LLW notes

Volume 19, Number 3 May/June 2004

U.S. General Accounting Office

GAO Issues Report re LLRW Disposal Availability

On June 10, the U.S. General Accounting Office issued a recently completed report on low-level radioactive waste disposal availability in the United States. The report, which is titled "Low-Level Radioactive Waste: Disposal Availability Adequate in the Short Term, but Oversight Needed to Identify Any Future Shortfalls," was written in response to a request from the U.S. Senate's Committee on Energy and Natural Resources. In particular, GAO was asked to report on (1) any changes in LLRW conditions since the agency's previously completed 1999 report on this issue, (2) recent LLRW annual disposal volumes and potential future volumes, (3) any current or anticipated shortfalls in LLRW disposal availability, and (4) potential effects of any such shortfall.

Both DOE and NRC provided comments to the GAO report, which are included in the appendix. Each agency agreed with portions of GAO's analysis and disagreed with other portions. DOE, in particular, took issue with GAO's characterization of its management of the Manifest Information Management System (MIMS) and future availability of this on-line database. NRC responded, among other things, that it believes that other alternatives to the current national low-level radioactive waste disposal system should be explored at this time. GAO's response to comments from both DOE and NRC are also contained in the report.

Changes in LLRW Conditions Since the Agency's 1999 Report

GAO identified several changes that have occurred since completion of the agency's 1999 report that have had or might have significant effects on LLRW disposal availability and federal oversight. In particular, the following items were identified as having potential implications to long-term disposal availability:

- the pending closure of the Barnwell facility to out-of-region waste in 2008;
- the issuance of a license to Envirocare to accept class B and C wastes pending approval

(Continued on page 18)

In This Issue

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As part of that mission, the LLW Forum publishes a newsletter, news flashes, and other publications on topics of interest and pertinent developments and activities in the states and compacts, federal agencies, the courts and waste management companies. These publications are available to members and to those who pay a subscription fee.

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

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LLW FORUM, INC

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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 material	NARM
Naturally-occurring radioactive material	NORM
Code of Federal Regulations	CFR

September 2004 LLW Forum Meeting to be Held in Buffalo, New York

2005 Meetings to be Held in Salt Lake City, UT and Las Vegas, NV

The fall 2004 meeting of the Low-Level Radioactive Waste Forum, Inc. will be held on September 20 - 21 in Buffalo, New York. The meeting, which is being sponsored by the State of New York, will be held at the Hyatt Regency Buffalo. A meeting of the Executive Committee will take place on Monday morning, September 20, just prior to the regularly scheduled meeting. A tour of the West Valley site is planned for Tuesday afternoon, September 21, after the conclusion of the regular meeting.

Registration The meeting is free for members of the LLW Forum, Inc. Registration for non-members is $500.00, payable to "LLW Forum, Inc." Attendees should complete a registration form and forward with payment, if applicable, to: Alyse Peterson, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, New York 12203-6399 (phone: 518-862-1090 ext. 3274/fax: 518-862-1091). A registration form and meeting bulletin can be found on the LLW Forum's web site at www.llwforum.org.

Reservations A block of 40 rooms has been reserved for meeting attendees at the special rate of $78.00 + tax per night for single occupancy and $103.00 for double occupancy. There is room availability for the weekend before the meeting and the day after the meeting at the same rate. Non-smoking rooms are available. To make a reservation, please call (716) 856-1234 or the toll-free reservations line at (800) 233-1234. *Please ask for a room in the LLW Forum block.* Reservations must be made by August 22, 2004 to obtain the special rate.

Future Meetings The winter 2005 meeting of the LLW Forum is being sponsored jointly by the State of Utah/Envirocare of Utah and will be held in Salt Lake City from March 14 - 15, 2005 (with a site visit to Envirocare of Utah tentatively planned for March 16). The fall 2005 meeting is being sponsored by the Rocky Mountain Compact and will be held in Las Vegas, Nevada from September 22 - 23, 2005 (with a site visit to Yucca Mountain tentatively planned for September 21).

West Valley Site Tour—September 21, 2004

The September 2004 LLW Forum meeting will include an optional visit to the West Valley site at the conclusion of the meeting on September 21. Among the things attendees will see on the tour are:

- the former reprocessing facilities, including a converted cell which is now being used to store the vitrified high-level waste;
- the high-level waste tank farm, where the waste in a liquid/sludge form was stored for the last 40 years;
- a brand new remote-handled waste processing facility, where large contaminated items can be cut up and packaged;
- various LLRW handling and storage facilities; and
- the closed commercial LLRW disposal facility, for which NYSERDA is the licensed custodian.

The estimated time of arrival back at the hotel after the tour is 5:00 p.m., so please plan your travel accordingly if you plan to go on the site tour.

For additional information on West Valley, please go to http://www.nyserda.org/westval.html.

Atlantic Compact/South Carolina

South Carolina Budget Passes Without Barnwell Amendment

On May 19, the South Carolina legislature passed a $5.3 billion budget that did not include an amendment contained in the original House-passed version that would have allowed for an increase in the volume of waste allowed to be disposed at the Barnwell low-level radioactive waste disposal facility in fiscal year 2004-05. As a result, volume limits imposed by current law will remain in effect.

Background

Current long-term commitments indicate that there is a relatively small amount of uncommitted space left at Barnwell for out-of-region generators through 2008. According to the South Carolina Budget and Control Board, volume projections by customers who have not entered into long-term commitment agreements with South Carolina indicate "that there is considerably more need for disposal volume" than the Budget and Control Board is able to accommodate under state law. As a result, the state revised its acceptance policy in late September. In the past, a generator without committed space would automatically receive authorization to dispose of waste at the facility with 3 days notice. This is no longer the case. As explained by the Budget and Control Board in letters—dated September 25, 2003—to its customers, "Because of the high demand for the small amount of remaining uncommitted disposal space this fiscal year and next fiscal year, it is now necessary to limit the acceptance of additional waste from customers outside the Atlantic Compact region who have not previously entered into disposal agreements with . . . [the State Budget and Control Board]." The letter does note, however, that generators may be placed on a waiting list by contacting George Antonucci, Director of Disposal Services and Special Projects at Chem-Nuclear. (See *LLW Notes,* September/October 2003, p. 5.)

House Action The Republican-led, South Carolina House of Representatives approved a $5.3 billion state budget on March 12 that would have increased the volume of waste allowed to be disposed at the Barnwell low-level radioactive waste disposal facility in fiscal year 2004-05. As proposed, the amendment would have allowed disposal of an additional 100,000 cubic feet of Class A waste at the Barnwell facility, which essentially would have raised the volume cap to 150,000 cubic feet. Chem-Nuclear, the site operator, would have paid South Carolina $6 million for the increase, in addition to the end-of-year transfer of proceeds for other wastes disposed. The money was to be used to fund police officer salary increases. The budget passed the House by a vote of 80 to 35.

The volume increase was part of a budget amendment sponsored by Representative Bobby Harrell (R), Chair of the House Ways and Means Committee; Representative Chip Limehouse (R-Charleston); Representative John Scott (D-Richland); and Representative Larry Koon (R-Lexington). The amendment did not come as a surprise, as Chem-Nuclear has expressed an interest in changing South Carolina law to allow the Barnwell facility to recoup some of the unused permitted waste disposal volumes for fiscal years 2000 through 2003 prior to the facility's scheduled closure to out-of-region waste in 2008. (See *LLW Notes,* November/December 2003, p. 5.) Under legislation passed in 2000, the amount of waste that can be disposed at the Barnwell facility is gradually reduced each year until 2008, at which time only waste from Atlantic Compact generators may be disposed of at the Barnwell facility. However, from fiscal years 2000 to 2003, Barnwell did not receive all of the waste permitted under the law.

Senate Action During debate on the budget on May 6, the state Senate removed similar proviso language that had been approved by the Senate Finance Committee. According to local news reports, the plan was killed after some Senators complained that the state was selling the use of additional disposal space too cheaply, with one Senator arguing that the space is worth at least $25 million. (Chem-Nuclear, under the plan approved by the House, would have paid the state $6 million for the right to dispose of additional waste.)

In addition, Will Folks, a spokesman for Governor Mark Sanford, said that the governor "was not wild about the idea of bringing in more waste because the state is having tough budget times." According to Folks, "it could lead to reopening Barnwell capacity to other waste."

The latter sentiment was echoed by Senator John Courson (R-Columbia), who complained that the proposal would allow more waste to come into South Carolina just as the state is trying to remove its label as the nation's disposal site. According to Courson, "this would be absolutely a step backward." Courson had been a member of the South Carolina Nuclear Waste Task Force that in early 2000 recommended that South Carolina join an interstate compact as a means to preserve disposal capacity at Barnwell for future decommissioning of the state's nuclear power reactors.

Conference Committee Although the Senate Finance Committee and House versions of the budget bill contained differences in how the $6 million would be spent, the House deleted the Barnwell amendment before sending the legislation to conference for reconciliation. As a result, neither bill included the proviso and it was not a topic for the conference committee and was not included in the budget bill that went to the Governor for signature.

The South Carolina legislature has adjourned for the 2004 year.

For additional information, see LLW Forum News Flashes titled, "Budget Amendment Introduced in South Carolina House of Representatives that would Increase Barnwell Volumes in FY 2004-05," March 11, 2004 and "South Carolina Senate Removes Plan to Allow Additional Waste at Barnwell from its Version of Budget," May 12, 2004.

Central Commission/Nebraska

Central Commission Declines Lawsuit Settlement Offer from Nebraska

Commission Said to be Drafting Counteroffer

On June 8, the Central Interstate Low-Level Radioactive Waste Commission reportedly rejected a confidential offer by the State of Nebraska to settle a lawsuit that challenges the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. The commission, however, reportedly directed its attorneys to develop a counterproposal to the state's offer.

Background

On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes,* September/October 2002, pp. 1, 15-17.) The court awarded the compact commission over $151 million in damages. The state filed a notice of appeal on October 30, 2002. The Eighth Circuit heard oral arguments on the appeal on June 12, 2003. (See *LLW Notes,* May/June 2003, p. 12.) Following the February 18, 2004 appellate decision affirming the lower court's ruling, Nebraska filed a petition for rehearing en banc on March 2. The Central Commission filed a reply brief opposing rehearing on March 15. On April 22, the appeals court denied the state's request for a rehearing en banc. (See News Flash titled, "Eighth Circuit Denies Nebraska's Petition for Rehearing En Banc," April 24, 2004.)

Settlement Offer

The Central Commission reportedly considered an offer by the State of Nebraska to settle the lawsuit during executive session at a meeting on Tuesday, June 8. According to local press reports, representatives from the Omaha Public Power District, Nebraska Public Power District, major out-of-state waste generators, and site developer US Ecology were called in one at a time to discuss settlement negotiations with the commission. Nebraska Commissioner Gregory Hayden agreed to stay out of the session after the other commissioner's objected that a conflict of interest existed.

In the end, the commission voted 4 to 0 to reject the state's offer. Nonetheless, the commissioners directed their attorneys to work on a counter-proposal. Neither the state nor the commission would release the details of the state's offer.

Reaction and Next Steps

Nebraska Attorney General Jon Bruning was quoted in local press as expressing optimism about the chances of settling the lawsuit. "Our goal is to bring this to an end within the next several weeks," said Bruning. He noted, however, that a settlement may require legislative approval.

A spokesperson for Nebraska Governor Mike Johanns acknowledged that he was briefed on the settlement proposal and stated that he is supportive of the efforts to resolve the case, but declined to comment on the possibility of allowing a facility to be built in the state. "It would be inappropriate to discuss at this critical point in the negotiations," said the spokesperson.

If a settlement is not reached, Nebraska may still appeal the judgment to the U.S. Supreme Court. The deadline for filing a petition for a writ of certiorari to ask the high court to hear the case is June 21.

Potential New Litigation

During the same June 8 meeting, the Central Commission adopted a resolution directing its attorneys to prepare a new bad-faith lawsuit against the State of Nebraska regarding the legislature's recent action to reduce the interest rates paid on judgments against the state. The new law, which was signed by Governor Johanns on April 15, reduces the rate that the state pays on judgments from 10 percent to a flexible rate that changes with a U.S. Treasury note yield. The action could significantly reduce the amount of interest that the state has to pay on the commission's lawsuit. In response to this action (and the state's request that the court confirm that the stay remains in effect), the Central Commission requested that the district court lift the stay of judgment in the case or, in the alternative, require the state to post a bond equal to the judgment amount plus interest. The commission argued, among other things, that the change in the law was motivated, at least in part, in response to the district court's earlier judgment. On June 1, the court nonetheless rejected the commission's request. (See LLW Forum News Flash titled, "Court Upholds Stay in Judgment in Central Compact/Nebraska Case," June 14, 2004.)

For additional information, see related story in the "Courts" section of this issue.

Northwest Compact/State of Utah

Utah Legislative Task Force Recommends that Legislature Not Allow B/C Waste Disposal

Legislative Audit re Utah DEQ Issued

On May 18, following a four-hour hearing, the Utah Hazardous Waste Regulation and Tax Policy Legislative Task Force adopted a motion recommending that state lawmakers not approve the disposal of Class B and C waste within the state. The motion, however, did not call for a repeal of state legislation setting out procedures for applying for a license to accept such waste. Moreover, despite passage of the motion, the task force may conduct further study of the issue or prepare legislation for the 2005 General Session.

The motion was passed on the same day an audit was released by the Office of the Utah Legislative Auditor General that finds that "[r]egulatory oversight of hazardous and radioactive waste disposal in Utah appears to adequately follow safeguards for the health and safety of Utah's population," but that expresses "concerns with some questionable operating procedures and accessibility of information that may limit . . . [the Utah Department of Environmental Quality's] program effectiveness." The 55-page audit report was requested by the waste task force, but most members of the task force had reportedly not read the report prior to passage of the motion concerning B/C waste disposal because the report was not publicly released until after the beginning of the task force meeting.

Task Force Motion

The task force considered a half-dozen different motions and substitutes on the B/C waste disposal issue prior to adopting a consensus measure put forth by committee Co-Chair Senator Curtis Bramble (R-Provo). One of the earlier motions, which was narrowly defeated, would have prohibited Class B and C waste acceptance permanently. That motion was put forth by Senator Greg Bell (R-Fruit Heights).

Parties on both sides of the issue expressed disappointment in the final outcome. Tim Barney, Senior Vice President at Envirocare of Utah, was quoted as saying that the company is "a little disappointed," but as also expressing optimism that "there's still an opportunity for legislators to come up with more expert testimony" and for further study. Opponents, on the other hand, were quoted as expressing dismay that the task force did not recommend repeal of the application procedure for B/C waste and as questioning the impact of the task force's recommendation on the legislature.

Envirocare was issued a license to dispose of Class B and C waste by the Utah DEQ in July 2001. (See *LLW Notes,* July/August 2001, pp. 6 - 9.) The license expires in 2006, but may be extended by the DEQ. Under state law, approval from the legislature and Governor are required before the company can begin accepting such waste. To date, Envirocare has not actively solicited such approval.

Legislative Audit

In its original request, the task force asked that the Office of the Legislative Auditor determine

- if state-licensed radioactive, solid, and hazardous waste disposal facilities are regulated according to, and in compliance with, Utah statutory requirements;
- if Utah's regulatory requirements are adequate to provide effective management of state environmental concerns; and
- if established fees are used in accordance with state statute and are sufficient for the department's operational needs.

Administrative Support and Funding of DEQ Waste Site Programs

The audit report reaches the following conclusion in regard to the adequacy of DEQ administrative support of waste disposal oversight:

> The . . . [department] lacks a coordinated, written plan to guide its divisions' oversight of commercial waste disposal facilities. A clearly developed, risk-based, plan could better guide budgetary decisions. Such a plan should address fee fluctuations and the department's current reliance on the diminishing . . . [Environmental Quality Restricted Account (EQRA)]. On a positive note, DEQ's oversight of site financial assurances appears appropriate.

In regard to operational efficiency and funding of the waste site program, the auditor report concludes as follows:

> The department reported to the . . . [task force] that certain oversight activities are conducted annually when, in fact, during tight budget years they have not been performed. Adequate funding for future oversight of waste disposal programs is a concern that can be addressed, in part, with regular DEQ audits of waste disposal fees. Our review indicates that information gained in fee audits could increase revenues available for oversight programs. Improvements are also needed in information storage/retrieval management and information available for future fee setting.

In these areas, the audit report makes the following recommendations:

> 1. We recommend the Legislature review the Utah Code outlining the EQRA account to clarify legislative intent.
>
> 2. We recommend the DEQ formalize its oversight plans and include prioritization, risk assessment and necessary funding levels.

Oversight of Commercial Waste Disposal

In regard to DRC's groundwater oversight program, the audit report states as follows:

> Oversight of commercial waste disposal programs is in large part done by a variety of inspections and monitoring programs. We reviewed . . . [the Division of Radiation Control's (DRC)] groundwater sampling program and are concerned with: 1) well sample selection which has been cost-based not risk-based; 2) less frequent sampling than reported; and, 3) elimination or reduction of sampling as budgeted funds are used elsewhere.

The report, however, finds that inspection programs appear to be effective and seem to meet current health-safety needs:

> DRC inspectors appear to be thorough and effective in addressing health-safety needs. DRC inspections have been broken down into manageable 'modules' that have been approved for content and effectiveness by the NRC.

Disposal facility oversight, on the other hand, is an area that the auditors believe needs improvement:

> In contrast to DRC inspections . . . [the Division of Solid and Hazardous Waste (DSHW)] does not utilize a written inspection plan. Rather, the division relies on the expertise of its staff. As a result, there is neither a formal risk assessment nor tracking of violation trends to guide DSHW activities.

In these areas, the audit report makes the following recommendations:

> 1. We recommend the department ensure that its oversight plans are coordinated between divisions and kept current.
>
> 2. We recommend DRC establish formal policy and practice of a risk-based groundwater split-sampling program.

3. We recommend that DSHW design and implement written, uniform, annual inspection plans.

4. We recommend the Legislature study DSHW's penalties to determine appropriate maximum fine levels.

5. We recommend that DSHW sample treated waste to ensure that it meets treatment standards.

Record Keeping and Fee Collection Reviews

In regard to DEQ administrative controls, the audit report concludes as follows:

> Oversight functions can be improved with additional administrative control of information and improved fee collection from waste disposal facilities. Currently, DRC's lack of an integrated information system prevents easy access to information such as the tracking of notices of violations (NOVs). This concern has also been voiced by the NRC. Additional controls, primarily in fee collections, are necessary if the state is to fully collect the legislatively set fees. Our review found substantial under-payments. Clarification and improved policies regarding fee collections would better transmit legislative intent to the department and to the disposal site operators.

As for fee collection regulations, the report states the following:

> Clarification of state statute and formalization of departmental policies could provide the state with increased revenues without changing the existing fee structure. As an example, facility operators have elected to either not follow or reinterpret state statute to reduce fee payments. The department was not aware of the altered practice of the facilities. In another instance, the department has used an informal policy to not collect all the legislatively established fees in cases where multiple fees apply.

In these areas, the audit report makes the following recommendations:

1. We recommend that DRC create a position to maintain its information systems.

2. We recommend that the facilities submit monthly fee reports in a more user-friendly format.

3. We recommend that DEQ establish a commercial waste facility audit program to provide quality assurance for its regulatory program.

4. We recommend that the Legislature review Utah Code 19-6-118, regarding generator fees, and clarify its intent.

Dianne Nielson, the head of DEQ, reportedly told the legislative task force that she does not agree with all of the auditor's findings, but looks forward to the opportunity "to build on what I see as already a strong and effective program."

As part of the audit report, DEQ provided a legnthy response to the audit findings that is included in the report. At the next task force meeting, DEQ will be given the opportunity to express its views on the audit, answer questions from task force members regarding findings of the audit, and report on actions taken as a result of the audit. The next task force meeting is currently scheduled for June 15, 2004.

The legislative audit report can be found on-line at http://le.utah.gov/audit/newaudit.htm.

Utah Division of Radiation Control to Review Public Comment re Preliminary Decision on Envirocare License Amendment Application

On June 3, the public comment period closed on a recent preliminary decision by Dane Finerfrock, the Executive Secretary of the Utah Radiation Control Board, to approve requested amendments to the low-level radioactive waste disposal license of Envirocare of Utah. As proposed, the license amendments would authorize Envirocare to dispose of mixed waste containing low-level radioactive waste at full Class A activity limits and NARM in the mixed waste disposal cell; revise the list of radionuclides; allow the disposal of wastes containing mobile radionuclides under the sideslope cover areas of the LARW disposal cell; expand the allowable open cell area within the LARW and Class A disposal embankments; make minor typographical corrections; and list the relevant documents regarding the license changes incorporated in amendment 19. A Draft License Amendment with Statement of Basis describing the license changes is available for review at the offices of the Utah Division of Radiation Control. All comments receivd within the 30-day comment period will be considered in formulation of final determinations to be imposed on the license.

Utah Division of Radiation Control Seeks Public Comment re Preliminary Decision on Cedar Mountain Environmental Siting Application

The Utah Division of Radiation Control is seeking public comment on a recent preliminary decision by Dane Finerfrock, the Executive Secretary of the Utah Radiation Control Board, to approve a siting application submitted by Cedar Mountain Environmental as part of a proposed license application for a commercial low-level radioactive waste disposal facility in Tooele County, Utah. The Executive Secretary has found the application—which was submitted on January 30, 2003 and supplemented during the review process—to be complete and the siting criteria to be met. Pursuant to Utah Radiation Control Rule R313-25-3, public notice and an opportunity for comment are now being provided.

The Application

Cedar Mountain, which is headed by former Envirocare of Utah President Charles Judd, is proposing to build a facility within Section 29, T1S, R11W of approximately 315 acres immediately north of Envirocare of Utah's low-level radioactive waste disposal facility. (See *LLW Notes,* January/February 2003, p. 9.) A portion of the proposed site, which is within the boundaries of the Tooele County Hazardous Waste Industries Zone, is currently occupied by Envirocare's earth moving contractor—Broken Arrow.

During the review process on Cedar Mountain's siting application, a draft Siting Evaluation Report (SIER) was prepared. The SIER is available for public review and copying at the offices of the Division of Radiation Control. A thirty-day public comment period on the Executive Director's

decision commenced on June 2 with the publication of a notice in local ewspapers. Written comments must be received no later than the close of business on July 2, 2004 and will be considered in the Executive Secretary's final determination on the siting pplication. Comments should be addressed to: Dane L. Finerfrock, Executive Secretary, Utah Radiation Control Board, P.O. Box 144850, Salt Lake City, UT 84114-4850. In addition, public hearings will be held on June 28 at the Department of Environmental Quality's offices and on June 29 at the Tooele County Health Department Auditorium.

Earlier Decisions

In March 2004, the three-member Tooele County Commission denied Cedar Mountain Environmental's application for a temporary conditional use permit. (See *LLW Notes,* March/April 2004, p. 6.) In so doing, they upheld a September 2003 decision—by a vote of 6 to 1—by the Tooele County Planning and Zoning Commission to recommend that the permit application be denied. (See *LLW Notes,* September/October 2003, p. 10.)

At the time, Cedar Mountain Environmental President Charles Judd was quoted in local press as stating that the company will appeal the decision to a court of law. "We'll keep plugging along," said Judd. "We think there's a need for another waste facility and that there is plenty of waste out there."

By ordinance, Tooele County requires that waste companies must demonstrate that there is a need for such a facility before a conditional-use permit may be granted. Commissioners said that they rejected Cedar Mountain's proposal because the company did not demonstrate the need for another low-level radioactive waste disposal facility.

Even if Cedar Mountain were to win county approval, the company still has several hurdles

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Southeast Compact

Nominations Sought for the Richard S. Hodes, M.D. Honor Lecture Award

The Southeast Compact Commission for Low-Level Radioactive Waste Management is seeking nominations for the 2004 Richard S. Hodes, M.D. Honor Lecture Award—a program that recognizes an individual, company, or organization that contributed in a significant way to improving the technology, policy, or practices of low-level radioactive waste management in the United States. The award recipient will present the innovation being recognized at a lecture during the Waste Management '05 Symposium in Tucson, Arizona. The award recipient will receive a $5,000 honorarium and all travel expenses will be paid.

Dr. Richard S. Hodes was a distinguished statesman and a lifetime scholar. He was one of the negotiators of the Southeast Compact law, in itself an innovative approach to public policy in waste management. He then served as the chair of the Southeast Compact Commission for Low-Level Radioactive Waste Management from its inception in 1983 until his death in 2002. Throughout his career, Dr. Hodes developed and supported innovation in medicine, law, public policy, and technology.

The Richard S. Hodes, M.D. Honor Lecture Award was established in 2003 to honor the memory of Dr. Hodes and his achievements in the field of low-level radioactive waste management. In that year, the Southeast Compact Commission chose W.H. "Bud" Arrowsmith as the winner of the first Hodes Award. Mr. Arrowsmith currently serves as the Vice President of Marketing and Sales for RWE NUKEM Corporation. He was the founder and

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Central Interstate Low-Level Radioactive Waste Commission v. State of Nebraska

Eighth Circuit Denies Nebraska's Petition for Rehearing En Banc

On April 22, the U.S. Court of Appeals for the Eighth Circuit denied the State of Nebraska's petition for rehearing en banc in regard to the appellate court's February 18 decision affirming a lower court's ruling in a case filed by the Central Interstate Low-Level Radioactive Waste Commission against the state. The case involves a challenge of the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County.

Background

On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes,* September/October 2002, pp. 1, 15-17.) The court awarded the compact commission over $151 million in damages. The state filed a notice of appeal on October 30, 2002. The Eighth Circuit heard oral arguments on the appeal on June 12, 2003. (See *LLW Notes,* May/June 2003, p. 12.) Following the February 18, 2004 appellate decision affirming the lower court's ruling, Nebraska filed a petition for rehearing en banc on March 2. The Central Commission filed a reply brief opposing rehearing on March 15.

Appellate Court's Decision

The appellate court's ruling states as follows:

> The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

As is typical, the ruling did not include an explanation for or analysis of the court's reasons for denying the petition.

Dissenting Opinion

A dissenting opinion was filed by three of the judges, including the Chief Judge, all of who would grant the petition for rehearing en banc. (There are nine active judges on the appellate court, plus one senior judge.)

Overall, the dissenting judges found that the State of Nebraska's petition "involves a 'question of exceptional importance' worthy of consideration" by the entire court "[b]ecause Nebraska's petition for rehearing strongly implicates a fundamental concept of our Republic, i.e., sovereign immunity of one of the 50 States under the Eleventh Amendment." In particular, the author of the dissenting opinion characterized the judges position as follows:

> Because our panel in Entergy III may have misread two previous Entergy decisions and not addressed the Nebraska sovereign immunity issue, and because, on the merits of the Nebraska sovereign immunity issue, I doubt a state's waiver of immunity for specific performance also waives immunity from a damages award, I respectfully dissent from the denial of Nebraska's petition for rehearing en banc.

Did the Appellate Court Conclude that Nebraska Waived its Sovereign Immunity for Money Damages? The dissenting opinion first addresses the issue of whether or not the appellate court has addressed and concluded that Nebraska

waived sovereign immunity for claims of money damages when it entered into the Central Compact. The dissenting opinion finds that the Entergy III panel decision concludes that an earlier panel (Entergy II) affirmed the district court's ruling that such a waiver exists and extends to money damages. The dissenting opinion concludes, however, that Entergy II does not appear to affirm any such ruling by the district court.

> The Entergy II panel cited . . . [Entergy I], observing that the "law of the case" was Nebraska waived Eleventh Amendment immunity to suits for damages. However, the Entergy I court expressly and clearly never went that far. Instead, the Entergy I panel actually ruled that, by entering the Compact, "Nebraska [had] waived a *portion* of its sovereign immunity." (emphasis added) Entergy I also noted the importance of injunctive relief was heightened "by the likely unavailability of money damages should the Commission prevail on the merits of its claims. Relief in the form of money damages could well be barred by Nebraska's sovereign immunity."
>
> As one reads Entergy I, Entergy II, and Entergy III together (which is no small undertaking), the exceptionally important issue of Nebraska's sovereign immunity as to an award of monetary damages appears unaddressed. Based on Entergy I, the "law of the case" seems only to be that "[r]elief in the form of money damages could well be barred by Nebraska's sovereign immunity."
> (citations omitted)

Did Nebraska's Waiver of Immunity for Specific Performance Simultaneously Waive Immunity from Money Damages? The dissenting opinion next addresses the question of whether or not Nebraska's waiver of immunity for specific performance simultaneously waived immunity from a money damages award. In answering the question, the dissenting opinion notes that "[n]either the district court nor our court has cited any direct authority finding a state's waiver of immunity as to one type of remedy also waives that state's immunity as to all remedies, including money damages."

As part of its analysis, the dissenting opinion points out that the State of Nebraska "does not dispute that it could be compelled to perform its obligations expressed in the Compact." The dissenting opinion finds, however, that the compact does not—either directly or indirectly—provide that a party state agrees to a suit for damages or more broadly authorize any action. This is significant in that, according to the dissenting opinion, "the Supreme Court insists a 'clear declaration' of intent must exist to submit a state to federal court jurisdiction." The dissenting opinion goes on to note that the "test for waiver of a state's immunity for federal court jurisdiction 'is a stringent one'" and that the "leap from a state's waiver of immunity for specific performance to a state's waiver of immunity for damages envisions a broad or liberal application of waiver, not a narrow or stringent one." Moreover, the dissenting opinion contends that "[t]he Supreme Court has suggested that a selective waiver of sovereign immunity should be respected." The Eighth Circuit, according to the dissenting opinion, has also recognized a state's ability to exercise a partial waiver of Eleventh Amendment immunity.

Conclusion The dissenting opinion concludes with the following overall analysis of the case:

> We must remember that protection of state treasuries from "financial ruin" is the core of the Eleventh Amendment. The Entergy III decision certainly places the treasury of Nebraska in jeopardy.
>
> The severity of the debt placed on Nebraska's treasury and the importance of a state's sovereign immunity in our federal system warrant further review in our

court. The issue of sovereign immunity should be directly addressed by our court en banc.
(citations omitted)

Next Step

Now that the U.S. Court of Appeals for the Eighth Circuit has rejected Nebraska's petition for rehearing en banc and petition for rehearing by the panel, the only available option to the state for challenging the damages award is an appeal to the U.S. Supreme Court. In the alternative, the parties could also reach a settlement agreement.

For additional information, please see related story in the States and Compacts section.

Court Upholds Stay on Judgment

On June 1, the U.S. District Court for the District of Nebraska refused to lift a stay of the $151 million judgment previously rendered against the State of Nebraska in a case filed by the Central Interstate Low-Level Radioactive Waste Commission that challenges the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. The Central Commission had requested that the court lift the stay or, in the alternative, require the state to post a bond equal to the judgment amount plus interest. The commission did so in a brief responding to an earlier request by the state for court confirmation that the stay remained in place pending disposition of a petition for certiorari to the U.S. Supreme Court. In the brief, the commission claimed that the state is no longer entitled to an unbonded stay because of actions taken by the legislature and the Governor in April 2004 "to weaken the statutory means of promptly enforcing judgments against the state." The court, however, denied the commission's request.

The Issues

On April 15, Nebraska Governor Mike Johanns signed into law a measure that reduces the rate that the state pays on judgments from 10 percent to a flexible rate that changes with a U.S. Treasury note yield. The action could significantly reduce the amount of interest that the state has to pay on the commission's lawsuit. According to local press reports, during the appeal process, interest on the judgment has accrued since 2002 at a rate of 1.68 percent or about $7,000 a day. Under the previous law, the rate would increase to 10 percent upon expiration of the appeals process. Had the court removed the stay before the law goes into effect on July 16, the state may have been required to pay the 10 percent interest rate anyway. The Central Commission, in its brief to the court, argued that the change in the law was motivated, at least in part, in response to the district court's earlier judgment.

The Court's Decision

In a three-page order, U.S. District Judge Richard Kopf refused to lift the stay or to require the state to post a bond until the appeals process is completed. In support of his ruling, Kopf noted that the state is likely to appeal the case to the U.S. Supreme Court. "It has been clear throughout this litigation that the losing party was likely to petition the Supreme Court," wrote Kopf. The judge did not express an opinion on what motivated the state to enact the legislation reducing the interest paid on judgments. "The court does not decide whether Nebraska engaged in bad faith when it altered the interest rate applicable to unpaid judgments," wrote Kopf. "Any such claim could not be asserted in this case until after all appeals are terminated." Kopf noted that he previously imposed a stay on the judgment with the understanding that it would remain in effect until the expected appeals had all been decided.

Alabama, Florida, Tennessee, Virginia and the Southeast Interstate Low-Level Radioactive Waste Management Commission v. State of North Carolina

Briefs Filed in Dispute Between Southeast Compact Commission and North Carolina

On Friday, May 21, 2004, three briefs were filed in the Supreme Court of the United States pertaining to a lawsuit previously filed by the Southeast Interstate Low-Level Radioactive Waste Management Commission and several of its member states against the State of North Carolina in an action seeking the enforcement of sanctions against the state for its alleged failure to develop a regional low-level radioactive waste disposal facility. (See *LLW Notes*, May/June 2002, pp. 1, 11.) On March 30, the plaintiffs had filed a motion for summary judgment of the case and North Carolina had filed a motion to dismiss the action. (See *LLW Notes,* March/April 2004, pp. 16-21.) On May 21, the compact filed a brief in opposition to the state's motion to dismiss and North Carolina filed a brief in opposition to the plaintiffs' motion for summary judgment. In addition, the US Solicitor General filed an amicus brief pertaining to the both motions.

Background

The Complaint On June 3, 2002, the States of Alabama, Florida, Tennessee, and Virginia—as well as the Southeast Compact 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. The action, which accuses North Carolina of "failing to comply with the provisions of North Carolina and the Southeast Compact laws and of not meeting its obligations as a member of the Compact," seeks to enforce $90 million in sanctions against the defendant state. It contains various charges against North Carolina, including violation of the member states' rights under the compact, breach of contract, unjust enrichment, and promissory estoppel. (See *LLW Notes*, May/June 2002, pp. 1, 11.)

For specific arguments raised in briefs filed by the petitioners and respondent, see LLW Notes, July/August 2002, pp. 15-17. For a procedural history of prior filings in the case, see LLW Notes, May/June 2003, pp. 10 - 12.

Original Jurisdiction Under Article III, Section 2 of the U.S. Constitution, the U.S. Supreme Court may exercise original jurisdiction over a judicial case or controversy between states. 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 Briefs

Plaintiff's Brief The brief filed by the Commission and the four party state plaintiffs asserts that North Carolina's motion to dismiss should be denied because

- the Compact Law authorizes the Commission to sanction a state for breaching its obligations as a party state;
- the Compact authorizes the Commission to impose monetary sanctions; and
- the Court has jurisdiction to determine claims asserting that North Carolina breached the Compact and to impose an appropriate remedy.

North Carolina's Brief In its brief, the State of North Carolina argued that the plaintiffs' motion for summary judgment should be denied for the following reasons:

- summary enforcement of the Commission sanctions award is inappropriate because (1) the Court (through the Special Master) must use its own authority to resolve the dispute, (2) North Carolina was not a party to the Compact when the sanctions were imposed and therefore the Commission lacked jurisdiction over it, and (3) the Compact does not authorize the Commission to impose monetary sanctions; and
- if the sanctions award is not summarily enforced, then summary judgment must be denied because there are disputed material facts affecting North Carolina's liability for breach of the Compact.

Solicitor General's Brief The amicus brief filed by the US Solicitor General stated that the plaintiffs should not be entitled to summary judgment to enforce the sanctions order because the Compact does not authorize the Commission to impose monetary sanctions and limits sanctions to denying a state the benefits of Compact membership for failure to fulfill its compact obligations. However the Solicitor General's brief also stated that the plaintiffs can still pursue a judicial remedy against North Carolina for breach of its contractual obligations and that North Carolina's motion to dismiss should also be denied. The Solicitor General recommended that "the Special Master should determine, through future proceedings, whether the plaintiffs are entitled to a judicial remedy, under contract or equity principles, based on North Carolina's alleged breach of its compact obligations."

Next Steps

Attorneys from the Southeast Compact Commission are expected to reply in late June to both the Solicitor General's amicus brief and North Carolina's brief in opposition to the motion for summary judgment. Oral arguments are then expected to be held before the Special Master from both parties on all of the issues raised by the motions and briefs. The oral arguments could be made during a single session or a series of sessions covering specific issues and are not expected to occur any earlier than July.

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served as President and CEO of the Scientific Ecology Group which, with Mr. Arrowsmith's guidance, developed and implemented numerous technical innovations in the field of radioactive waste management including compaction, incineration, recycling, decontamination, and vitrification. The Texas A & M University Student Chapter of Advocates for Responsible Disposal in Texas (ARDT) was also chosen in 2003 for special recognition as an Honorable Mention in the Hodes Award program for its innovation in educational activities related to low-level radioactive waste management.

To nominate yourself or another individual, company, or organization for this distinguished award, please contact:

Ted Buckner, Associate Director
Southeast Compact Commission
21 Glenwood Avenue, Suite 207
Raleigh, NC 27603
919.821.0500
tedb@secompact.org

or visit the Southeast Compact Commission's website at www.secompact.org.

Nominations must be received by June 30, 2004.

(Continued from page 1)

by the state legislature and Governor;

- legislation in Texas that allows for the licensing of a new disposal facility in that state; and
- a federal court ruling finding that the State of Nebraska exercised bad faith in its review of US Ecology's license application, the results of which GAO noted may be to prompt the state to reconsider development of a disposal facility.

In addition, GAO noted that federal agency guidance and oversight of LLRW management has decreased in recent years. DOE is no longer appropriated specific funds to support a National Low-Level Waste Management Program and is no longer required to report to Congress on LLRW conditions. NRC's involvement in LLRW management was also decreased in the late 1990's because no new disposal sites were being developed that would involve NRC licensing or technical assistance.

Recent LLRW Disposal Volumes and Future Volumes

GAO found that annual LLRW disposal volumes have increased in recent years, but noted that the timing and level of future volumes needing disposal remain uncertain. According to data obtained from facility operators by GAO, disposal volumes grew to about 12 million cubic feet in 2003—an increase of 200 percent over 1999—with Class A waste accounting for 99 percent of the disposal volume. The increase is attributed to the cleaning up of DOE sites and disposal of some decommissioning waste from nuclear power plants. GAO reported, however, that "uncertainties will remain regarding the timing and volume of LLRW needing disposal in the future, which will largely depend on the disposal decisions made by DOE and nuclear utility companies."

Current or Anticipated Shortfalls in LLRW Disposal Availability

GAO determined that "[t]here appears to be enough disposal availability to serve the nation's needs at least until mid-2008, when generators in many states might lose disposal access for their class B and C wastes." In particular, the report found that Class A disposal availability does not appear to be a problem nationally in the short- or long-term, with all three currently operating disposal facilities reporting that they have 20 years or more disposal capacity. Class B and C disposal availability appears to be sufficient also for those states served by the Barnwell and Richland facilities. However, for the other 36 states, there will not be disposal options for Class B and C waste in the long-term "[u]nless South Carolina changes its position [on closing the Barnwell facility to out-of-region waste after 2008] or additional disposal capacity is made available."

Potential Effects of Any LLRW Disposal Capacity Shortfall

In its report, GAO concluded that in the event that these 36 states encounter a lack of disposal options for Class B and C wastes, "licensed users of radioactive materials can continue to minimize waste generation, process waste into safer forms, and store waste pending the development of additional disposal options." In this regard, GAO noted that NRC, while preferring disposal, allows on-site storage as long as the waste remains safe and secure. GAO also pointed out in its report that in the event of an immediate and serious threat, NRC has authority under the federal Low-Level Radioactive Waste Policy Act to override any compact restrictions and allow shipment of waste to a regional or other nonfederal disposal facility under narrowly defined conditions. Finally, GAO noted that while waste minimization and storage can be costly, no widespread national impacts are anticipated if generators were to face limited or no disposal options—at least in the short term. Indeed, a survey by GAO on the issue of approximately 2,000 radiation safety officers

yielded only 14 responses, with only one respondent raising any concerns whatsoever. In addition, the National Research Council did a report in 2001 which concluded that "it would take 10 to 20 years before the lack of an LLRW disposal option might adversely impact biomedical research or clinical practice."

The MIMS Database

GAO did not use the Manifest Information Management System (MIMS) to determine recent disposal volumes or to analyze sources of LLRW because, as stated by the agency in its report, the system has "shortcomings in its usefulness and reliability" and does not capture all of the desired data. For instance, MIMS does not capture the large quantities of LLRW shipped to commercial disposal facilities by DOE, nor does it include information on storage of waste and volume of waste reduction. This is all information that GAO believes would be useful to include in the system. Indeed, GAO noted that "[t]he consensus among the compact and unaffiliated state officials we surveyed was that they could more effectively regulate and monitor LLRW in their compacts and states if MIMS offered more comprehensive and reliable data." In regard to perceived shortcomings of the system, GAO noted that inconsistencies were identified between what the disposal facility operators claimed had been disposed of at their facilities and what was actually recorded in MIMS. In addition, discrepancies regarding the origins of waste identified in the system were also found. In addition, GAO pointed out that "while DOE takes some steps to ensure that it accurately uploads operator-supplied data into MIMS, it does not perform other systematic quality checks on the data, such as 'reasonableness' checks, cross tabulations, or exceptions reports."

GAO's Recommendations

In regard to recommendations for future federal oversight and monitoring, GAO provided the following comments in its report:

> Although no shortfall in disposal availability appears imminent, uncertainties about future access to disposal facilities remain, such as the development of new disposal options and the increased safety and security risks associated with longer-term storage of LLRW. Therefore, continued federal oversight of disposal availability and the conditions of stored waste is warranted. However, as a result of decreased federal oversight and a national LLRW database with known shortcomings, there is no central collection of information to monitor this situation. Given that NRC is the federal agency responsible for overseeing the use, storage, and disposal of radioactive materials, and DOE's changed role in LLRW management, we believe that NRC is now the most appropriate agency to report to the Congress on LLRW conditions. Recognizing the deficiencies in the national LLRW database, we recommend that the Secretary of Energy halt dissemination of information from it as long as these deficiencies persist. Considering the need for federal oversight, the Congress may wish to direct NRC to report to it if LLRW disposal and storage conditions should change enough to warrant consideration of new legislation to ensure safe, reliable, and cost-effective disposal availability.

DOE Comments and GAO's Response

DOE's Comments After reviewing a draft copy of GAO's report, DOE commented that it agreed with the agency's assessment that existing LLRW disposal capacity is adequate for the near future. The department offered no comment on GAO's recommendation that Congress consider directing NRC to perform data gathering and oversight of commercial LLRW disposal.

However, DOE did comment that it disagreed with GAO's recommendation that the Energy Secretary halt dissemination of information contained in MIMS. In this regard, DOE stated as follows:

> The report's characterization of the usefulness of the MIMS data does not fully represent the utility of the system, and removal of MIMS without an alternative would evoke sharp criticism from states and regional compacts who use it as a source of information on radioactive waste disposal. MIMS was developed and is now maintained to address a requirement in the National Low-Level Waste Policy Act of 1980. Specifically, the Department was required to establish "a computerized data-base to monitor management of low-level radioactive wastes" (Section 7.(a)(1)). If MIMS were no longer available without another alternative being developed, DOE's compliance with the Act could be questioned.

GAO's Response In its response to DOE's comments, GAO stated that its recommendation did not call for the removal of MIMS, but rather for the halting of dissemination of information in MIMS until internal control weaknesses and shortcomings in its usefulness and reliability are corrected. In terms of usefulness of the database, GAO noted that its report acknowledges that state and compact officials use MIMS for various purposes, but also pointed out that these same officials could more effectively regulate and monitor LLRW if MIMS offered more comprehensive and reliable data. Finally, GAO commented that the agency "stand[s] by our recommendation to DOE because we believe that it is inappropriate to disseminate information that is known to be unreliable and incomplete."

NRC Comments and GAO's Response

NRC's Comments In its comments, NRC stated that "[t]he GAO report provides an accurate summary of current low-level radioactive waste (LLRW) disposal activities and potential issues that may be encountered in the future." However, NRC disagreed with GAO's ultimate recommendation that it be directed to gather information to monitor disposal activities and to report to Congress if conditions change. Such responsibility, according to NRC, more appropriately rests with DOE. NRC pointed out, nonetheless, that it is taking various actions to identify radioactive materials of concern and to enhance their safety and security. NRC believes these actions to be sufficient in the current environment. In addition, NRC commented that other alternatives to the current national low-level radioactive waste disposal system should be explored at this time. In this regard, NRC stated as follows:

> We believe that it is now time for GAO to explore . . . [other] alternatives further because the future availability of disposal capacity and the costs of disposal under the current system remain highly uncertain and LLRW generators need predictability and stability in the national disposal system. We acknowledge that the potential approval for Envirocare to accept Class B and Class C wastes and the licensing of a LLRW waste disposal facility in Texas could significantly improve the current LLRW disposal system in the U.S. At the same time, the nearly 20 years of experience under the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA) has demonstrated the difficulties in siting and licensing a LLRW facility. Not one new facility has been developed in this time under the LLRWPAA. Therefore, we believe it is in the national interest to begin exploring . . . alternatives . . . that would potentially provide a better legal and policy framework for new disposal options for commercial generators of LLRW.

GAO's Response GAO disagreed with NRC's recommendation that alternative options to the current LLRW management system should be explored at this time. "Given current disposal availability through mid-2008, and uncertainties about future disposal availability, we believe that such an evaluation by us is not needed at this time. As long as NRC places no time limits on LLRW storage and provides assurance that it is safe and secure, any shortfalls in disposal capacity would be manageable in the short-term." GAO also disagreed with NRC's position that it would be outside of the agency's mission to report to Congress on changes in disposal availability and the conditions of stored waste. Indeed, GAO responded that it believes NRC to be "the most appropriate agency to determine when the safety and security of stored LLRW are approaching a level of risk that might warrant congressional assessment of legislative options. GAO feels that DOE "is no longer the most appropriate agency to oversee the states' management of LLRW given that it has become the major user of commercial disposal facilities . . . and that the Congress eliminated its reporting responsibilities." GAO did, however, agree with NRC's assessment that there is no need for Congress to direct the agency to gather additional information to monitor disposal availability and the safety and security of stored waste, as NRC is already taking significant appropriate actions.

LLRW Legislative Options Appendix

GAO's report includes an appendix that updates the three management options analyzed in the agency's earlier 1999 report to address concerns about limited or no disposal access for generators of LLRW: (1) allowing the compact system under existing federal legislation to adapt to the changing LLRW situation; (2) repealing the existing federal legislation to allow market forces to respond to the changing LLRW situation; and (3) using DOE disposal facilities for commercial waste. Persons interested in GAO's updated analysis of these options should refer to pages 40 - 43 of the report.

GAO's report can be viewed on-line by going to www.gao.gov. Once you get to GAO's home-page, click on the link on the left-hand column titled, "GAO Reports." When the page pulls up, click on "Today's Reports" and then on "June 10, 2004." It is the first report that is listed on this page, GAO-04-604.

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ahead. Besides needing approval from the county and state regulators, the proposal would need to be approved by the legislature and the governor of Utah. In addition, a moratorium is currently in effect on such proposals until a task force completes a two year study, which is expected to be completed in November 2004 and presented to the legislature in 2005.

Hightlights of the GAO Report on LLRW Disposal Availability

The following are some quotes providing highlights of GAO's report, as identified by the agency.

Why GAO Did This Study

Low-level radioactive waste (LLRW) management concerns persist despite enactment of the LLRW Policy Act of 1980, as amended, which made states responsible for providing for disposal of most LLRW. It also enumerated guidance and oversight responsibilities for DOE and NRC. When GAO last reported on LLRW disposal, in 1999, the only existing facility accepting the more highly radioactive types of LLRW (known as class B and C waste) from most states was expected to be full within 10 years. In this context, GAO examined (1) changes in LLRW conditions since 1999, (2) recent annual LLRW disposal volumes and potential future volumes, (3) any current or anticipated shortfalls in disposal availability, and (4) potential effects of any such shortfall.

What GAO Found

GAO identified several changes in LLRW disposal availability and federal agency oversight since its 1990 report that have had or might have significant impacts on LLRW management by the states. For example, while one disposal facility plans to close to most states and new options are evolving that may counteract this shortfall, federal guidance and oversight of LLRW management has virtually ended.

Annual LLRW disposal volumes increased 200 percent between 1999 and 2003, primarily due to LLRW shipped to commercial disposal by DOE. GAO identified this increase using data from the three commercial disposal facility operators because GAO determined that data from the national LLRW database, maintained by DOE to assist the LLRW community in managing LLRW, were unreliable. The uncertain timing and volume of future waste shipments from DOE and nuclear utilities make it difficult to forecast disposal needs for all classes of LLRW.

At current LLRW disposal volumes, disposal availability appears adequate until at least mid-2008 for class B and C wastes. There are no expected shortfalls in disposal availability for class A waste. If disposal conditions do not change, however, most states will not have a place to dispose of their class B and C wastes after 2008. Nevertheless, any disposal shortfall that might arise is unlikely to pose an immediate problem because generators can minimize, process, and safely store waste. While these approaches are costly, GAO did not detect other immediate widespread effects. NRC places no limit on stored waste and presently does not centrally track it. However, as LLRW storage volume and duration increase in the absence of reliable and cost-effective disposal options, so might the safety and security risks.

What GAO Recommends

The Congress may wish to consider directing NRC to report if LLRW disposal and storage conditions change enough to warrant congressional intervention. GAO also recommends that DOE halt dissemination of its on-line LLRW database as long as it has internal control weaknesses and other shortcomings. NRC disagreed that it was the most appropriate entity to prepare this report. DOE disagreed that it should halt dissemination of LLRW information despite known problems with its database. GAO remains firm in its suggestion to the Congress and in its agency recommendation.

U.S. Department of Energy

Errors in Envirocare Data Identified on MIMS

DOE/Envirocare Working to Correct Information

Recently, some significant issues about data and data validation for the Manifest Information Management System (MIMS) have been brought to the attention of the U.S. Department of Energy (DOE). In particular, substantial discrepancies have been identified in the amount of waste actually disposed at the Envirocare of Utah (Envirocare) facility and that which has been attributed to the Envirocare facility on MIMS in recent years. Indeed, it has been determined that data provided to DOE for MIMS included other waste—e.g., mixed low-level radioactive waste (MLLW) data and naturally-occurring radioactive material (NORM).

DOE staff, with the cooperation of Envirocare officials, have been working to track down and identify the cause of the discrepancies and to fix the data set. According to DOE staff, Envirocare will provide DOE with a revised data set with just commercial low-level radioactive waste in late June after on-going IT system upgrades are complete.

DOE plans to keep MIMS on-line while the data set is corrected. However, until the new data set is input, users should be aware that figures for the Envirocare facility may not be correct. DOE expects to have the situation resolved in a month or so.

Input from Compacts and States

As part of the department's review of this matter, DOE staff is requesting opinions from the compacts and states on whether manifested commercial MLLW disposal data should or should not be included in MIMS. Other issues that have been brought to the department's attention concern the completeness of the data—e.g., not including DOE waste disposed at commercial facilities on MIMS and the lack of a data validation process. According to DOE staff, there are no plans to add DOE waste or do new validation, at this time. However, adding MLLW disposed at Envirocare is a possibility.

If you would like to comment on the usefulness of adding manifested commercial MLLW disposal data to MIMS—or on any other issues involving the MIMS system—please forward your comments to Todd D. Lovinger at llwforuminc@aol.com . If you have questions, or would prefer to send your comments directly to DOE, please contact Douglas Tonkay at Douglas.tonkay@em.doe.gov.

Roberson to Leave DOE; Marcinowski Comes Over from EPA

On June 15, Jessie Roberson resigned her position as Assistant Energy Secretary at the U.S. Department of Energy. Roberson, who has been in charge of the environmental cleanup program at the department's nuclear weapons sites, said she was resigning in order to spend more time with her family. Her resignation becomes effective July 15.

While at DOE, Roberson was in charge of crafting an accelerated cleanup agenda of DOE sites. Her efforts to do so were praised by some as extremely successful and criticized by others as an attempt to lower cleanup standards in order to do the work cheaper and faster. Energy Secretary Spencer Abraham praised Roberson's three years on the job, saying that she had "fundamentally changed the management" of the cleanup effort.

Before getting this post, Roberson had worked for three years for the DOE office overseeing the cleanup of the Rocky Flats nuclear site in Colorado.

In addition to Roberson, two other officials closely involved in the department's cleanup and environmental management programs have recently resigned. DOE Undersecretary Robert Card and Assistant Secretary Beverly Cook both resigned in early April following a clash with members of Congress over a worker health issue. They, too, cited a desire to spend more time with family as a basis for leaving.

In other department news, Frank Marcinowski has joined DOE's Office of Environmental Management as the Deputy Assistant Secretary for Logistics and Waste Disposition Enhancements. Marcinowski comes to DOE from the U.S. Environmental Protection Agency, where he served as the Director of the Radiation Protection Division of the Office of Radiation and Indoor Air. Alice Williams—who attended the LLW Forum's winter meeting in Seattle, Washington—will now serve as Marcinowski's deputy, although she has been detailed for several months to NNSA to help set up a new waste management organization.

U.S. Nuclear Regulatory Commission

NRC Renews Licenses for H.B. Robinson, R.E. Ginna and Virgil C. Summer Plants

Moves Forward on Other Renewal Applications

The U.S. Nuclear Regulatory Commission recently renewed for 20 years each of the operating licenses of Unit 2 of the nuclear power facility at the H.B. Robinson Steam Electric Plant, Unit 1 of the Virgil C. Summer Nuclear Station, and the R.E. Ginna Nuclear Power Plant. In addition, the agency recently announced the availability of license renewal applications for the Nine Mile Point Nuclear Station, Units 1 and 2, and took interim action on renewal applications for the Point Beach Nuclear Plant, Units 1 and 2, and the Millstone Nuclear Plant.

License Renewals: Robinson, Summer and Ginna

The H.B. Robinson nuclear facility is located 26 miles from Florence, South Carolina. Carolina Power & Light Co., which operates the plant, submitted an application for renewal of the operating license of Unit 2 on June 17, 2002. That license is currently set to expire on July 31, 2010.

The Virgil C. Summer nuclear facility is located 26 miles from Columbia, South Carolina. The current operating license for the facility expires on August 6, 2002. The operator of the plant, South Carolina Electric and Gas Company, submitted an application for renewal of the license on August 6, 2002.

The R.E. Ginna nuclear facility is located 20 miles from Rochester, New York. The operating license expires on September 18, 2009. The operator of the plant, Rochester Gas and Electric

Corporation, submitted an application for renewal of the license on July 30, 2002.

Copies of the final environmental impact statement for the H.B. Robinson Plant can be found on the NRC's Agency-wide Documents Access and Management System (ADAMS) at http://www.nrc.gov/reading-rm/adams/web-based.html by entering accession number ML033450517. Copies of the Summer final EIS are available electronically at http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement15/index.html. Copies of the Ginna final EIS are also available electronically at http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement14/sr1437s14.pdf.

New Application: Nine Mile Point

On May 28, NRC announced that copies of an application for a 20 year renewal of the operating licenses for Units 1 and 2 at the Nine Mile Point Nuclear Station are available to interested parties. The licensee, Constellation Energy, submitted the application on May 27. The Nine Mile Point Plant is located near Oswego, New York. The current operating licenses for Units 1 and 2 expire on August 22, 2009 and October 31, 2026, respectively.

The Nine Mile Point application is available on-line at http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html.

Hearing Opportunity and Public Comment: Point Beach and Millstone

The Point Beach Nuclear Power Station is located near Two Rivers, Wisconsin. The current operating licenses for Units 1 and 2 expire on October 5, 2010, and March 8, 2013, respectively. Nuclear Management Company submitted a license renewal application for the units on February 26, 2004. In mid-April, NRC announced that it had determined that sufficient information had been filed for the agency to formally "docket," or file, the application. Interested parties were given until June 14 to request a hearing.

The Millstone Nuclear Power Plant is located in Waterford, Connecticut. The current operating licenses for Units 2 and 3 expire on July 31, 2015 and November 25, 2015, respectively. Dominion Nuclear Connecticut, Inc. submitted a license renewal application on January 22, 2004. In mid-May, NRC held two public meetings to obtain input on the environmental impact statement prepared for the license application.

A copy of the Point Beach application is available on the NRC web site at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/point-beach.html. A copy of the Millstone relicensing application can be found at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/millstone.html.

NRC Regulations/Status of Renewals

Under NRC regulations, a nuclear power plant's original operating license may last up to 40 years. License renewal may then be granted for up to an additional 20 years, if NRC requirements are met. To date, NRC has approved license extension requests for 26 reactor units. In addition, NRC is currently processing license renewal requests for several other reactors.

For a complete listing of completed renewal applications and those currently under review, go to http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html.

NRC Issues Review Standard for Early Site Permit Applications

The U.S. Nuclear Regulatory Commission has issued its review standard for early site permit applications for possible new nuclear power plants. The early site permit process is intended to resolve site-related issues regarding possible future construction and operation of a nuclear power plant at a site selected by the applicant. The review standard covers issues such as population density, probable maximum floods that could affect a site, stability of subsurface materials and foundations, aircraft hazards and emergency planning. It also informs potential applicants and other stakeholders of the information that the staff needs to perform its review.

The review standard can be found on the NRC's Agencywide Documents Access and Management System (ADAMS) by entering accession number ML040700094 at http://www.nrc.gov/reading-rm/adams/web-based.html.

To date, early site permit applications have been submitted for the Clinton site in Illinois and the Grand Gulf site in Mississippi. The ESP for the Clinton site was filed by Exelon Generation Company on September 25, 2003. The ESP for the Grand Gulf site was filed by System Energy Resources, Inc. in October 2003. If approved, the early site permits would give these companies up to 20 years to decide whether to build one or more nuclear plants on the sites, and to file applications with NRC to begin construction. (See *LLW Notes,* January/February 2004, p. 22.)

For additional information, contact Michael L. Scott, Project Manager, New Reactor Licensing Project Office, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 or at (301) 415-1421 or at mls3@nrc.gov.

NRC Issues Report re Quality of DOE's Yucca Mountain Information

The U.S. Nuclear Regulatory Commission's Office of Nuclear Material Safety and Safeguards has released a report on its evaluation of the quality of certain technical information contained in three documents being prepared by the U.S. Department of Energy in support of its expected application for a license to build and operate a high-level radioactive waste repository at Yucca Mountain, Nevada. The report finds that the license application may not contain sufficient information to support technical positions if DOE continues to use its existing policies, procedures, methods and practices at the same level of implementation and rigor. In such case, NRC may need to issue a large volume of requests for additional information, which could extend NRC staff's time for review of the application and prevent the agency from issuing a construction authorization decision within the three years (with a possible extension to four) required by law.

The report did not contain any determination on the technical adequacy of the documents that were evaluated, as such decision would be made only during the license review process. It determined that the department and its contractor had used several good practices and found that the technical information was much improved over what was previously presented in 2001. In addition, the report concluded that the information was up to date, comprehensive, and contained more data. Nonetheless, the report also identified concerns with the clarity of the technical bases and the sufficiency of technical information used to support DOE's explanation of the technical bases. Concerns were also noted with the effectiveness of DOE's corrective actions.

NRC staff met with DOE officials in Las Vegas on May 5 to discuss the findings contained in the report. Comments and questions from members of the public were taken at the conclusion of the meeting.

Copies of the report, which is titled "U.S. Nuclear Regulatory Commission Staff Evaluation of U.S. Department of Energy Analysis Model Reports, Process Controls, and Corrective Actions," will be made available on NRC's website at http://www.nrc.gov/waste/hlw-disposal/reg-initiatives/resolve-key-tech-issues.html.

NRC Amends Licensing, Inspection and Annual Fees Rule

The U.S. Nuclear Regulatory Commission is amending its regulations pertaining to the licensing, inspection and annual fees that it will charge to applicants and licensees for FY 2004. By law, NRC is required to collect nearly all of its annual appropriated budget through two types of fees: (1) those for specific NRC services, such as licensing and inspection activities, that apply to a specific license, and (2) those paid by all licensees to recover generic regulatory expenses and other costs not recovered through fees for specific services.

NRC must recover $545.3 million for FY 2004 (which represents 92 percent of the agency's budget) less the $32.9 million appropriated from the Nuclear Waste Fund for high-level waste activities. The amount to be recovered in FY 2004 includes $51.1 million appropriated for NRC activities related to homeland security. The total amount to be recovered is about $19 million more than last year, which will fund increases in the agency's resources for homeland security activities, operating reactor license renewals and new reactor licensing.

The annual fees were determined under the "re-baselining" method due to changes in the total budget and the magnitude of the budget allocated to certain classes of licensees. A complete listing of the fees can be found in the final rule, which was published in the *Federal Register* on April 26. The final rule includes a summary of 14 comments that were received on the earlier proposed rule, dated February 2, along with the agency's responses.

U.S. Congress

Legislation Introduced to Amend LLRWPAA to Require Shared Liability Among Member States of Compacts

On June 15, U.S. Senator Benjamin Nelson introduced legislation "to establish a threshold of shared liability among all member states of the ten regional [low-level radioactive waste disposal] compacts to ensure that the entire burden of liability does not rest on the shoulders of the states hosting storage facilities." As drafted, the bill (S. 2518) would amend the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act to provide that states establishing regional low-level waste disposal facilities shall share the long-term liability for any damages caused by radioactive releases from such regional facilities. The draft legislation, which has not yet been assigned to a committee, states that it would take effect 3 years after the date of enactment.

The Draft Bill

As drafted, the legislation provides that Section 212 of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act (42 U.S.C. 2021d; Public Law 99-240) is amended by, among other things, adding the following language at the end:

> (4) is granted only if the compact provides that all party states to the compact are jointly and severally liable for the cost of long-term liability incurred in connection with the radioactive release from a regional facility in a host state of the compact (in excess of fund[s] available from the extended care and long-term liability fund of the host State and from property and third-party liability insurance), based on the proportionate share of the total volume of waste placed in the regional facilities by generators located in each party state, except that this paragraph shall not apply to a party state with a total volume of waste recorded on low-level radioactive waste manifests for any year that is less than 10 percent of the total volume recorded on those manifests for the region during the same year.

Nelson's Press Release

According to a press release issued by Senator Nelson's office, the legislation was drafted to address "what he considers to be a fairness flaw in the federal low-level radioactive waste compact law and with recent congressional action to reclassify certain high-level waste as low-level waste." Nelson signed similar legislation when he was Governor of Nebraska. That legislation passed the Nebraska Unicameral and was enacted by three of the four other member states of the Central Compact.

"What we have now among the compacts is a widely varying degree of liability among the member states and with the host states," said Nelson. "My bill addresses this flaw and requires all member states of a regional compact to share liability for future accidental release of materials and clean-up costs . . . This is simply a matter of fairness. Federal law already exempts the generators from future liability. The compact agreements do not extend shared liability to all member states leaving the host state with the assumed liability. It's simply not fair to the host states to assume all future liability for the radioactive waste generated by other states."

The press release states that Nelson decided to push forward with this bill because of recent efforts to change federal law. In this regard, the Fiscal Year 2005 Department of Defense Authorization Bill currently being considered by the U.S. Senate contains a controversial provision that would allow the U.S. Department of Energy in the State of South Carolina to reclassify some waste that is currently deemed high-level as low-level. An attempt to remove the provision failed on a 48 to 48 vote on June 3. According to Nelson, "[t]his language opens the door for future

reclassifications of waste and could potentially result in the storage of waste currently classified as high-level waste at low-level waste storage facilities."

The press release states that, "Nelson will work with his colleagues in the Senate to find a suitable opportunity to address this issue and may seek to attach his bill as an amendment to legislation pending before the U.S. Senate."

Congressional Research Service Memo re Compact Liability Provisions

Nelson asked the Congressional Research Service (CRS) to study shared liability provisions contained in existing low-level radioactive waste disposal compacts. In a June 7 memo, CRS provided a brief explanation of several recurring compact features in regard to shared liability. The following is an excerpt from the memo:

> . . . [M]any of the compacts make clear that the liability of a given Commission does not transfer to the party states.
>
> Many of the compacts also contain general provisions stating that liability under existing law will remain unaltered, except as may be provided elsewhere in the compact. The other applicable law[s], such as the Resource Conservation and Recovery Act [42 U.S.C. s. 6901-6991k] and the Comprehensive Environmental Response and Cleanup Liability Act [42 U.S.C. s. 9601-9675], will each impose their own schemes of liability.
>
> Finally, several of the compacts set out a system of shared liability among party states. Others opt to prevent attachment of any additional liability than would be permitted under existing law . . .

Attached to the memo is a table that cites liability provisions of each of the individual low-level radioactive waste compacts. The following is a reprinting of the table, as provided in the CRS memo.

Compact	**Legal Authority**	**Liability Provisions**
Appalachian	Pub. L. No. 100-319	**Art. 1:** Commission liability does not extend to party states **Art. 3:** Liability for regional facility: Each state shares in liability in proportion to the share of waste stored at the facility. Party states may sue under other applicable law if their liability is the result of a host state's negligence, malfeasance, or neglect. **Art. 4:** Generators, brokers, carriers, owners, and operators are liable in accordance with all applicable laws.
Central	Pub. L. No.99-240	**Art. IV:** Except as otherwise provided, compact has no effect on liability. Generators, transporters, owners, and operators are liable in accordance with all applicable laws. Commission liability does not extend to party states.

Compact	Legal Authority	Liability Provisions
Central Midwest	Pub. L. No.99-240 Pub. L. No.103-439	**Art. III:** Commission liability does not extend to party states. The Commission is not liable for facility licensing, construction, operation, stabilization, closure, extended care, institutional control after extended care, or transportation of waste to a facility. **Art. VI:** Shared liability among party states for extended care and long-term liability for regional facilities: Extent of liability depends upon proportion of waste each state disposes at facility for each relevant year. A state has no liability for years in which the state is responsible for less than 10% of total deposit volume for that year.
Midwest	Pub. L. No.99-240	**Art. III:** Commission liability does not extend to party states. Compact has no effect on liability, except as provided. The Commission not liable for facility licensing, construction, operation, stabilization, closure, extended care, institutional control after extended care, or transportation of waste to a facility. **Art. VII:** Transporters, owners, and operators remain liable in accordance with all applicable laws.
Northeast	Pub. L. No.99-240	**Art. III:** Party state does not assume liability for siting, operation, maintenance, long-term care, or other activity relating to a regional facility. If host state is the operator of regional facility, it has liability of "normal owner." **Art. IV:** Commission liability does not extend to party states. Compact has no effect on liability, except as provided.
Northwest	Pub. L. No.99-240	No relevant liability provisions.
Rocky Mountain	Pub. L. No.99-240	No relevant liability provisions.
Southeast	Pub. L. No.99-240 Pub. L. No.101-171	**Art. IV:** Commission liability does not extend to party states. Except as specifically provided in the compact, nothing shall be construed to alter the liability of generators, transporters, owners, or operators under other applicable laws.
Southwest	Pub. L. No. 100-712	**Art. III:** Commission liability does not extend to party states. **Art. IV:** Party state does not assume liability for siting, operation, maintenance, long-term care, or other activity relating to a regional facility. No party state will be held liable for harm caused by a facility not within that state.
Texas	Pub. L. No. 105-263	**Art. III:** Commission liability does not extend to party states. **Art. VIII:** Party state does not gain liability by joining the compact.

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**

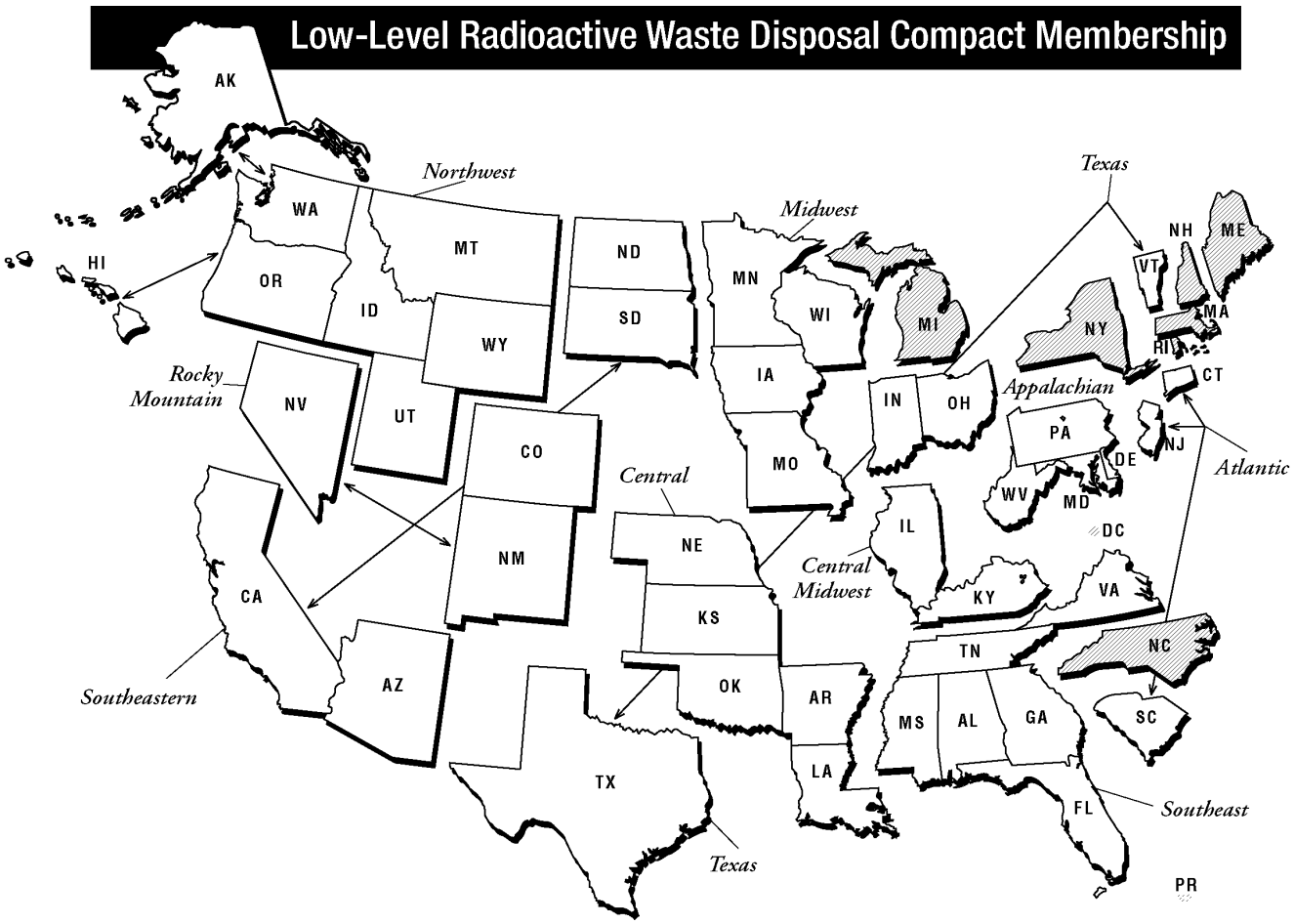
- GAO homepage (access to reports and testimony) ..... **www.gao.gov**

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 at U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, or by calling (703) 605-6000.



Appalachian Compact
Delaware
Maryland
Pennsylvania
West Virginia

Atlantic Compact
Connecticut
New Jersey
South Carolina

Central Compact
Arkansas
Kansas
Louisiana
Nebraska
Oklahoma

Central Midwest Compact
Illinois
Kentucky

Northwest Compact
Alaska
Hawaii
Idaho
Montana
Oregon
Utah
Washington
Wyoming

Midwest Compact
Indiana
Iowa
Minnesota
Missouri
Ohio
Wisconsin

Rocky Mountain Compact
Colorado
Nevada
New Mexico

Nothwest accepts Rocky Mountain waste as agreed between compacts

Southeast Compact
Alabama
Florida
Georgia
Mississippi
Tennessee
Virginia

Southwestern Compact
Arizona
California
North Dakota
South Dakota

Texas Compact
Texas
Vermont

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District of Columbia
Maine
Massachusetts
Michigan
New Hampshire
New York
North Carolina
Puerto Rico
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