-Level Radioactive Waste Commission. The lawsuit, which was originally filed in December 1998, challenges the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. In its petition, Nebraska asks the Court to review a decision of the U.S. Court of Appeals for the Eighth Circuit rejecting the State's claim of Eleventh Amendment sovereign immunity. (See *LLW Notes,* March/April 2001, pp. 16-19.) Specifically, Nebraska presents the following question to the Court:

"Whether a State waives its Eleventh Amendment sovereign immunity from a suit seeking damages and other retrospective relief in federal court by entering into a multistate compact that authorizes only prospective relief against the State and only in 'any court that has jurisdiction'?"

In mid-August, twelve states filed an amici curiae brief in support of Nebraska's petition. The brief supports review by the high court, arguing that "[t]he Eighth Circuit's decision substantially erodes States' Eleventh Amendment immunity with regard to their obligations under interstate compacts." The following states signed on to the amici curiae brief: Alaska, California, Florida, Hawaii, Mississippi, Missouri, Montana, North Carolina, Ohio, South Carolina, Utah, and West Virginia.

Also in mid-August, the Central Commission filed a brief in opposition to Nebraska's petition for a writ of certiorari.

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Low-Level Radioactive Waste Forum, Inc.

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Key to Abbreviations

U.S. Department of Engergy	DOE
U.S. Department of Transportation	DOT
U.S. Enviromental Protection Agency	EPA
U.S. General Accounting Office	GAO
U.S. Nuclear Regulatory Commission	NRC
Naturally-occuring and accelerator-produced Radioactive material	NARM
Naturally-occuring radioactive material	NORM
Code of Federal Regulations	CFR

Appalachian Compact

Appalachian Commission Releases 99-00 Annual Report

The Appalachian States Low-Level Radioactive Commission recently issued its 1999-2000 Annual Report. Among other things, the report discusses disposal trends for low-level radioactive waste in the Appalachian Compact region from 1986 to 1999. Graphics and charts are used to help explain the "significant reduction in the volumes of LLRW generated in the Appalachian States Compact since 1986, due to waste minimization practices by LLRW generators."

Although the report acknowledges a significant increase in the volume of low-level radioactive waste disposed of from the region in 1999, it notes that this was mainly due to decommissioning and decontamination activities and that this waste (approximately 86% of the total waste disposed that year) would not have been disposed of at the proposed regional disposal facility in Pennsylvania. In regard to trends in the levels of radioactivity for waste disposed, the report notes as follows:

> The historical data shows that the radioactivity of the LLRW has generally remained constant since 1993. This indicates that, although waste minimization methods and processes have been very effective in reducing the volume of LLRW, they have not been as effective in reducing the radioactivity level of the waste during this period.

Atlantic Compact/South Carolina

Update re Barnwell LLRW Disposal Facility

On August 1, Bill Newberry—Manager of the Radioactive Waste Disposal Program of the Energy Office of the South Carolina Budget and Control Board—sent a letter to generators who use the Barnwell low-level radioactive waste disposal facility. The purpose of the letter was to update customers on policies and plans related to the facility, which will cease accepting out-of-region waste after June 30, 2008 pursuant to state law. In the interim, the annual volume of waste that can be accepted at Barnwell is limited. For instance, from July 1, 2001 through June 30, 2002, the Barnwell facility may accept up to 80,000 cubic feet of waste—a 35 percent reduction from the volume received during the prior one-year period.

In his letter, Newberry emphasizes the following points:

- Disposal rates for the Barnwell facility are set by the State of South Carolina, as is the methodology for allocating the declining annual volumes among potential customers. Chem-Nuclear is compensated for operating the site based on audited operating costs, with any excess disposal revenues going to the state for educational purposes.

- In the unlikely event that Chem-Nuclear determines to terminate its lease for the disposal facility, the company is required to give the state six months notice. In such an event, the South Carolina Budget and Control Board would take steps to minimize any disruption in disposal service.

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Central Compact

Hayden Argues Central Compact Controlled by Corporate Influence

Nebraska Commissioner and economics professor Gregory Hayden recently released a new report arguing that the Central Interstate Low-Level Radioactive Waste Commission is controlled by a "corporate web of influence." The driving force in the compact, according to Hayden, is Entergy Corporation of New Orleans—the third largest power generator in the country. Entergy officials have been quoted as calling Hayden's comments ridiculous, stating that the company does not have any control over the compact commission.

The New Report and Its Findings

In his report, titled "The Corporate Power Structure of the Central Interstate Low-Level Radioactive Waste Compact," Hayden defines and analyzes what he claims to be a corporate power structure surrounding the Central Commission. The report finds that, "given the associated power structure, the five-state compact was not a viable policy alternative for the citizens and ratepayers of the five states." Moreover, the report concludes that "the compact approach to the management of LLRW is not a policy consistent with the enhancement of citizen welfare in the compact states."

Specifically, Hayden claims that four corporate boards formed power blocs that are linearly connected by interlocking directorships. The power blocs were then utilized by the utilities "to formulate networks of collusive decision making and action by the overlapping boards of directors." This corporate network, according to Hayden, was used as both an "impregnable fort" and an "offensive force" to control economic and political decisions within the Central Compact. As a result, Hayden believes that the Central Compact became "the victim of a set of powerful corporate alliances . . . that have numerous horizontal ties with each other and government agencies, and vertical ties with small-scale producers and contractors."

The result of the alliances, according to Hayden, is as follows:

> The citizens of the five states of the . . . (Central Compact) have been subjected to such a squeeze regarding the disposal of radioactive waste for over a decade. Nebraska has been the most abused, but the citizens of all five states have lost control of low-level radioactive waste policymaking. The only way to have prevented the squeeze is for the states to have never joined such a compact because, as this report clarifies, the integrated corporations are too powerful to be controlled or led.

Hayden's 1997 Report re Excess Disposal Capacity

In 1997, Hayden released a report titled "Excess Capacity for the Disposal of Low-Level Radioactive Waste in the United States Means New Compact Sites Are Not Needed." In that report, Hayden found that "existing capacity for disposal exceeds the volume of waste needing disposal without any change to the existing system." He attributed the dramatic decrease in the volume of low-level radioactive waste disposed of annually to market and technological forces and projected that the decline would continue. As a result, Hayden argued that new disposal sites are not needed and will not be economically viable.

To obtain a copy of the report, contact Gregory Hayden of the University of Nebraska at (402) 472-2332 or ghaydenl@unl.edu.

Midwest Compact/Iowa

Iowa Transportation Fee Placed on Hold

In response to concerns about a new rule imposing fees for the transport of both high- and low-level radioactive waste across the State of Iowa, the state Administrative Rules Committee suspended implementation of the fee until next spring. The rule, which was originally adopted on March 14 by the Iowa Board of Health, was intended to collect revenues to support a program initiated by the Iowa Department of Public Health for proper response in case of an accident involving the transportation of radioactive waste in Iowa. Three major interstates cross Iowa and large amounts of radioactive waste are transported on these roads. Nonetheless, industry and transportation officials expressed concern about setting a precedent in this area and opposed implementation of the rule. (See *LLW Notes,* May/June 2001, p. 5.)

The rule, Iowa Administrative Code Chapter (IAC) 641-38.8(11), states as follows:

> a. All shippers of waste containing radioactive materials transporting waste across Iowa shall pay the following fee(s) unless the agency is able to obtain funding from another source (i.e., federal agency).
>
> (1) $1750 per truck for each truck shipment of spent nuclear fuel, high-level radioactive waste or transuranic waste traversing the state or any portion thereof. Single cask truck shipments are subject to a surcharge of $5 per mile for every mile over 250 miles for the first truck in each shipment.
>
> (2) $250 per truck for transport of low-level radioactive waste.
>
> (3) $1250 for the first cask and $100 for each additional cask for each rail shipment of spent nuclear fuel, high-level radioactive waste or transuranic waste traversing the state or any portion thereof.
>
> (4) $250 for the first rail car and $50 for each additional rail car in the train for transport of low-level radioactive waste.
>
> b. All fees must be received by the Department of Public Health prior to shipment.

The rule originally had an effective date of May 9, but that date was subsequently deferred for 90 days. The American Council of Users of Radioactive Waste (ACURI), among others, wrote a letter expressing concern about the rule and requesting that it be rescinded.

State officials plan to work with industry and transportation officials during the period in which the fee is suspended to find an acceptable fee structure.

Northwest Compact / Utah

Envirocare's Class A, B and C License Request Approved
Three Appeals Filed Challenging Decision

On July 9, the Executive Secretary of the Utah Radiation Control Board issued a final decision to approve—subject to specified limitations and conditions—an application by Envirocare of Utah to receive and dispose of containerized Class A, B, and C low-level radioactive waste at its facility in Tooele County, Utah. Shortly thereafter, Envirocare President Charles Judd issued a statement that "[a]fter careful consideration, Envirocare has determined it will not seek legislative or gubernatorial approval for its Class B and C low-level radioactive waste proposal." Under Utah law, the Governor and legislature must approve any new waste disposal licenses. The next legislative session begins January 15, 2002.

The issuance of the Executive Secretary's technical decision to approve the license commenced a 30-day period in which interested parties could file an appeal. The deadline for filing appeals expired on August 7. Three different entities filed appeals—(1) the U.S. Air Force, (2) the Sierra Club, Inc. and (3) a joint filing by a group of three non-profit corporations and various individual parties.

Approval of License Request

The July 9 technical decision to approve Envirocare's license request is based on a thorough review by the Utah Division of Radiation Control and its contractor, URS Corporation, of Envirocare's application, supporting technical documents and public comments. It contains the following conditions:

- the legislature and Governor must both approve the facility;
- the legislature must determine ownership of the site after 100 years of closure of the facility; and
- the legislature must authorize sufficient resources to the Division of Radiation Control to oversee transportation and disposal activities associated with the license.

A tentative decision to approve Envirocare's license request was originally issued on January 2, 2001. (See *LLW Notes,* January/February 2001, pp. 1, 6.)

For further information, please contact Bill Sinclair of the Division of Radiation Control at (801) 536-4250.

Envirocare's Decision Not to Seek Legislative or Gubernatorial Approval

Following announcement of the Executive Secretary's decision to approve the license request, Envirocare released the following official statement by Charles Judd:

"After careful consideration, Envirocare has determined it will not seek legislative or gubernatorial approval for its Class B & C low-level radioactive waste proposal.

"Over the last several months, it has become increasingly obvious to Envirocare that the major differences between our proposal to dispose of Class B & C low-level radioactive waste and the proposal by the Goshute Tribe and Private Fuel Storage (PFS) to accept high-level spent fuel rods from nuclear power plants has created a public perception problem that makes pursuit of our proposal an extremely difficult task.

"Unfortunately, our opponents, much to the benefit of our competitors and assisted by some members of the news media, have deliberately confused the

Northwest Compact/Utah

Continued from previous page - Envirocare's License

people of Utah about the huge differences between the two proposals.

"Although the differences between the two proposals are extreme, the firestorm of controversy that has surrounded the PFS/Goshute proposal has spilled over onto Envirocare's project, making it difficult to obtain a properly documented, well considered decision concerning Envirocare's proposal.

"Envirocare understands that the State of Utah is determined to stop the PFS plan to import high-level waste into our state. We feel that pursuing our project while the PFS proposal is pending, will only lead to more confusion and continued misrepresentation of the facts surrounding our efforts.

"This decision by Envirocare will have a negative impact on future employment at Envirocare, and will result in the loss of millions of dollars of lost revenue for Tooele County and the State of Utah."

For background information on the PFS /Goshute proposal, see LLW Notes, July/August 2000, p. 26. For information about recent litigation over the PFS/Goshute proposal, see LLW Notes, May/June 2001, p. 18.

For additional information on Envirocare's response to the approval decision, please contact Charles Judd at (801) 532-1330.

The Appeals

Three separate appeals to the licensing decision were filed by (1) the United States Air Force, (2) the Sierra Club, Inc. and (3) a joint filing by a group of three non-profit corporations and various individual parties.

U.S. Air Force Appeal The U.S. Air Force's appeal is limited to language in the license which requires Envirocare to demonstrate that export approval for waste to be received at the facility has been obtained from the compact of origin or unaffiliated state—"to the extent a state can exercise such approval." The Air Force had filed a timely comment on the draft permit explaining its position that "the Low-Level Radioactive Waste Policy Act (the source of the states' authority to form compacts to regulate commerce in LLRW) does not permit states to require Federal facilities to obtain export approval prior to shipping their LLRW to disposal sites outside the compact region in which the waste originated." In support of this position, the Air Force points to 42 U.S.C. section 2021(d)(1)(B)—that portion of the Policy Act which addresses the extent to which federal facilities are subject to compacts' authorities.

"Low-level radioactive waste owned or generated by the Federal Government that is disposed of at a regional facility or non-Federal disposal facility within a State that is not a member of a compact shall be subject to the same conditions, regulations, requirements, fees, taxes, and surcharges imposed *by the compact commission, and by the State in which such facility is located,* in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government." (emphasis added)

The Air Force argues that "[f]ederal agencies are only subject to regulation to the extent Congress has clearly and unambiguously waived the Federal government's sovereign immunity." Accordingly, the Air Force contends that the absence of statutory language in section 2021(d)(1)(B) subjecting federal agencies to regulations by the compact of origin when waste is exported for disposal to another region operates to deny such authority to the compact of origin.

In its earlier comment, the Air Force requested that the draft permit be modified to clarify that requirements on Envirocare to demonstrate export approval would not apply to federal facilities. The requested modification was not made and the Air Force argues that no adequate basis for rejection of

Northwest Compact/Utah

Continued from previous page - Envirocare's License

the comment has been provided by the Utah Radiation Control Board. Accordingly, the Air Force is asking in its appeal for (1) an opportunity to brief the Radiation Control Board on the issues raised once a basis for denial has been provided and to present its case at a hearing, (2) a ruling that Envirocare is not required to verify that federal agencies have obtained export permits, and (3) modification to the license to exclude federal agencies from such export approval requirements.

Sierra Club Appeal In its appeal, the Sierra Club—a self described "environmental awareness and watchdog group"—identified the following five issues which it believes require agency review:

- *Emergency Response Coordination.* The Sierra Club argues that Envirocare did not provide adequate details and plans for the proper coordination of emergency response agencies in the event of a spill or breach of containment. Furthermore, the Sierra Club complains that Envirocare's "privatization" of the emergency response coordination "is not an option under state law and the relevant administrative rules."

- *Land Use Exemption.* The Sierra Club contends that the January 2001 grant of an exemption to Envirocare of the requirement that low-level radioactive waste disposal "may be permitted only on land owned in fee by the Federal or State Government" is unwise and illegal. In support of its position, the Sierra Club points out that "the Nuclear Regulatory Commission has stated that it would consider it appropriate to await the passage of legislation and assurance of the assumption of ownership of the land by the state at the end of the 100-year period."

- *Potential for Seismic Activity.* According to the Sierra Club, the seismic data that was relied on in issuing the license "is outdated and may not accurately convey the potential for earthquakes or other seismic activity at the site."

- *Potential Groundwater Contamination.* The Sierra Club asserts that groundwater data indicating a potential for contamination of a 300-foot deep aquifer (which could affect the Great Salt Lake and other aquifers) was not properly reviewed.

- *Container Leak.* In conclusion, the Sierra Club notes that the recent discovery of a leaking container which was transported through Utah "should serve as a reminder that the best-laid plans can often go awry."

In response to its appeal, the Sierra Club is asking that the Radiation Control Board (1) provide them with an opportunity to brief the issues in this matter and present its case at a hearing and (2) rule that the license is invalid and must be stayed pending approval by the Governor and legislature.

Appeal by Non-Profits and Individuals A joint appeal was filed by Families Against Incinerator Risk, Utah Legislative Watch, Citizens Against Radioactive Waste in Utah, and nine individuals seeking (1) agency action and review as to the validity of the licensing decision and (2) to intervene in that proceeding and in any proceeding brought by any party to contest the license. The non-profits and individuals offer the following arguments, among others, in support of their appeal.

- They complain that the licensing decision does not meet the findings requirement under Utah law, including that "the issuance of the license will not constitute an unreasonable risk to the health and safety of the public." In particular, the petitioners argue that Envirocare's emergency response plan is inadequate.

- The non-profits and individuals assert that the license violates the land ownership requirements contained in Utah law and that the Radiation Control Board exceeded its authority in voting to exempt Envirocare from this requirement. They, too, point to NRC's letter on this issue in support of their contentions. In addition, they

argue that granting the exemption contingent upon passage of future legislation for ownership and perpetual care funding was improper because it relies on actions by third parties.

- The petitioners argue that the licensing decision violates compact law "which prohibits the acceptance of low-level radioactive waste generated outside of the region comprised of the party states by facilities located in any party state." To overcome this prohibition, according to the petitioners, a two-thirds vote of the compact member states is required. They argue that any such vote would be contrary to the intent of the Low-Level Radioactive Waste Policy Act and its 1985 amendments "which establishes the policy of protecting the health and safety of the public by minimizing the amount of handling and transportation required to dispose of wastes."

In their appeal, the non-profits and individuals seek (1) invalidation, cancellation, and rescission of the license, (2) remand of this proceeding to the Executive Secretary for further proceedings, (3) a formal adjudicative hearing, open to the public, and (4) specific findings of fact and conclusions of law following the adjudicative hearing, including those on the ability to adequately oversee existing and additional radioactive waste disposal facilities.

Next Steps

The Utah Attorney General's Office is in the process of evaluating the appeals and determining the next steps for the Utah Radiation Control Board and the parties in the appeals process. It is anticipated that the administrative hearing process will take a few months. Once the hearing commences, the Utah Radiation Control Board will have to determine whether to uphold the licensing decision of the Executive Secretary, modify the licensing decision, or grant relief as requested by some parties and deny the Executive Secretary's decision. The Board may appoint a hearing officer to hear the appeals and report findings to the Board or the full Board (11 members) may choose to hear the appeals. In either case, the full Board must make their decision by majority vote. Any action by the Board is appealable to the Utah Court of Appeals which would determine if proper administrative procedures were followed during the hearing process.

Background: Envirocare's Application for Class B and C Waste Disposal

Envirocare originally filed an application for the disposal of containerized Class A, B and C radioactive waste with the Utah Department of Environmental Quality's Division of Radiation Control on November 1, 1999. (See *LLW Notes,* November/December 1999, pp. 18-19.) Envirocare then provided supplements to the application during the review process. (See *LLW Notes,* July/August 2000, p. 14.)

Documents related to Envirocare's application for the disposal of containerized Class A, B and C radioactive waste—including a copy of Envirocare's license application, the draft Safety Evaluation Report, the draft Radioactive Materials License, and the draft Groundwater Discharge Permit—are available for review and downloading on the Division of Radiation Control's website at

www.deq.state.ut us/eqrad/drc hmpg.htm.

For further information about the appeals, please contact Bill Sinclair of the Utah Division of Radiation Control at (801) 536-4250.

Northwest Compact / Washington

Richland EIS Delayed

The Washington Department of Ecology has delayed issuance of the final environmental impact statement (EIS) for the Richland, Washington low-level radioactive waste disposal facility by more than a year. The EIS, which was originally scheduled for publication in March 2001, is not expected to be issued until the summer of 2002. The delay is due to the large number and complexity of comments received in response to issuance of the draft EIS.

For additional information, see LLW Notes, May/June 2001, p. 6.

Southeast Compact

Southeast Compact Commission Signs Interregional Access Agreement

On June 19, 2001, the Southeast Compact Commission for Low-Level Radioactive Waste Management became a signatory to the Interregional Access Agreement for Waste Management. The agreement was signed by Kathryn Haynes, Executive Director of the Southeast Compact Commission.

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."

All nine operating compacts are now signatories to the agreement. The following unaffiliated states have also signed the agreement: Massachusetts, Michigan, New York, and the District of Columbia. The states of Texas, Maine, and Vermont have also signed the agreement individually.

For additional information about the Interregional Access Agreement for Waste Management, please contact Todd D. Lovinger of the LLW Forum, Inc. at (202) 265-7990.

Atlantic Compact/South Carolina

Continued from page 3 - Barnwell Update

- Waste which is disposed of at the Barnwell facility is attributed to the original generator, regardless of whether its form has been changed by an intermediate processor.

- State policy is to provide equal pricing and access for waste from all generators—no waste broker or processor is given special access privileges or pricing discounts.

- South Carolina discourages agreements between waste brokers, processors and decontamination service and their waste generator customers that do not separate out and itemize disposal prices for generators. Chem-Nuclear has been asked to separate out disposal contracts from other waste management contracts in the future.

- The deadline for customers to submit payments to reserve disposal capacity has been extended to January 15, 2002. Payments will be used as partial pre-payments for waste which is disposed during the remainder of this fiscal year.

For additional information about the Barnwell facility and pricing and access policies, please go to the South Carolina Budget and Control Board's web site at

www.state.sc.us/energy/llrwdisposal.htm

or call Bill Newberry at (803) 737-8037 (bnewberry@ogs.state.sc.us) or Gary Lester, Marketing Manager for the Barnwell facility, at (517) 768-7873 (glester354@aol.com).

NEI Official Says Industry Open to Possibility of Building on DOE Sites

Marvin Fertel, Senior Vice President of Business Operations at the Nuclear Energy Institute, recently testified before a Senate panel that industry is open to the concept of a study that would evaluate the possibility of building new nuclear power plants on federal property.

> The industry is committed to building new nuclear power plants to meet growing electricity demands during the next 20 years. In that context, the industry supports provisions in . . . [legislation] that would study the feasibility of building new nuclear power plants at existing Department of Energy sites.

In the past, industry has expressed discomfort with such an idea. However, Senator Strom Thurmond (R-SC) recently introduced legislation—S.919—directing the Secretary of Energy to study the possibility of building new reactors on DOE property as a way of developing new electricity supplies more quickly. In his testimony before the Senate Energy and Natural Resources Committee, Fertel expressed support for at least studying the idea.

At NEI's annual meeting in May, in response to questions about the possibility of building new facilities on federal land, NEI President and Chief Executive Officer Joe Colvin also avoided completely dismissing the idea. However, Colvin said he felt that industry could build new facilities without federal support, an issue which he noted could pose several potential problems.

Nebraska v. Central Compact

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Background

On December 21, 1998, Nebraska regulators announced their decision to deny US Ecology's application for a license to operate a low-level radioactive waste disposal facility in Boyd County. (See *LLW Notes,* January/February 1999, p. 8.) Nine days later, five regional utilities filed suit, arguing that the Nebraska regulators violated the compact, state, and federal law—as well as a statutory and contractual obligation to exercise "good faith"—in their review of the license application. (See *LLW Notes,* January/February 1999, pp. 16–17.) US Ecology subsequently joined the action as a plaintiff. The Central Commission, which was originally named as a defendant to the utilities lawsuit, was granted leave of court to re-align itself as a plaintiff and file its own claims. Nebraska's petition for a writ of certiorari, however, only applies to the Eighth Circuit ruling concerning the petition filed by the Central Commission. The issues surrounding the abilities of the remaining plaintiffs to sue the state have either been dismissed or remanded for further proceedings.

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

Requested Relief The commission is asking that the court issue

- a declaratory order finding that the state's actions constitute a violation of their "good faith" duty to the other states and to the compact and a violation of the commission's statutory rights under the compact;

- a declaratory order finding that the state license review process is "unrectifiably tainted" and that the State of Nebraska should be removed from supervising and managing any further aspect of the license review process; and

- an award of money damages, interest, attorneys fees and costs.

On June 7, the Central Interstate Low-Level Radioactive Waste Commission filed an application for leave to amend its complaint and to add parties defendant, as well as a memorandum brief in support of its application. (See *LLW Notes,* May/June 2001, pp. 1, 11-12.)

For additional background information on the lawsuit, see LLW Notes, January/February 1999, pp. 16–17.

Nebraska's Petition for Writ of Certiorari

The State of Nebraska argues that "[i]n holding that the State, by virtue of its entry into a multi-state compact, waived its immunity from federal suits seeking damages and other forms of retrospective relief, the court of appeals broke sharply with settled legal precedent, put itself on a collision course with other federal courts of appeals, and chose to disregard the prospective-only nature of the carefully worded enforcement language that the signatory States agreed upon in the compact." (citations omitted)

In its petition, Nebraska points out that a state's Eleventh Amendment sovereign immunity from suit in federal court is a core constitutional protection

which demands strict enforcement and which can not be overcome absent a valid abrogation by Congress or an unequivocal waiver by the state itself. Nebraska claims that the Eighth Circuit Court erred in finding that the state had waived it's immunity upon joining the compact and that, in so doing, the appellate court "departed from well-entrenched Supreme Court and federal appellate precedent regarding the degree of specificity necessary to constitute a valid waiver of Eleventh Amendment immunity."

The state contends that the compact provisions which the appellate court found constituted a waiver "undeniably operate on an exclusively prospective basis" and do not "empower[] the Commission to sue a member state *for damages or other retrospective relief* to redress alleged malfeasance occurring in the past." The commission's suit, according to the state, is of a retrospective nature only.

In regard to retrospective actions against a party state, Nebraska argues that the compact "explicitly dictates that such proceedings are to be taken administratively, not in court." In finding that Nebraska had waived its sovereign immunity, the Eighth Circuit Court noted that the compact does not state that the administrative remedies are exclusive. Nebraska argues, however, that "the more telling observation for Eleventh Amendment purposes is that nowhere does the Compact state that they are *not* exclusive." According to Nebraska, the Supreme Court "has repeatedly emphasized that a waiver of sovereign immunity from retrospective lawsuits is not to be inferred from the unstated, but can *only* be discerned from that which is explicitly stated."

Nebraska also challenges the appellate court's finding of a waiver based on the venue provision of the compact. Nebraska contends that the phraseology of the venue provision—"in any court . . . that has jurisdiction"—does not create an enforceable Eleventh Amendment waiver. The appellate court's finding to the contrary is, according to the state, "in direct and irreconcilable conflict with established precedent of this Court and other federal appellate courts, all of which have refused to extrapolate a waiver of sovereign immunity from federal suits on virtually identical language."

Nebraska concludes its petition with the following statement:

"This Court and other federal courts have made it clear in other contexts that States cannot be deemed to have waived their immunity from suit without explicitly consenting to be sued in federal court for money damages or other retrospective relief. The present circumstances of the State of Nebraska as a member of an interstate compact arrangement offers no justification for departing from that constitutional imperative. Plenary review by the Supreme Court is needed to correct an Eighth Circuit ruling that undermines the strong sovereign immunity decisions of this Court in recent years, and promises to compromise the Eleventh Amendment protections that are such a fundamental component of State sovereignty."

Central Compact's Brief in Opposition

In its brief in opposition to review by the high court, the Central Commission offered the following reasons for denial of Nebraska's petition:

- the petition for certiorari is premature, especially given that the state "has no expectation of immunity from the entire suit,"
- the issues raised in the July 16 petition do not arise from the decision below nor from the case record, and
- the appellate court's decision is entirely consistent with prior holdings of the Supreme Court and lower federal courts.

The Petition is Premature The Central Commission argues that Nebraska has not offered

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adequate justification for the Court to exercise its discretionary jurisdiction and that the case is not ripe for review. In support of its contention, the commission asserts that Nebraska has conceded that the compact's very language entitles the commission to seek "prospective relief" against the state. Given that admission, the commission argues that it is appropriate to allow the case to proceed and to develop a complete record prior to any review of potential remedy issues. In addition, the commission specifically denies Nebraska's claim that "prospective relief" was not sought in the complaint.

Issue Presented Is Not Raised by Lower Court Decisions The Central Commission claims that the issue presented in Nebraska's petition—specifically "[w]hether a State waives its Eleventh Amendment sovereign immunity from a suit seeking damages and other retrospective relief in federal court by entering into a multistate compact that authorizes only prospective relief against the State and only in 'any court that has jurisdiction'"—is not in fact presented by the appellate court decisions nor by the record. Specifically, the commission argues that Nebraska's interpretation of the compact as providing only prospective relief is an argument, not a factual premise, and that "the courts below have reasonably construed the compact remedy otherwise, to encompass enforcement of duties and obligations, including those arising from breach of the compact by Nebraska."

Appellate Decisions Consistent with Court Rulings and Law The Central Commission asserts that the appellate court decisions finding that Nebraska waived its sovereign immunity to suits by the commission to enforce the compact are consistent with rulings by other courts, including those of the Supreme Court. In support of this contention, the commission argues that Nebraska has not offered "any reasonable alternative explanation of the enforcement mandates or any alternative mechanism by which a party state could be required to keep its federally approved, contractual promises made to its four sister states." In regard to Nebraska's references to the enforceability of other low-level radioactive waste compacts, the Central Commission states:

"[P]etitioner misleadingly seeks to expand the impact of the immunity waiver decision below by citing to other compacts, particularly the other radioactive waste compacts, which it amazingly claims are 'identical in all relevant respects.' A simple review of the language in those compacts reveals not even one with comparable provisions. None of them so patently says the administrative commission must or even can sue a member state." (citations and references omitted)

In addition, the commission points out that a review of the non low-level radioactive waste compacts "reveals that the states and federal government have chosen and expressed a wide variety of mechanisms for resolving disputes among compact members and for enforcing the terms of their compacts." According to the commission, this analysis shows that "determination of whether a compact party state has waived its immunity can only be made by careful reference to the particular language the party states chose (and Congress approved) when they entered into the compact/contract."

Twelve States' Amici Curiae Brief

The amici curiae brief offers a variety of reasons for review of the appellate court decision by the high court, all of which focus on state sovereign immunity issues rather than state or federal policy regarding low-level radioactive waste disposal.

The Issues The amici curiae brief argues that "[t]he Eighth Circuit's decision anoints the lower federal courts as the arbiters of disputes arising under . . . [interstate compact] agreements in the absence of an explicit disclaimer of such authority." Such action, according to the amici curiae, is in stark contrast to the Supreme Court's "well-established

Eleventh Amendment jurisprudence and thus the settled expectations of the States." In particular, they argue that the appellate decision undermines state's sovereign immunity rights in two distinct ways.

(1) It contradicts the traditional principle that a waiver of sovereign immunity will not be implied.

According to the amici curiae, the Supreme Court has made clear that sovereign immunity will be deemed waived only where the waiver is "stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" The Eighth Circuit, they argue, turned the explicit waiver requirement "on its head."

"The only evidence cited by the court regarding Nebraska's consent to federal jurisdiction was the compact's provision authorizing the Commission to bring an enforcement action in a court of law 'that *has jurisdiction* over any matter arising under' the compact. (emphasis added) But this language on its face does not *vest* jurisdiction in any court; it merely says that *if* jurisdiction over compact disputes has been properly vested in a court of law by an independent statutory or contractual provision – that is, one specifically waiving States' sovereign immunity – then an action enforcing the compact can be brought in that court."

The amici curiae point to "indistinguishable" language in other statutes, such as the Equal Access to Justice Act, in support of their argument.

(2) It "inappropriately" converted the compact's provision for enforcement through *prospective* relief into a waiver for claims of *monetary* damages.

The amici curiae acknowledge that the State of Nebraska did, via the compact, consent to suits to enforce "performance" of the compact's terms in courts that have jurisdiction. However, consent to such injunctive relief is, they argue, very different from consent to suits for monetary damages. "[T]his Court has consistently enforced a strict prohibition on suits seeking monetary or other retrospective relief against a State in the absence of an explicit waiver of immunity." The Eighth Circuit, they assert, ignored the fundamental difference between prospective and retroactive relief "thereby opening States to unlimited liability for claims brought under interstate compacts."

In sum, the amici curiae caution that the Eighth Circuit's endorsement of an implied waiver theory will "disturb the settled expectations of States that have carefully framed acceptable enforcement provisions in interstate compacts" and threatens "the 'delicate balance' between the States and the federal government." Enforcement clauses permitting signatory states to "sue or be sued" or to permit suits in "courts of competent jurisdiction" are commonplace. They should not be deemed, according to the amici curiae, to effectuate a waiver of sovereign immunity.

Requested Relief In support of Nebraska's request that the Supreme Court review the Eighth Circuit's decision in regard to waivers of sovereign immunity, the amici curiae state as follows:

"Given the broad array of governmental functions addressed in interstate compacts, the rules for resolving disputes under these agreements is an issue of utmost national importance, amply warranting this Court's review. Indeed, the very purpose of many of these compacts is for the *signatory States* to establish a mechanism for resolving contentious issues, rather than submitting them to federal jurisdiction resolution, and the selection of an appropriate enforcement mechanism is central to that objective. The Eighth Circuit's decision undermines this purpose by opening the possibility that a federal forum can, by implication and not by design, entirely supplant the signatory States as the essential compact decisionmakers. This Court should grant the State of Nebraska's petition to

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provide guidance to States seeking to enforce the wide range of obligations arising under these agreements."

Specifically, the amici curiae ask that the Eighth Circuit's use of the implied waiver approach be rejected and that the Supreme Court reaffirm the continued application of the explicit waiver requirement to interstate compacts.

WGA Passes Resolution re Waste Transportation

In mid-August, the Western Governors' Association passed a policy resolution requesting the Nuclear Regulatory Commission to update its assessments to address the adequacy of its regulations related to physical protections (10 CFR 72) for nuclear waste shipments. This request is made for the second time in order to assist the U.S. Department of Energy in addressing the terrorism and transportation elements of the environmental impact statement for the civilian spent nuclear fuel program. The resolution was sponsored by Utah Governor Mike Leavitt and Nevada Governor Kenny Guinn, and was passed unanimously by the Western Governors. The resolution was sent to the secretaries of Energy and Transportation, the Chairman of NRC and Congress.

The resolution calls for several actions by NRC and DOE, including in part the following:

"The NRC should conduct [in a forum conducive to public input] a comprehensive assessment of the consequences of attacks that have the potential for radiological sabotage, including attacks against transportation infrastructure used by nuclear waste shipments, attacks involving capture of a nuclear waste shipment and use of high energy explosives against the cask, and direct attacks upon a nuclear waste shipping cask using antitank missiles."

Putin Approves Spent Fuel Import Plan

Russian President Vladimir Putin recently approved changes to the country's environmental laws which will allow the importation of large quantities of spent nuclear fuel from foreign countries for reprocessing and storage. In so doing, Putin named a special commission to review all proposed waste imports.

Legislation allowing the imports was passed by the Russian Parliament in June. (See *LLW Notes,* May/June 2001, p. 19.) The controversial legislation changed Russian laws which previously barred the importation of radioactive waste into Russia. In so doing, the legislation allows the Russian Ministry of Atomic Energy to pursue billions of dollars worth of contracts for the disposal of spent fuel from a variety of countries including, among others, Japan, Taiwan, Switzerland, Germany, Spain, Korea and China. The U.S. government has remained officially neutral on the issue.

Under the plan, Russia will import approximately 1,000 tonnes of spent nuclear fuel per year. The imported fuel will be stored until 2021, during which time Russia will upgrade its reprocessing facilities with money earned from the program.

For additional information, see LLW Notes, March/April 2001, p. 20.

Quotes From State and Compact Officials on Amici Curiae Filing

Southeast Compact When asked about her reaction to hearing that three states (FL, MS, and NC) in the Southeast Compact had signed onto the *amici curiae* brief supporting Nebraska, Kathryn Haynes, Executive Director of the Southeast Compact Commission, remarked that "This was not a complete surprise--the overarching issue of sovereign immunity is obviously significant to attorneys general. By signing this petition for *certiorari*, these attorneys general were not necessarily weighing in on the merits of the *Nebraska v. Central States Compact* case, but simply saying the issue is important enough for the Supreme Court to hear the case. And for the Southeast Compact, it may be good for the Supreme Court to settle this question."

Ms. Haynes speculated that if the Court decides to hear the case, then attorneys general will be asked to sign another *amici curiae* brief to support Nebraska on the merits of the case. "Before siding with Nebraska or the Central States Compact, I hope all attorneys general will carefully discuss the ramifications of this action with their compact commissions and their state public health officials. The outcome of this case will have serious consequences for the enforceability of interstate compacts, and ultimately, the future of radioactive waste disposal in this country. This is not an action to be taken lightly."

Nebraska "The State of Nebraska was very pleased and heartened to have twelve states, representing a broad cross-section of the country, file an amicus brief supporting Nebraska's certiorari petition," stated Brad Reynolds, attorney for the State of Nebraska in the lawsuit over the licensing of a low-level radioactive waste disposal facility in Nebraska. "The strong support from the wide array of states demonstrates the fundamental importance of upholding the constitutional principle of sovereign immunity that is being tested in this lawsuit."

Central Compact In response to the amici curiae filing, James O'Connell, Chair of the Central Compact, offered the following remarks:

"The amici brief ignores or deliberately evades the central issue when it argues that 'waiver' of sovereign immunity in the Central States Compact is not sufficiently explicit, as when Congress unilaterally seeks to impose a duty upon and to abrogate the states' sovereign immunity and when the brief focuses on issues of U.S. District Court jurisdiction and remedies. Where the member states have acted voluntarily, there is no 'imposition.' The central issue really is whether member states forming a compact can agree to provide and be bound by enforcement mechanisms in their contract with each other such that the entity, in this case the Compact Commission, charged with carrying out the duties and administering and enforcing that contract can reasonably be expected to be effective in doing so. The fact that a member state may later disagree with a decision of the administrative entity or may act in bad faith in failing to fulfill that state's agreed upon duties under a compact is the very reason for effective enforcement mechanisms. Where the member states have entered a contract between them creating the administrative entity, assigning duties to it and empowering it to sue and be sued to enforce the contract, including actions by and against member states, it is not only reasonable but essential that customary remedies for the enforcement of contracts, including suits for damages, be available to it."

Southeast Interstate Low-Level Radioactive Waste Management Commission v. State of North Carolina

Original Jurisdiction Not Granted in Southeast Compact Suit

On June 25, the U.S. Supreme Court issued an order denying the Southeast Compact Commission for Low-Level Radioactive Waste Management's motion to file a bill of complaint in its lawsuit against the State of North Carolina. The motion requested that the Court take original jurisdiction over the case. The Southeast Compact had filed the motion in an attempt to enforce sanctions against the compact's host state for failure to take appropriate actions toward the development and siting of a low-level radioactive waste disposal facility. The Court issued its order without ruling or commenting on the merits of the complaint itself.

Next Steps

In response to the Court's action, Kathryn Haynes, Executive Director of the Southeast Compact Commission, issued the following statement:

> The Supreme Court's order is not a decision on the merits of the Commission's claim against North Carolina to recover $90 million. It merely means that the Supreme Court has ruled it would not exercise its jurisdiction over the claim filed by the Commission.
>
> We now have to decide who are the proper parties to enforce North Carolina's duties under the Compact Law and what is the appropriate court in which to get this accomplished. The Southeast Compact Commission still maintains that it has a valid claim and expects to recoup the $90 million from the State. The Commission is actively and seriously considering its options.

The Solicitor General of the United States had filed an amicus brief in the action on May 30 in response to an October 2000 invitation from the Court. The Solicitor General argued that the case does not fall within the Court's exclusive jurisdiction and should be resolved in another forum or through other means. Significantly, however, the Solicitor General concluded that the Court "would have exclusive jurisdiction over a suit brought by one or more of the States that are parties to the Southeast . . . Compact against North Carolina based on that State's alleged violations of the Compact." (See *LLW Notes,* May/June 2001, pp. 13–15.)

Background

The Lawsuit The Southeast Commission filed a "Motion for Leave to File a Bill of Complaint" and a "Bill of Complaint" in the U.S. Supreme Court against the State of North Carolina on July 10, 2000. At that time, the commission released a press statement explaining that the action was taken "to enforce $90 million in sanctions against North Carolina for the state's failure to comply with provisions of the Southeast Compact law and to fulfill its obligations as a party state to the Compact." The action contains various charges against North Carolina, including violation of the member states' rights under the compact, breach of contract, bad faith/deceit, unjust enrichment, and promissory estoppel. (See *LLW Notes,* July/August 2000, pp. 1, 16-18.)

Original Jurisdiction Under Article III, Section 2 of the U.S. Constitution, the U.S. Supreme Court may exercise original jurisdiction over a lawsuit. In determining whether or not to do so, the Court has generally considered two factors: (1) the "nature of

the interest of the complaining State," focusing mainly on the "seriousness and dignity of the claim," and (2) "the availability of an alternative forum in which the issue tendered can be resolved."

The Southeast Commission argues, with respect to the first factor, that serious public health concerns are at stake and that "the proper interpretation of an interstate compact is the archetypical matter warranting the Court's exercise of its exclusive, original jurisdiction." Furthermore, the commission asserts that the Court "rarely has declined to exercise its original jurisdiction in . . . a dispute among sovereign states concerning the interpretation and enforcement of an interstate compact." As to the second factor, the compact asserts that there is no other "jurisdiction available in which a state would not be 'its own ultimate judge in a controversy with a sister State.'"

The Response North Carolina filed a brief in opposition to the commission's motion on September 11, 2000. (See *LLW Notes,* September/October 2000, pp. 20-22.) In its brief, the state argued that (1) the Southeast Commission cannot properly invoke the original jurisdiction of the Supreme Court, (2) the nature of the case does not justify the exercise of original jurisdiction, (3) alternative forums are available, and (4) the state did not breach its obligations under the compact.

For additional information about the lawsuit and the response, see LLW Notes, July/August 2000, pp. 1, 16-18 and September/October 2000, pp. 20-22.

Rocky Mountain Low-Level Radioactive Waste Board v. U.S. Air Force

Complaint Withdrawn in Rocky Mountain Board's Enforcement Action Against the U.S. Air Force

On June 28, the Executive Director of the Rocky Mountain Low-Level Radioactive Waste Board filed a written notice of withdrawal of his complaint against the U.S. Air Force Institute for Environmental, Safety and Occupational Health Risk Analysis, Radioactive and Mixed Waste Office and the U.S. Air Force Center for Environmental Excellence, effective June 21, 2001. The complaint against the Air Force was originally filed in August 2000 due to alleged violations of the compact's requirements regarding the obtaining of export authorizations prior to shipping low-level radioactive waste from the region. (See *LLW Notes,* May/June 2001, p. 16.) A hearing on the enforcement action began on April 23 and was continued on June 21, at which time the Rocky Mountain Board's Executive Director orally withdrew the complaint.

At the hearing on June 21st and in the June 28 pleading, the Executive Director provided the following explanation for withdrawal of the complaint:

"To the best of the Executive Director's knowledge, the Air Force entities have complied with the Compact since the filing of the Complaint in August, 2000. Two applications for the export of Air Force low-level radioactive waste were submitted and approved in February 2001. A third application was approved in April 2001, and another application, to dispose of the so-called recyclable materials that are the subject of this proceeding, was approved on June 25, 2001.

Rocky Mountain Low-Level Radioactive Waste Board v. U.S. Air Force

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"The Executive Director is hopeful that, with the threat of a civil penalty no longer present, the Air Force may be more inclined to resolve this dispute. The termination of this enforcement proceeding will provide policy makers in the Department of Defense additional time to consider whether the benefits of the compact system are worth the minimal procedures of this Board.

"It appears to the Executive Director that the Air Force's primary objective in defending the enforcement action has been to litigate this dispute in federal court. Such litigation would be lengthy and very costly to both sides, without providing a commensurate public benefit. In fact, such litigation has the very real potential to destabilize the national compact system. The potential result could be the loss of access by all generators to the existing disposal sites. This would be contrary to this Compact's responsibility to provide disposal capacity to all of its generators, including the Department of Defense.

"If the Air Force wishes to continue to benefit from the compact system but believes that it needs more explicit congressional authorization to apply to the Board for import or export approval and pay import and export fees, the Executive Director believes that the parties should go to Congress together to obtain such authorization. The Executive Director stands ready to work with the Air Force to help facilitate its compliance with the Compact's simple procedures."

The LLW Forum, Inc. has scheduled a meeting with the Acting Deputy Undersecretary of Defense (Environmental Security) in Virginia on July 25 to discuss concerns regarding several recent developments—including the subject matter of the Rocky Mountain Board's enforcement proceeding—relating to U.S. Department of Defense (DoD)

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Skull Valley Band of Goshute Indians v. State of Utah

Utah Files Counterclaim to Suit re Spent Fuel Facility

On July 18, Utah Governor Mike Leavitt filed a counterclaim to an April 2001 lawsuit against the state by the Skull Valley Band of Goshute Indians and Private Fuel Storage Limited Liability Company (PFS)—a coalition of nuclear utilities seeking to site a spent fuel facility on the Goshutes reservation. The counterclaim questions the legitimacy of the siting proposal.

The original lawsuit, which was filed in the U.S. District Court for Salt Lake City, complains that six recently enacted state laws erect unfair and unconstitutional barriers to the plaintiffs' facility siting plans. In particular, the suit alleges that the laws unlawfully interfere with interstate commerce and infringe upon exclusive federal authority over the regulation of Indian affairs and nuclear power. (See *LLW Notes,* May/June 2001, p. 18.)

Leavitt's counterclaim does not directly respond to the constitutional and legal issues raised in the suit, but rather cites five "fatal flaws" to the proposal including:

- NRC has no jurisdiction to license a private spent fuel storage facility;
- the issuance of such a license would violate federal environmental policy law;
- the Goshute-PFS lease has not been properly approved by the tribe's membership;
- the lease has not been properly approved by the U.S. Bureau of Indian Affairs (BIA); and

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Trial of Utah Ex-Regulator Begins

On August 27, the extortion trial of Larry Anderson—a former Director of the Utah Division of Radiation Control—began in the U.S. District Court for the District of Utah. Anderson—who is facing a six count indictment including charges of extortion, mail fraud, tax evasion, and the filing of false income tax returns—recently asked U.S. District Court Judge Tena Campbell to withdraw a plea agreement he had previously reached with federal prosecutors. (See *LLW Notes,* May/June 2001, p. 17.) Under the terms of the plea agreement, Anderson would have served one year in federal prison, paid back taxes, and returned property and other revenues which were alleged to have been received improperly.

The charges against Anderson stem from allegations contained in a lawsuit which he filed in October 1996 against Envirocare of Utah and its owner, Khosrow Semnani. (See *LLW Notes,* January 1997, pp. 1, 5-6.) The suit alleged that the defendants owe Anderson in excess of $5 million for site application and consulting services related to the licensing and operation of the Envirocare of Utah low-level radioactive waste disposal facility. In response to the action, Semnani admitted to giving Anderson cash, gold coins, and real property totaling approximately $600,000 in value over an eight-year period, but denied that such payments were for consulting services. Instead, Semnani asserted that the payments were made in response to Anderson's ongoing practice of using his official position with the State of Utah to extort moneys from Semnani. The lawsuit was dismissed by a Utah district court in March 2000. (See *LLW Notes,* March/April 2000, pp. 30-32.)

In July 1998, Semnani pleaded guilty to a misdemeanor tax charge for helping to conceal one of his payments to Anderson. As part of the plea agreement, Semnani was fined $100,000 and agreed to testify against Anderson in any subsequent legal action. (See *LLW Notes,* August/September 1998, p. 32.)

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continued - Utah Files Counterclaim

- approval of the lease by BIA would be invalid because it would breach the federal government's trust obligation to the tribe.

In pointing out these "fatal flaws," Leavitt argues that the plaintiffs have no legal standing to challenge Utah laws dealing with spent fuel storage and disposal.

For background information on the PFS/Goshute proposal, see LLW Notes, July/August 2000, p. 26.

continued - Complaint Withdrawn

radioactive waste management practices and policies. A report on the DoD meeting will be provided at the LLW Forum's next meeting in Denver, Colorado on September 20-21.

For additional information, please contact Leonard Slosky, Executive Director of the Rocky Mountain Board, at (303) 825-1912.

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U.S. Department of Energy

Manifest Information Management System Update

The following story on the status of the Manifest Information Management System (MIMS) was provided upon request by officials from the U.S. Department of Energy.

The Department of Energy Office of Environmental Management (EM) has decided to consolidate their radioactive waste data management initiatives within the HQ Office of Integration and Disposition. The Manifest Information Management System (MIMS), maintained and operated at the Idaho National Engineering and Environmental Laboratory (INEEL) since its inception, will now be managed by Karen Guevara, Waste Team Leader of EM's Office of Technical Program Integration, Waste Management Team, with staff support from Helen Belencan, Mixed Low-Level Waste and Low-Level Waste Program Manager and contractor support from the Germantown, Maryland office of MACTEC, Inc.

The Office of Technical Program Integration manages stream disposition data in EM's Integrated Planning, Accountability, and Budgeting System (IPABS), and is responsible for implementation of the low-level waste (LLW) and mixed low-level waste (MLLW) disposal records of decision. The change in management responsibility of MIMS will result in closer integration of commercial disposal information with EM's disposition planning for LLW and MLLW as well as increased efficiencies in data management functions.

Preparations for the transition are already in motion. Programmer and technical personnel from MACTEC will meet with their INEEL counterparts the week of August 27. Contractual arrangements for the three disposal facilities to provide data to MIMS are expected to be completed by September 30. We anticipate that the transition from INEEL to Headquarters will be transparent to MIMS users, and no interruptions in service or access are expected. However, until all the details of the transition have been worked out it is not possible to say there won't be brief periods when the data is not accessible. However, EM's experience with database hosting is extensive, so if there is a gap in accessibility, the time involved should be minimal.

For additional information, contact Karen Guevara at 301-903-4981 (e-mail address: Karen.Guevara@em.doe.gov) or Helen Belencan at 301-903-7921 (e-mail address: Helen.Belencan@em.doe.gov).

DOE to Begin EIS on GTCC Disposal Options

The U.S. Department of Energy has allocated funds in its fiscal year 2002 to begin work on an environmental impact statement (EIS) addressing disposal options for Greater-Than-Class C (GTCC) waste. DOE was given responsibility for GTCC waste disposal under the 1980 Low-Level Radioactive Waste Policy Act and its 1985 amendments, which require the department to dispose of this material in NRC licensed facilities. Under DOE's current policy, utilities must store GTCC waste following NRC regulations.

There are several potential disposal alternatives which are being considered by DOE including:

- disposal in a high-level radioactive waste repository,
- disposal in an intermediate to deep facility, such as a drilled bore hole,
- storage of some GTCC for decay and eventual disposal, and
- disposal at the Waste Isolation Pilot Plant (WIPP).

The last alternative—disposal at WIPP—would require a congressional amendment to those provisions of the Low-Level Radioactive Waste Policy Act requiring disposal in an NRC-licensed facility, as well as to WIPP legislation.

U.S. Department of Energy

GAO and IG Comment re DOE LLRW Disposal

The U.S. General Accounting Office and the DOE Office of the Inspector General recently released separate reports concerning the disposal of low-level radioactive waste by the U.S. Department of Energy.

Inspector General's Report The Inspector General (IG) report found that DOE, over the past two years, has not taken full use of low-level radioactive waste disposal facilities in the States of Nevada and Washington, but rather has focused on the use of on-site storage or commercial disposal options. The report recommends that DOE "develop and implement a complex-wide program that integrates waste disposal operations."

GAO Report The General Accounting Office (GAO) report, titled "DOE Should Reevaluate Waste Disposal Options Before Building New Disposal Facilities," recommends that the department examine low-level radioactive waste disposal options before building new on-site facilities or expanding existing ones. The department had previously determined that the uncertainties of long-term costs and safety risks made on-site storage a better solution at the facilities investigated. The report, however, encourages DOE to "revisit the cost comparisons for onsite and offsite disposal to determine if the cost estimates used to support the . . . [Record of Decision] remain valid." Disposal options for waste at three DOE sites were looked at in the report: Fernald, Idaho National Engineering and Environment Laboratory (INEEL), and Oak Ridge.

A copy of the GAO report can be obtained on-line at www.gao.gov. For further information, please contact Dwayne Weigel of GAO at (202) 512-6876.

DOE Proposes Privacy Act Exemptions

The U.S. Department of Energy is proposing to allow broad exemptions from Privacy Act disclosure requirements for documents developed in investigations concerning whistleblower complaints and security matters. Under the proposal, three DOE offices would not be required to give a person named in a document information—including an accounting of who has access to the document and the date, nature and purpose of the disclosures of the document—even if requested by the named individual. The three exempt offices under the proposal include the Office of Intelligence, the Office of Hearings and Appeals, and the Office of Employee Concerns. The department contends that the exemptions are necessary because the Privacy Act disclosure requirements are not workable and may compromise sensitive investigations or national security information. In addition, under the proposal, the three DOE offices would not have to meet Privacy Act Requirements that they amend information in their records which is believed to be irrelevant, incorrect, or untimely. Such a requirement, according to DOE, would create an impossible administrative and investigative burden.

Richardson Elected to NRDC Board

Former U.S. Department of Energy Secretary Bill Richardson was recently elected to the Board of Trustees of the Natural Resources Defense Council. Commenting on his unanimous election to the 41-member board, NRDC President John Adams commented that Richardson's "knowledge and understanding of complex energy issues will be an invaluable addition to our organization—especially as we continue to gear up to fight the problem of global warming." Among other things, NRDC credits Richardson with improving security at nuclear weapons laboratories, helping to get Congress to pass legislation to compensate DOE workers made ill by working conditions during the Cold War, and spearheading efforts to combat rising oil prices. Adams said that NRDC is "honored and delighted to have Bill join us."

U.S. Environmental Protection Agency

EPA's Mixed Waste Rule Soon to Be Effective

The U.S. Environmental Protection Agency recently issued regulations to afford regulatory relief to generators of mixed low-level radioactive waste. The rule will become effective November 13, 2001. However, affirmative regulatory action to adopt EPA's rule—which can be found at 66 *Federal Register* 27,218 (May 16, 2001)—will be required in most states before generators may take advantage of the rule's benefits.

Basis for Rule

The rule is intended to address the cumbersome system of federal regulation that currently controls the management and disposal of mixed low-level radioactive waste. Under the current regulatory regime, jurisdiction is exercised over mixed waste by both the U.S. Nuclear Regulatory Commission—which has jurisdiction over radioactive waste under the Atomic Energy Act of 1954—and the U.S. Environmental Protection Agency—which has jurisdiction over "hazardous" waste under the Resource Conservation and Recovery Act of 1976 (RCRA). Industry groups and others have asked EPA to provide relief in the management of mixed low-level radioactive waste, arguing that NRC requirements adequately protect the public health and environment.

"Conditional" Exemption Scheme

Under EPA's new rule, mixed low-level radioactive waste may become "conditionally exempt" from RCRA Subtitle C jurisdiction (including most, but not all, of the standard RCRA hazardous waste management regulations) if certain qualifications are met. The primary conditions under which a generator of mixed low-level radioactive waste may qualify for the exemption include:

- the waste must be generated and managed under the terms of a valid NRC license, and

- the waste must be managed under a single NRC or Agreement State license.

In addition, a generator must meet the following storage conditions to secure and maintain the exemption:

- a notification must be sent to the RCRA regulatory agency to claim the exemption (the notification must include certain detailed information and a certification),

- the waste must be stored in tanks or containers in compliance with chemical compatibility and the storage requirements of an NRC or Agreement State license, and

- a certification must be provided that the generator's personnel are trained in hazardous waste management.

In addition, a generator must conduct annual inventory and quarterly inspections, and maintain an emergency plan that meets specified criteria.

For a disposal exemption, the waste must be treated to RCRA Land Disposal Restriction Treatment Standards; be containerized in a carbon steel drum or high integrity container; and go to a low-level radioactive waste disposal facility licensed by the NRC or an Agreement State.

Potential Cost Savings

The new rule is expected to provide generators of mixed low-level radioactive waste—for which commercial disposal options are very limited—with several potential cost savings.

- It allows conditionally exempt waste treated to LDR standards to be disposed of as low-level radioactive waste, thereby allowing for disposal in commercial low-level radioactive waste disposal

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U.S. Nuclear Regulatory Commission

NRC and Corps Sign MOU re FUSRAP Cleanups

The U.S. Nuclear Regulatory Commission and the U.S. Army Corps of Engineers recently signed a memorandum of understanding (MOU), effective July 5, which is designed to clarify regulatory authority over the cleanup of Formerly Utilized Sites Remedial Action Program (FUSRAP) facilities. Under the terms of the MOU, which addresses the release of remediated sites for unrestricted reuse under 10 CFR 20.1402, the Corps has agreed to apply criteria that is at least as stringent as that found in NRC's License Termination Rule. Restricted releases under 10 CFR 20.1403 are not covered under the MOU. NRC, on the other hand, commits under the MOU to use its discretion to suspend NRC-issued licenses, or portions thereof, at FUSRAP sites upon request by the Corps, as long as the Corps is prepared to take physical possession of the site for remediation. In addition, the Corps agrees to facilitate NRC observance of its remediation activities.

The Corps was given the lead on FUSRAP site cleanups by Congress in 1998. It is not required to obtain an NRC license for remediation work at these sites, but must ensure that the cleanup is done in a manner that protects human health and the environment. Under the Atomic Energy Act, however, NRC is responsible for ensuring that facilities operated by source, byproduct and special nuclear materials licensees are decommissioned in a manner that protects human health and the environment.

NRC Seeks Comment re Unrestricted Use

The U.S. Nuclear Regulatory Commission is seeking public comment on a proposed rule "that will standardize the process for permitting nuclear power plant licensees to release parts of their facilities or sites for unrestricted use before the reactor operating license has been terminated." The proposed rule is a response to recent expressions of interest from several licensees who want to release part of their sites. Current regulations do not address partial release prior to approval of a license termination plan. The proposed rule covers operating and decommissioning facilities—not other nuclear facilities, such as those engaged in fuel fabrication.

The proposed rule calls for NRC to conduct reviews and inspections to ensure that strict radiological criteria will be met. This includes publication of all partial site release proposals, as well as the seeking of public comments thereon and the holding of public meetings.

Once the proposed rule is published in the Federal Register, which is expected shortly, interested parties will have 75 days in which to submit comments electronically or via regular mail service.

Diaz Awaits Renomination Approval

NRC Commissioner Nils Diaz' term expired June 30, leaving the U.S. Nuclear Regulatory Commission with only four of its five commissioners currently in office. President Bush, however, has renominated Diaz for another term. He is currently awaiting confirmation by the Senate Environment and Public Works Committee. The Senate, which is on recess at present, is expected to return on September 4.

U.S. Nuclear Regulatory Commission

NRC Issues License Renewal Guidance Documents

On July 2, the U.S. Nuclear Regulatory Commission approved three guidance documents which describe acceptable methods for implementing the license renewal rule and the agency's evaluation process.

The first document, Regulatory Guide 1.188, provides a uniform format and content for submitting information in a license renewal application. It endorses the Nuclear Energy Institute's guidance document for compliance with NRC renewal requirements. Another document—the Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants (NUREG 1800)—provides NRC staff with guidance in performing renewal application safety reviews. The last document, titled the Generic Aging Lessons Learned (GALL) Report (NUREG 1801), offers "a compilation of generic evaluations of existing programs to manage aging effects on plant structures and components, documents the basis for determining the adequacy of those programs and identifies where staff review should focus on whether existing programs may need to be augmented for license renewal."

Copies of the documents can be obtained from NRC's Public Document Room by calling (800) 397-4209 or on the agency's web site.

Continued - Mix Waste Rule

facilities such as Envirocare, Barnwell, or Hanford.

- It enables generators who choose to allow the radioactive component of the waste to decay under the provisions of the generator's NRC license to dispose of the waste in a RCRA facility after treatment. (This "decay in storage" approach is particularly beneficial to medical and academic institutions, which generate primarily waste containing radionuclides with relatively short half-lives.)

Potential for Loss of Exemption

The rule provides for serious consequences if a generator fails to meet any of the specified conditions—namely, loss of the RCRA exemption. Such loss is automatic and the generator is then required to "immediately" manage the mixed low-level radioactive waste losing the exemption as RCRA hazardous waste. This can have severe repercussions, as it can expose the generator to heavy civil and criminal penalties. In addition, storage of hazardous waste for more than 90 days at the generating facility triggers a requirement for facility-wide corrective action that can subject the entire facility to a remediation program.

Need for State Implementing Action

EPA's new rule will become effective without any state action in only a small number of states including Hawaii, Iowa, Puerto Rico, and the Virgin Islands. For most states, the rule's benefits will not be realized unless and until the state takes action to adopt the same or similar provisions as a matter of state law. Generators are advised to check with their state RCRA agency.

Other Information

The rule contains additional components that should be looked at and reviewed by interested parties. For instance, naturally occurring and/or accelerator-produced radioactive material (NARM) may be subject under certain circumstances to the exemption from RCRA transportation and disposal requirements—but not to storage and treatment requirements. Moreover, a generator who loses its exemption under the rule may "reclaim" it in some instances.

Persons interested in more detailed information are directed to the rule themselves or may contact the RCRA Center at (703) 412-9810 or (800) 424-9346.

Obtaining Publications

To Obtain Federal Government Information

by telephone

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

by internet

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

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

- EPA • (for program information, publications, laws and regulations) . . . . . **http://www.epa.gov/**

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

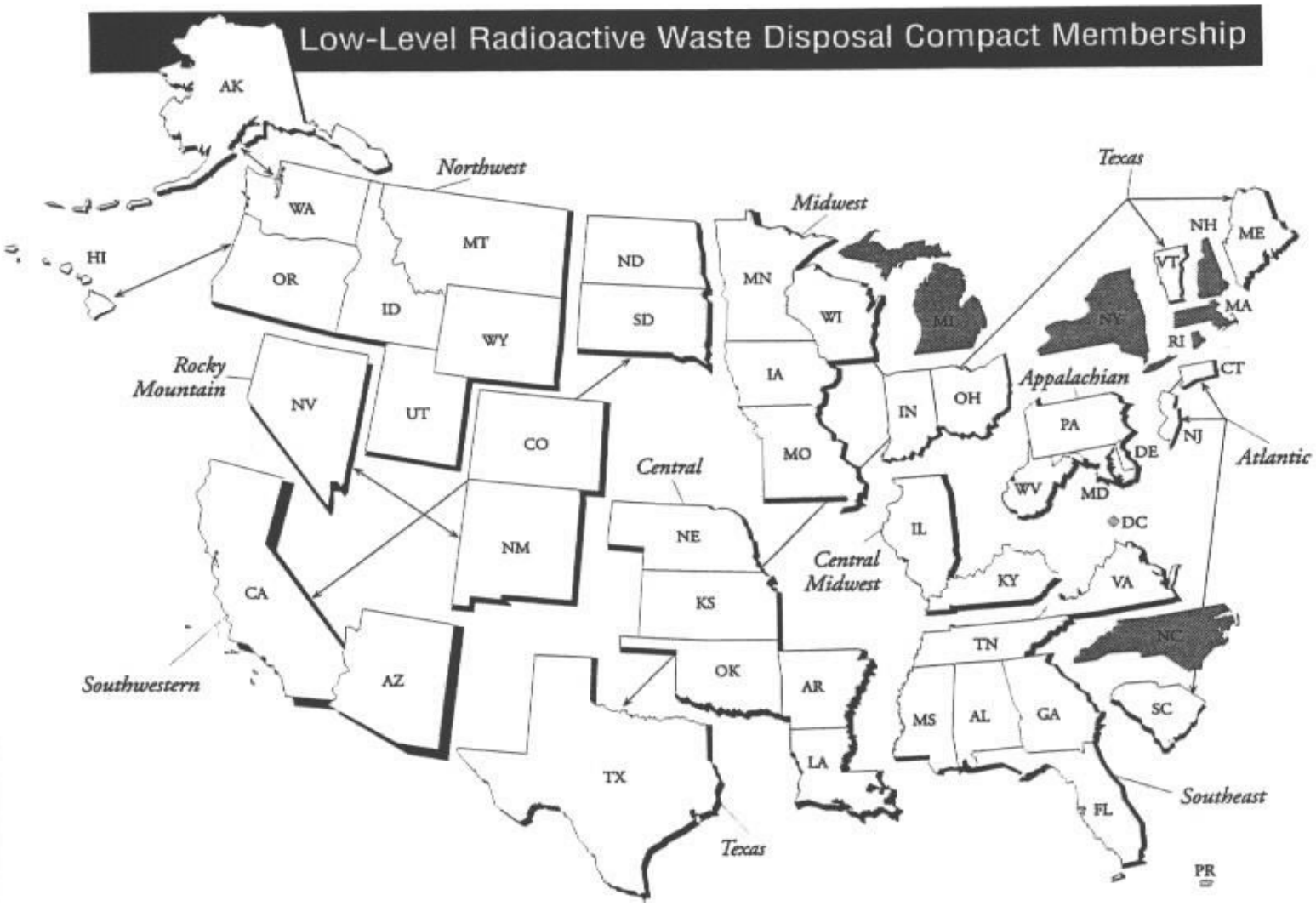
- GAO homepage (access to reports and testimony) . . . . . **www.gao.gov**

To access a variety of documents through numerous links, visit the web site for the LLW Forum, Inc. at www.llwforum.org

Accessing LLW Forum, Inc. Documents on the Web

LLW Notes, LLW Forum Meeting Reports and the *Summary Report: Low-Level Radioactive Waste Management Activities in the States and Compacts* are distributed to the Board of Directors of the LLW Forum, Inc. As of March 1998, LLW Notes and LLW Forum Meeting Reports are also available on the LLW Forum web site at www.llwforum.org. The Summary Report and accompanying Development Chart, as well as LLW Forum News Flashes, have been available on the LLW Forum web site since January 1997.

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



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Colorado
Nevada
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Nothwest accepts Rocky Mountain waste as agreed between compacts

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