LLWnotes

Volume 13, Number 2 March 1998

Utilities to Help Make Up Barnwell Tax Shortfall

According to the Nuclear Energy Institute (NEI), a majority of its member utilities have agreed to help make up an anticipated shortfall in state surcharges collected at the commercial low-level radioactive waste disposal facility in Barnwell, South Carolina. Participating utilities will enter into individual agreements with the facility operator, Chem-Nuclear Systems, to pay a prorated share of the surcharge deficit. In exchange, Chem-Nuclear will be obligated to operate the Barnwell facility through June 1999—or return any utility contributions.

The projected surcharge shortfall for FY '97-'98, which ends on June 30, is approximately $10.3 million. Of this, utilities are expected to contribute over $5 million, with Chem-Nuclear liable for the rest.

Chem-Nuclear is addressing the projected shortfall for FY '98-'99 through changes in the new disposal contracts that will become effective July 1, 1998.

Basis for Utility Contributions

Voluntary contribution levels by NEI member utilities are based on the fact that waste from utilities has historically accounted for approximately 75 percent of the total waste volume received at Barnwell. Of the projected $10.3 million shortfall for the higher education grants in FY '97-'98, approximately $7.7 million could therefore be attributed to declining disposal volumes from utilities.

NEI set a goal of contributing 90 percent of the $7.7 million, or up to $6.9 million, through voluntary payments from its member utilities. The rest of the $7.7 million—along with the remainder of the projected shortfall—will still be the responsibility of Chem-Nuclear, which is also an NEI member.

Utilities agreed to address up to 25 percent of the $7.7 million—or as much as $1.9 million—by flat payments. Since it was impossible to know during negotiations how many utilities would ultimately agree to enter into agreements with Chem-Nuclear, the payment per utility was set at $43,784, which represents an even distribution of the $1.9 million among the 44 possible participating utilities. Up to 65 percent of the $7.7 million—or as much as $5 million—is to be addressed through payments based on megawattage. Because the pool of appropriate utility participants has a total installed capacity of 101,774 megawatts, the payment per megawatt was set at approximately $49.

Nearly three-quarters of the 44 possible participating utilities have agreed to make contributions, which are expected to add up to over $5 million, about 80 percent of the utility goal.

This contribution level is based on the assumption that Barnwell will receive 190,000 cubic feet of waste during FY '97-'98. Should the facility receive more waste than expected, utility contributions will be reduced accordingly.

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Low-Level Radioactive Waste Forum

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

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LLW FORUM

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Key to Abbreviations

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

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Chem-Nuclear Joined with Federal Services Company

Parent Company for Both May Merge with Garbage Concern

In February, Chem-Nuclear Systems and Waste Management Federal Services—two subsidiaries of Waste Management, Inc.—were consolidated into a single region known as Waste Management Nuclear Services. Tom Dabrowski, President of Waste Management Federal Services, has been designated as Vice President and General Manager of the new region, which provides waste treatment and disposal services for both commercial and federal customers. Regan Voit continues as President of Chem-Nuclear Systems, the operator of the low-level radioactive waste disposal facility in Barnwell, South Carolina.

Further changes are possible if a proposed merger between Waste Management, Inc. and USA Waste Services, Inc. takes place later this year. The two companies announced on March 11 that they have signed a definitive agreement to merge, subject to shareholder approval and other requirements.

The resulting conglomerate would be named Waste Management, Inc. USA Waste Chief Executive Officer John Drury would serve as Chief Executive Officer of the new company and Chair of the board's executive committee. Steve Miller, currently Chief Executive Officer of Waste Management, would serve as non-executive Chair of the board of directors.

According to a March 11 article in the *Wall Street Journal*, Waste Management had 1997 sales of $9.19 billion, but posted a net loss of over $1 billion after special charges. USA Waste, on the other hand, earned $267 million on sales of $2.61 billion.

The core business for both Waste Management, Inc. and USA Waste Services, Inc. is garbage removal, but Waste Management has diversified into a number of other areas. If the merger is finalized, the parties are expected to pursue aggressive cost-cutting measures designed to produce savings of at least $800 million. Transition teams have been formed by both companies to review operations and assets. A fact sheet provided by Waste Management states, however, that no decisions are expected for several months on how the new combined enterprise would be structured or which businesses would be part of the new Waste Management.

—CN

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Background: State Surcharge

South Carolina assesses a surcharge of $235 per cubic foot of low-level radioactive waste disposed of at the Barnwell facility. The surcharge is allocated as follows: 28.5 percent for higher education grants, 66.5 percent for other education assistance, and 5 percent for Barnwell County. Although the dollar amounts allocated to each purpose fluctuate based on waste volumes, state law sets a mandatory minimum contribution to the higher education grants program of $23 million for FY '97-'98 and $24 million annually thereafter. By law, Chem-Nuclear must pay the State of South Carolina any deficit between the surcharge moneys collected and the prescribed funding level for the grants. (See *LLW Notes*, August/September 1997, p. 7.)

Long-Term Plan

In May 1998, Chem-Nuclear is slated to issue a revised "transaction plan" for its initiative to ensure long-term access to Barnwell. Revisions being explored include elimination of the "commitment fee" previously proposed. The initiative is intended to allow the facility to operate for an additional twenty-five years. (See *LLW Notes*, February 1998, p. 3.)

—CN

Rocky Mountain Compact

USGS Reports on Tritium Migration at Beatty

A report released by the U.S. Geological Survey (USGS) on March 4 contains additional information about the distribution of tritium near the closed low-level radioactive waste disposal facility near Beatty, Nevada. (See related story, this issue, p. 5.) Data for the report were collected in May 1997 as part of ongoing research by USGS into mechanisms that control tritium transport in arid unsaturated zones above the water table.

During the last two years, USGS has issued three previous reports concerning tritium migration at Beatty, but the transport mechanisms may never be fully understood due to historical uncertainties about disposal practices at the site. (See box, p. 5). See also *LLW Notes*, May/June 1997, p. 1, and *LLW Notes*, March 1996, p. 13.)

Findings presented in the most recent report—entitled *Tritium in Unsaturated Zone Gases and Air at the Amargosa Desert Research Site, and in Spring and River Water, near Beatty, Nevada, May 1997*—include the following:

- Tritium concentrations in shallow soil gas samples measured on a grid within 1,000 feet of the disposal facility indicate a general trend of increasing concentrations toward the facility.

- Measurements of soil gas at a test hole 330 feet south of the disposal facility show that tritium concentrations in soil gas in the upper 164 feet of the unsaturated zone have stabilized and tritium concentrations in soil gas below 164 feet have increased since the time they were sampled one to three years previously. It is not known whether these changes are attributable to increased tritium transport after the test hole was drilled or to recovery of the test hole as subsurface air gradually mixed back into the area that was injected with atmospheric air when the hole was created. Migration of air- or water-borne tritium down the test hole is another possible, if unlikely, explanation.

- Elevated levels of tritium found in the air of the creosote bush canopy about 300 feet from the disposal facility are attributable to plant transpiration removing water from the unsaturated zone.

- Tritium concentrations in surface-water sources as close as 6 miles from the facility were near or less than tritium concentrations in precipitation.

For further information on this USGS report, contact Robert Striegl of USGS at (303)236-4993. For further information on studies at the USGS Amargosa Desert Research site, visit the USGS Internet site at http://wwwnv.wr.usgs.gov/adrs/.

See also "New Materials and Publications."

—CN

Beatty License Transferred

The radioactive material license for the low-level radioactive waste disposal facility at Beatty, Nevada, was transferred from US Ecology to the State of Nevada on December 30, 1997. This action marks the first time that a commercial facility has fully completed the closure process. Low-level radioactive waste was last accepted at the facility in December 1992. Stabilization activities have since been completed at the site, but it will continue to be monitored.

—CN

Liquid Waste Disposal Complicates Beatty Studies

Site Not an Analog for Ward Valley

In a letter transmitting two previous studies prepared by USGS staff, USGS Director Gordon Eaton explained that USGS scientists believe "the observed tritium distribution at Beatty is probably the result of the burial of liquid wastes and the fact that some disposal trenches at Beatty were open for years until filled, allowing accumulation and infiltration of precipitation." He noted that, "[b]ecause of the incomplete accounting of liquid waste disposal at Beatty, it is unlikely that the current tritium distribution and its evolution through time will ever be understood in detail."

Eaton continued by emphasizing that data from the Beatty facility should not be extrapolated to apply to the performance of the planned low-level radioactive waste disposal facility in Ward Valley, California.

> Because the tritium levels detected near Beatty are probably related to disposal of liquid tritium below the land surface, they do not address the potential for vertical movement of tritium from atmospheric sources through the root zone or uppermost part of the unsaturated zone. Thus, the findings of tritium near the Beatty waste-burial site do not provide further insight into which, if any, of the hypotheses about tritium at Ward Valley is correct.

Eaton's letter was addressed to Ed Hastey, California State Director of the Bureau of Land Management. The letter was dated February 14, 1996. (See *LLW Notes*, March 1996, p. 13.)

—CN

Appalachian Compact/Pennsylvania

New Forum Participant for Pennsylvania

Richard Janati has been appointed by Pennsylvania Governor Tom Ridge to serve as the Commonwealth's Forum Participant. In this capacity, Janati replaces William Dornsife, formally with the Pennsylvania Department of Environmental Protection (PADEP), who is now the Vice-President for Nuclear Affairs at Waste Control Specialists, L.L.C. (See *LLW Notes*, Winter 1997, p. 37.)

Janati joined the PADEP in 1985 as a nuclear engineer and currently serves there as the Chief of the Division of Nuclear Safety within the Bureau of Radiation Protection, a position he has held for over three years. Prior to joining the PADEP, Janati worked as an engineer for both the Pennsylvania Public Utility Commission and Westinghouse Electric Corporation.

In addition to this new appointment, Janati serves as a member of several other professional organizations including the American Nuclear Society. He has also co-authored a number of publications pertaining to low-level radioactive waste issues.

Janati graduated with a bachelor of science degree in nuclear engineering from the University of Massachusetts in Lowell and earned his master of science degree from the University of Pittsburgh.

—RTG

Southwestern Compact/California

Protesters Occupy Ward Valley, Block BLM Access

"Where in the World is the Secretary of Interior?"

On January 29, the U.S. Department of Interior's Bureau of Land Management (BLM) issued in the Federal Register an order to temporarily close the Ward Valley site to ensure that "drilling and related activities to be undertaken by the Department of the Interior and the California Department of Health Services ... are carried out under conditions which will ensure public safety, promote site security, and provide for integrity of the sampling activities." BLM also announced that the existing protest encampment at the Ward Valley site, which is conducted under a BLM permit issued to the Fort Mojave Tribe, would be relocated to an adjacent area. The closure notice became effective February 13, 1998, and remains effective for a period of six months—until August 13—unless terminated earlier due to completion of the drilling activities. (See *LLW Notes*, Feb. 1998, pp. 6-7.)

Following the announcements pertaining to the imminent closure of the Ward Valley site, opponents of the planned disposal facility issued numerous alerts and requests for participants to engage in "mass, nonviolent sustained direct action" to prevent the testing. On February 13, BLM issued a five-day notice to relocate to the protest encampment, which became effective on February 18. On February 18, BLM rangers posted notices of site closure at the access road to the Ward Valley site. Site opponents, however, have refused to relocate the protest encampment to the BLM-designated area and have blocked access to the site to all individuals—including federal law enforcement officers—unless they submit to a personal search and a tribally designated "security escort."

On February 25, BLM State Director Ed Hastey ordered the withdrawal of BLM rangers from the Ward Valley site. Interior Department and BLM officials have held several informal meetings with the site opponents to attempt negotiations. Since the BLM-ordered site closure, the protesters have held several events at the Ward Valley site, including a marriage of two site opponents, a burial ceremony of cremation ashes, and a benefit concert.

Senator Murkowski Condemns Federal Inaction; Requests Answers from Attorney General, Interior Secretary

On March 27, Senator Frank Murkowski (R-AK), Chair of the Senate Committee on Energy and Natural Resources, spoke about the lack of federal control of the BLM lands in California.

During his speech he also released two letters requesting answers to questions pertaining to federal policies regarding the occupation of the Ward Valley site. The letters were written to Attorney General Janet Reno and Interior Secretary Bruce Babbitt on March 24. Senator Murkowski requested responses by April 1.

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

—LAS

Senator Murkowski on Federal Inaction • March 27, 1998

These protesters are already in violation of their original land use permit. They have refused to comply with the February 18 deadline. Incredibly, the protesters, who are clearly trespassing on Federal land, are still there today. February 18 has come and gone. Federal rangers made no effort to evict them from the property. In fact, on February 25 all Federal rangers were withdrawn from the property. The question is, why?

Even more incredibly, over the past 6 weeks the trespassers have now taken control of the property. They now, the trespassers, mind you, refuse to allow the BLM employees access to the property to initiate the testing. The protesters have also refused to allow the US Ecology, the State's licensee who is going to do the test, access to the property for environmental monitoring and refueling of its generators. When the BLM and the US Ecology employees have been allowed to enter the property, they have been frisked by the protesters and all vehicles have been searched by the protesters' so-called security forces.

Isn't that a turnaround? This is Federal property. The trespassers have taken it over and are dictating the terms and conditions by which the Federal agencies can have access to their own property. Where in the world is the Secretary of the Interior? Where in the world is the Attorney General? As chairman of the Committee on Energy and Natural Resources, I am extremely disappointed with how the Department of the Interior has handled this entire matter. The Department of the Interior is allowing persons who are in clear violation of the law to not only occupy Federal land but also control the Federal land by determining whether or not tests can occur. Even more incredible, the Department is allowing the trespassers, who are now outfitted with knives, cans of Mace and handcuffs, to dictate the terms and conditions under which the Federal employees have access to the Federal lands. What message does this send to our Federal employees? What message does it send to our citizens?

Senator Murkowski Questions re Ward Valley • March 24, 1998

To Attorney General Janet Reno

Has the Department of the Interior consulted with, or sought assistance from, the Department of Justice on this matter?

What must happen before the Department of Justice assumes control over the current standoff at the Ward Valley site?

What is the general policy of the Department of Justice with respect to trespassers on public lands?

To Interior Secretary Bruce Babbitt

Is the Department of the Interior negotiating with the protesters? If so, what is the status of these negotiations? When will these negotiations be complete? Include in your response the name, title, and phone number of the Department official responsible for conducting these negotiations.

When does the Department anticipate beginning its field tests? When does the Department anticipate completing these tests?

Does the Department intend to enforce the BLM's order to the protesters to vacate the Ward Valley site? If so, when?

Does the Department intend to enforce the terms of the BLM permit issued to US Ecology allowing it to collect environmental data at the Ward Valley site?

What are the current instructions to Federal rangers regarding surveillance, enforcement of permit conditions, and reports of illegal activities at the site to other law enforcement authorities?

Southwestern Compact/California

Correspondence re Ward Valley Testing

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

The following correspondence addresses issues related to the planned tests at the Ward Valley site. For detailed background information on Ward Valley testing, see LLW Notes, February 1998, pp. 6-7.

—LAS

John Pierson, Deputy Director and Chief Counsel
Peter Baldridge, Senior Staff Attorney
California Department of Health Services
to
Edward Hastey, California State Director
U.S. Bureau of Land Management (BLM)

February 5, 1998

> As a threshold matter, we fail to understand why it took [BLM] more than four months to process our permit application. We had previously been advised that this process would take only a few weeks at most ...
>
> Even more perplexing is the failure of this four-month process to yield the permit for which we applied. Instead, BLM has issued *itself* a permit to conduct its *own* study, and given DHS nothing more than a promise, in the guise of a permit, that at some undetermined time when BLM is finished with its drilling DHS may be allowed access to the Ward Valley site ...
>
> Finally, we note that opponents of the Ward Valley facility are now preparing to engage in large-scale civil disobedience in an effort to block the conduct of BLM's tests. In light of past delays, we will closely monitor the progress of your drilling. We hope that the protests will not become the latest excuse for further delay of DHS' scientific inquiry at the expense of the public health and safety.

[emphasis in original]

George Dunn, Chief of Staff
California Governor's Office
to
John Garamendi, Deputy Secretary
U.S. Department of Interior

March 5, 1998

> You previously invited the State to participate in your Department's testing program rather than conduct its own study. We have always maintained that, irrespective of your invitation, the Department of the Interior has no official regulatory role with respect to the proposed Ward Valley facility and no expertise in matters which the State's further study is intended to address.
>
> Finally, we have considered your invitation in light of your previous written statements that your Department's testing is simply part of a public relations campaign to cater to certain special interests. Under these circumstances, we cannot accept your invitation, and have instead asked DHS to closely monitor your drilling activities and to proceed with the State's study at the earliest opportunity should your Department ever proceed with the testing you announced two years ago.

Nora Helton, Chair
Fort Mojave Indian Tribe
to
Kevin Gover, Assistant Secretary
Bureau of Indian Affairs, DOI

March 6, 1998

> The Fort Mojave Indian Tribe and the tribes of the Colorado River Native Alliance would like to follow up regarding issues that were discussed during the meeting held at Fort Mojave, on March 4th, 1998, with yourself, Ken Paquill and Elizabeth Bell, all representing the Bureau of Indian Affairs ... It is our understanding that you would take the Tribe's request to Secretary Babbitt for his consideration and direction ...

Attached to the letter was a list of contentions.

Contentions
1. STOP DUMP NOW
2. Serious Nation to Nation Consultation
3. Cancel Tritium Testing
4. Rescind Eviction & Closure notices
5. Full funding to prepare environmental Justice/Sacred Sites research
6. Declare Ward Valley Sacred Site
7. National Historic Preservation Act designation

John Pierson, Deputy Director and Chief Counsel
Peter Baldridge, Senior Staff Attorney
California DHS
to
Edward Hastey, California State Director
U.S. BLM

March 13, 1998

> In my letter to you dated February 5, 1998, I expressed the concern of the California [DHS] that protests not become the basis for further delay of the State's testing of the Ward Valley site ... It now appears, based upon the events of the past thirty days, that our concerns have been realized. Protesters have occupied the site under the sponsorship and leadership of the Fort Mojave Indian Tribe, and threaten to block the access of BLM or State drilling equipment to the site. In response, BLM has suspended its drilling efforts ...
>
> There can be no mistaking that the occupation of the site, and the demands expressed by Ms. Helton, are designed to unilaterally impose the "no action" alternative described in the [Environmental Impact Report/Statement] upon the State and federal government despite the good faith conclusions of our respective agencies that other alternatives are more appropriate. The unlawful obstruction of the Ward Valley project increases the risk to public health and safety in communities where LLRW must be stored and is, therefore, of serious concern to DHS. In light of the Tribe's apparent request for an Environmental Justice Small Grant, it is ironic that many of the locations where LLRW must be stored due to the delay of the Ward Valley facility are predominantly minority communities. The delay caused by the Tribe's protest, which is based in part on assertions of environmental racism, therefore has the effect of discriminating against those minority communities.

Northeast Compact/Connecticut/New Jersey

New Jersey Discontinues Siting

On February 5, the New Jersey Low-Level Radioactive Waste Disposal Facility Siting Board voted to suspend the state's current siting process. In a letter sent to the state Governor that day, Siting Board Chair Paul Wyskowski explained the board's decision.

> The Siting Board continues to believe that a disposal facility for low-level radioactive waste would provide a safe, light industrial addition to New Jersey's economic base. The Board also believes that the voluntary siting process it adopted in 1995 made progress and would eventually lead one or more municipalities in the state to choose to host the facility. However, the continued, though unpredictable, availability of out-of-state disposal combined with the admirable and dramatic reductions in volume of low-level radioactive waste that new Jersey generators have accomplished have created a situation in which a disposal facility in New Jersey does not appear needed at this time. In addition, the development of a disposal facility in New Jersey may not be economically feasible in light of current out-of-state disposal options.

Next Steps

When the board voted to stop siting, it also voted to

- continue to provide public education materials on low-level radioactive waste,
- continue to monitor the disposal alternatives in the nation for the purpose of determining the future need for a disposal facility in New Jersey, and
- prepare a detailed record of its experience so that the state can quickly restart the siting process if necessary.

In light of its changed mission, the board will meet on April 2 to consider staff reductions and a revised budget for FY '99, which begins July 1, 1998. It will also consider a proposal to return to generators some of the fees assessed for the Low-Level Radioactive Waste Disposal Facility Fund. The fund currently holds over $8 million.

Background

Carneys Point Withdrawal The cessation of siting follows a decision in late December 1997 by officials in Carneys Point Township not to pursue hosting a facility. Earlier that month, the board had authorized an agreement proposed by the township's Economic Development Commission under which the board would have reimbursed the community for expenses to conduct a study of the advantages and disadvantages of hosting a facility. The township would also have received $750,000 in unrestricted funds. (See *LLW Notes*, February 1998, p. 7.)

Community Incentives Under the volunteer siting process, communities that could meet the technical criteria for hosting a facility were guaranteed a minimum of $2 million in revenue per year from facility operations. Additional benefits, such as those offered to Carneys Point, were negotiable. During the course of the siting program, a dozen or more communities expressed interest in the program but were either disqualified on technical grounds or decided not to proceed for other reasons.

For further information, contact John Weingart of the Siting Board at (609)777-4247.

—CN

Midwest Compact

Larson Announces Decision to Resign

In a letter dated March 19 to Stanley York, Chair of the Midwest Compact Commission, Gregg Larson announced his decision to resign as the commission's Executive Director, effective April 3, 1998. However, Larson has arranged with his new employer to spend 25 percent of his time working for the commission through its annual meeting in June. Until then, inquires concerning the commission should continue to be directed to Larson at the commission's office.

Larson's decision was prompted by events dating back to June 1997, when the Midwest Compact Commission voted to cease development of a regional disposal facility and to maintain the current office and staffing for one year, after which time the commission would make appropriate changes. (See *LLW Notes* July 1997 pp. 3-5.)

Larson recently accepted a position at the University of Minnesota as the Project Administrator of the Statistical Center which operates under contract with the National Institutes of Health. More specifically, Larson will have administrative responsibilities for a variety of national and international community programs for clinical trials on AIDS drugs and treatments.

After nearly 12 years at the commission, Larson wrote that he considers himself "very fortunate to have had the opportunity to serve as its Executive Director and to have had the pleasure of working with the Commissioners and staff; state, compact, and federal officials; generator and industry representatives; and citizens involved ..."

—RTG

ECOS Adopts Resolution re EPA's Environmental Permit Guidance

At its spring meeting, the Environmental Council of the States (ECOS) adopted a resolution addressing EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits. ECOS is the national non-profit, non-partisan association representing the state and territorial environmental commissioners.

(See pages 12 and 13 for the full text of the resolution.)

EPA issued the Interim Guidance on February 5 and is accepting comments through May 6, 1998.

To obtain a copy of the Interim Guidance, call EPA's Office of Environmental Justice at (202)564-2515 or access it via the World Wide Web at http://es.epa.gov/oeca/oej/titlevi.html.

The Environmental Council of the States
Resolution Number 98-2
Approved March 26, 1998 • New Orleans, Louisiana

Environmental Protection Agency's Interim Guidance for Investigating Environmental Permit Challenges

WHEREAS, State environmental commissioners and officials fully support the implementation of environmental programs to protect the health of our citizens and the environment in a manner which fully complies with Title VI of the Civil Rights Act and does not subject any person to discrimination on the grounds of race color or national origin;

WHEREAS, State environmental commissioners and officials are committed to ensuring that State and federal environmental standards are met in all areas, whether they are urban, rural, or tribal in order to ensure that residents are not subjected to disproportionately high and adverse human health or environmental effects;

WHEREAS, environmental commissioners are committed to objectives of achieving environmental equity;

WHEREAS, the U.S. Environmental Protection Agency has issued *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*;

WHEREAS, U.S. EPA's interim guidance would conflict with current State and local land use policies, brownfield cleanup and redevelopment, and urban revitalization efforts. This guidance would have the effect of working against efforts to achieve environmental protection and promote sustainable economic development;

WHEREAS, U.S. EPA's interim guidance does not provide definitions, standards and methodologies that are precise or based on sound, peer-reviewed science, especially the methodologies designed to assess cumulative exposure;

WHEREAS, States have the primary responsibility of implementing most of the nation's environmental protection programs. In this role, State environmental commissioners have continuously stressed the importance to U.S. EPA of extensive State involvement, beyond that of "stakeholders," in the development of major environmental policies and programs which will be carried out by the States;

WHEREAS, States have not have not had a significant role in the development of U.S. EPA's interim guidance;

WHEREAS, States are concerned that U.S. EPA's interim guidance goes far beyond Executive Order 12898, and would result in significant and unintended consequences in areas which extend well beyond traditional authority of U.S. EPA and State environmental programs;

WHEREAS, State environmental commissioners believe that promulgation, implementation or reliance upon the interim guidance in its current form would clearly disrupt the management of environmental permit programs and may not achieve its stated purpose of achieving equitable environmental protection in the most effective and cooperative manner:

THEREFORE, BE IT RESOLVED that the Environmental Council of the States:

Believes U.S. EPA's interim guidance is not workable in its current form and should be withdrawn, until States have resolved outstanding issues with U.S. EPA.

Acknowledges U.S. EPA's willingness to engage States in discussions on their interim guidance; however, reaffirms their position that as primary regulators, States must be afforded an opportunity to work in a collaborative and substantive fashion in developing policy guidance to advance environmental equity concepts in cooperation with local communities.

Embraces the following principles with regard to the development and implementation of policy or guidance in addressing Title VI complaints:

- U.S. EPA efforts must assist States to comply with Title VI, avoid Title Vl complaints, and avoid policy or regulation which has the effect of shifting permit decision-making from States to the federal government;

- Any U.S. EPA policy guidance must allow States to develop and implement alternative environmental equity programs, in lieu of any guidance document, which satisfy Title VI requirements;

- Any U.S. EPA policy for resolving administrate complaints must provide adequate and definite time frames and appropriate thresholds for accepting complaints. Such policy should clarify it is inapplicable to decisions in particular situations that a permit is not required or enforcement action will not be conducted. Processes for investigating and resolving disputes must not create unnecessary delays in the environmental permitting process;

- Any definitions, standards and methodologies provided in U.S. EPA guidance or policy, including methodologies used to assess cumulative exposure and human health risks, must be precise, be based on sound, peer-reviewed science and provide a high degree of certainly in decision-making outcomes;

- U.S. EPA must not develop policy which results in unnecessary burdens, unfunded mandates to States, or which could result in "takings" pursuant to the U.S. Constitution;

- Any guidance or policy to foster environmental equity must have a clear basis in regulation or statute, ensure equal protection under the law and avoid extending beyond the jurisdictions of U.S. EPA and State environmental agencies; and

- Such guidance or policy must be carefully designed to address and attempt to resolve conflicts with other laws, programs or policies, including: local zoning laws, brownfield redevelopment programs, urban economic revitalization efforts, greenspace preservation initiatives, performance partnership agreements, sustainable development activities, and pristine area designations under the Clean Air Act and other environmental statutes.

Expresses that environmental commissioners and officials are committed to the fair and equitable application of environmental laws to all citizens. ECOS reaffirms its position that U S. EPA's current interim guidance should not be formally promulgated, implemented nor relied upon. The above stated concerns must be appropriately addressed and reflected in any U.S. EPA guidance or policy addressing Title VI compliance.

Directs the chair of the Cross-Media Committee and Environmental Equity Subcommittee to contact EPA headquarters and establish a mechanism to begin discussions on appropriate guidance.

State and Compact Events

April	Event	Location/Contact
Midwest Compact	Midwest Interstate Low-Level Radioactive Waste Commission meeting: discussion regarding alternatives for Commission staffing	Des Moines, IA Contact: Commission Office (612)293-0126
Northeast Compact/ Connecticut/ New Jersey	Connecticut Hazardous Waste Management Service Board of Directors meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007
	New Jersey Radioactive Waste Disposal Facility Siting Board meeting: consideration of staff reductions, a revised budget for FY '99, and a proposal to return to generators a portion of the money from the Low-Level Radioactive Waste Disposal Facility Fund	Trenton, NJ Contact: John Weingart (609)777-4247
Southwestern Compact/ California	Southwestern LLRW Commission–sponsored workshop on waste streams and available waste treatment technologies, to be presented by DOE's National Low-Level Waste Management Program	Concord, CA Contact: Don Womeldorf (916)323-3019
Massachusetts	LLRW Management Board public forum on the transportation of radioactive materials and radioactive waste: presentations regarding low-level radioactive waste and high-level radioactive waste transportation on topics such as emergency response programs, packaging and shipping practices, history of radioactive waste transportation accidents	Springfield, MA Contact: Paul Mayo (617)727-6018
May	**Event**	**Location/Contact**
Central Compact/ Nebraska	Central Interstate LLRW Commission Facility Review Committee meeting	Lincoln, NE Contact: Don Rabbe (402)476-8247
Northeast Compact/ Connecticut/ New Jersey	Connecticut LLRW Advisory Committee meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007
	Connecticut Hazardous Waste Management Service Board of Directors meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007

June	Event	Location/Contact
Appalachian Compact/ Pennsylvania	Pennsylvania LLRW Advisory Committee meeting	Harrisburg, PA Contact: Rich Janati (717)787-2163
Rocky Mountain Compact	Rocky Mountain LLRW Board meeting	TBD Contact: Tracie Archibold (303)825-1912
Southwestern Compact/ California	Southwestern LLRW Commission meeting	Costa Mesa, CA Contact: Don Womeldorf (916)323-3019
Northeast Compact/ Connecticut/ New Jersey	Connecticut Hazardous Waste Management Service Board of Directors meeting	Hartford, CT Contact: Ron Gingerich (860)244-2007

Host State TCC Meets in Raleigh

The Host State Technical Coordinating Committee (TCC) met in Raleigh, North Carolina, on January 29. The meeting was followed by a January 30 tour of the Shearon Harris Nuclear Power Station.

TCC Meeting Attendance

The TCC meeting was attended by eight state persons from a total of five states; four persons from private companies; one person from Afton Associates, who serves as the TCC liaison; one person from an industry-based organization; one person from the NRC; and one person from DOE's National Low-Level Waste Management Program at Idaho National Engineering and Environmental Laboratory, who serves as the TCC Moderator.

Meeting Program

The following items constituted the TCC agenda:

- an update on the National Low-Level Waste Management Program's Waste Form and Container Testing Program;
- state highlights and reports;
- agency and organizational reports;
- a presentation on GEM 3, a non-intrusive tool for shallow subsurface geophysical investigation;
- a presentation on reactor entombment; and
- a presentation on the generation and treatment of mixed waste in the pharmaceutical industry and techniques for the reclamation of tritium.

The TCC will meet again on July 30 in Providence, Rhode Island. The meeting will follow a July 27-29 workshop on life-cycle management transition of nuclear facilities sponsored by the Nuclear Energy Institute.

For further information, contact TCC Moderator Thomas Kerr of DOE's National Low-Level Waste Management Program at (208)526-8465.

—LAS

Court Calendar

Case Name	Description	Court	Date	Action
California Department of Health Services v. Babbitt and *U.S. Ecology v. U.S. Department of the Interior* (See *LLW Notes*, February 1998, pp. 20-21, 25.)	Seeks to compel the U.S. Interior Department to transfer land at Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility and to issue the patent approved by DOI four years ago.	United States District Court for the District of Columbia	March 18, 1998 May 8, 1998	The court granted motions by Committee to Bridge the Gap and Bay Area Nuclear Waste Coalition (Ban Waste) to intervene in the action. The trial is scheduled to begin.
California Department of Health Services v. United States and *US Ecology v. United States* (See *LLW Notes*, April 1997, pp. 18-19.)	Involves a claim of breach of contract for failure to sell 1,000 acres of federal land in Ward Valley to the State of California for use in siting a low-level radioactive waste disposal facility.	United States Court of Federal Claims	February 3, 1998	Oral arguments were held on the parties' cross-motions for summary judgment.
Committee to Bridge the Gap v. Babbitt (See *LLW Notes*, February 1998, pp. 18-19.)	Seeks to postpone the Ward Valley land transfer until alleged violations of the National Environmental Policy Act and the Federal Land Policy and Management Act have been remedied.	United States District Court for the Northern District of California	January 26, 1998	The district court denied, without prejudice, plaintiffs' motion for injunctive relief.
New York v. Clinton and *Snake River Potato Growers v. Rubin*	Challenges the constitutionality of President Clinton's use of the line-item veto authority previously granted to him by the U.S. Congress.	United States District Court for the District of Columbia	February 12, 1998 February 1998	The district court rendered a decision declaring President Clinton's line-item veto authority unconstitutional. Defendants filed a notice of appeal to the U.S. Supreme Court.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Northern States Power Company v. U.S. Department of Energy and *Michigan v. U.S. Department of Energy* (See *LLW Notes*, Winter 1997, pp. 27–29.)	Seeks to enforce a July 1996 decision that DOE must take title to commercial spent fuel by 1998 and to allow state regulators to put contributions to the Nuclear Waste Fund into escrow.	United States Court of Appeals for the District of Columbia Circuit	February 19, 1998	Forty-one operators of nuclear power plants filed a petition requesting a rehearing of the matter, including an order that 1) requires DOE to submit a plan for disposition of spent fuel, and 2) defers operators obligation to contribute to the Nuclear Waste Fund until DOE begins taking the fuel.
Stilp v. Hafer (See *LLW Notes*, February 1998, pp. 22, 25.)	Challenges the legislative procedures used in Pennsylvania to pass Act 12 of 1988, otherwise known as the Low-Level Radioactive Waste Regional Disposal Facility Act.	Supreme Court of the Commonwealth of Pennsylvania	January 23, 1998	Plaintiffs filed a brief on their appeal of the Commonwealth Court of Pennsylvania's decision of November 7, 1997.
US Ecology v. Nebraska (See *LLW Notes*, May/June 1997, pp. 18-19.)	Challenges a determination by Nebraska agencies that activities proposed by US Ecology—including the filling of an on-site wetland and the creation of an off-site wetland—constitute an unlawful "commencement of construction" and is therefore prohibited.	District Court of Lancaster County, Nebraska	February 26, 1998 March 10, 1998 March 23, 1998	District Court issued a ruling in favor of US Ecology. State of Nebraska filed a notice of intent to appeal the district court's February 26 judgment and a motion seeking stay of the judgment pending outcome of the state's appeal. The district court denied the defendants' application for a stay of its February 26 ruling.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
Waste Control Specialists, LLC v. U.S. Department of Energy (See related story, this issue.)	Alleges that senior DOE officials have not carefully or reasonably considered a WCS proposal to dispose of DOE radioactive waste at the company's Andrew's County site.	United States District Court for the Northern District of Texas	February 17, 1998	WCS filed a motion in the District Court seeking additional injunctive relief.
			March 6, 1998	DOE filed its opposition to WCS' February 17 motion.
		United States Court of Appeals for the Fifth Circuit	February 19, 1998	An amicus brief regarding the issuance of the October 6, 1997 preliminary injunction was filed by 16 states.
			March 11, 1998	The court of appeals denied, without comment, the filing of the states' amicus brief.
			March 25, 1998	An amicus brief regarding the issuance of the October 6, 1997 preliminary injunction was filed by the State of Texas.
			April 7, 1998	A hearing on the defendants' appeal of the issuance of the preliminary injunction is scheduled to begin.

US Ecology v. Nebraska

Court Rules that US Ecology Can Fill Nebraska Wetland

On February 26, 1998, the District Court of Lancaster County, Nebraska, ruled in favor of US Ecology in its lawsuit against the State of Nebraska and two state agencies. In so doing, the court rejected the state's authority to determine that the placement of fill in a "small depression" on the site of the Central Interstate Low-Level Radioactive Waste Compact's proposed disposal facility constitutes the "commencement of construction" and is prohibited until after the issuance of a license for the facility. The court also found that one of the defendant agencies, the Nebraska Department of Health and Human Services, has no jurisdiction over the licensing of the facility.

On March 10, the State of Nebraska filed a notice of intent to appeal the court's decision, along with motions seeking a stay of the February 26 judgment. In a subsequent ruling on March 23, the Court denied the State's request for a stay of the judgment.

Background

The litigation arises out of a dispute between the state and facility developer US Ecology concerning the timing of the company's implementation of a 404 permit issued by the Army Corps of Engineers to perform activities at the site by filling a "0.98 acre headwater wetland" and creating a new wetland off site. Filling or draining of the wetland will be necessary for construction of the facility if the state licenses the facility. US Ecology wants to fill the wetland in advance of a licensing decision because of a concern that the presence of a wetland on the site may serve as a basis for denial of the license application. Creation of the new off-site wetland is deemed to be necessary because state law requires that whenever a developer fills or drains a wetland, the developer must mitigate such loss of the wetland area by creating a new and larger wetland area.

The Nebraska Department of Environmental Quality (NDEQ) and the Nebraska Department of Health and Human Services Regulation and Licensure (NDOH) had been evaluating US Ecology's license application pursuant to a memorandum of understanding between the two agencies. These agencies took the position that the proposed activity is prohibited under state law as it constitutes facility construction, which cannot be commenced until after a license is issued. US Ecology disagreed and asked that the state agencies reconsider their finding. The agencies, however, stood by their original determination, and US Ecology filed suit in April 1997.

For additional background information, see LLW Notes, May/June 1997, pp. 18–19.

Court's Findings

In its February 26 judgment, the court agreed with US Ecology that the proposed fill and mitigation activities do not constitute the commencement of construction and are not prohibited by state law. In so ruling, the court made several relevant findings, as follows.

Lack of an Adequate Remedy at Law and Infliction of Irreparable Harm The court disagreed with the state's position that relief should not be granted because US Ecology has failed to demonstrate that it has no adequate remedy at law and that it will suffer irreparable harm absent judicial action. The court noted that the Nebraska Supreme Court has specifically ruled in similar cases that the seeking of other avenues of relief, such as the filing of a contested case under the Administrative Procedure Act, is not required. Moreover, the court determined that US Ecology will suffer irreparable harm absent judicial intervention because its 404 permit expires on December 31, 1998, and both US Ecology and the state agree that a license will not be issued by that time.

> If US Ecology does the fill and mitigation under the 404 Permit, NDEQ claims the right to deny the license on the sole basis that the fill and mitigation work was done prior to the issuance of the NDEQ license. If US Ecology does not do the fill work, it risks being denied the license to construct the LLRW disposal facility due to the existence of the wetlands ... It is precisely this type of dilemma the Declaratory Judgment Act was intended to address. I find these harms are irreparable.

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US Ecology v. Nebraska (continued)

NDOH's Scope of Authority US Ecology argued that NDOH has no authority to take any action or make any determination regarding the proposed fill and mitigation activities due to statutory limitations placed upon the agency and due to limitations contained in the memorandum of understanding between the two state agencies. NDOH, on the other hand, contends that the statute and memorandum provide it with the requisite authority.

In reviewing this issue, the court determined that the state's Radiation Control Law contains conflicting language concerning NDOH authority in this area. The court found, however, that the legislative history indicates an intention on the part of the legislature that the license application should have to be filed with only one state agency and that NDEQ be the agency. In addition, the court determined that the agencies' memorandum of understanding could not confer authority over the license application to NDOH because any such agreement may not expand the agency's authority beyond that which is lawfully delegated to it by statute.

> There is no statute identified that authorizes NDEQ to delegate its rulemaking authority through a Memorandum of Understanding. Consequently, the best that can be said of the Memorandum of Understanding is that NDEQ recognizes that NDOH has certain experiences that might be resources for NDEQ in considering the license application.

The NDOH and the NDEQ have been jointly reviewing the license application pursuant to an interagency Memorandum of Understanding (MOU). In 1990, US Ecology also filed a separate application with the NDOH for a radioactive materials handling license. That application is still being reviewed by NDOH. No decision has yet been made with respect to the radioactive materials handling license.

NDEQ's Scope of Authority Over the Mitigation Area The court held that NDEQ and NDOH may not take adverse action against US Ecology if it proceeds with the creation of the mitigation wetland because such activity is clearly beyond the scope of authority of either agency.

> The mitigation area to be constructed by US Ecology under the Corps of Engineers 404 Permit is not within the ... [currently identified site]. Its location is outside the scope of the current pending license application. Defendants have pointed to no statute granting any defendant authority to control any property located beyond that described in the license application.

NDEQ's Scope of Authority Over the Fill Area The court held that "it is beyond the scope of authority for NDEQ to determine that the placement of fill in this depression as authorized by the Corps of Engineers' 404 Permit is a substantial action that constitutes commencement of construction."

In so ruling, the court rejected NDEQ's argument that the agency is statutorily required to conduct an environmental impact analysis on the fill and mitigation activity. Noting that such an analysis is required only for licensed activities which significantly impact the human environment, the court determined that US Ecology's proposed action is insignificant and does not require an NDEQ license. "There is no disagreement that the land involved in this litigation is a patch of weeds that is meaningless to anything to do with this facility," the court stated. "There was not a scintilla of evidence to the contrary."

The court also found that NDEQ's actions do not bear a reasonable relation to the legislation defining what constitutes the commencement of construction and are not a reasonable exercise of the agency's authority. In support of this finding, the court noted that there is a long history of NDEQ's allowing, and in some cases requiring, other significant work on sites for which license applications were pending—including the installation of trailers, setting of power poles, stringing of fences, and installation and improvement of gravel roads.

Relief Granted

The court ordered the following relief:

- NDOH is enjoined from (1) taking any action regarding US Ecology's license application for the construction of a low-level radioactive waste disposal facility; (2) taking any further action on the fill and mitigation project US Ecology intends to carry out under the 404 permit; and (3) attempting to enforce any decision, rule, or regulation relating to US Ecology's license application or its planned fill and mitigation project.

- NDEQ is enjoined from (1) taking any action regarding US Ecology's license application on the basis of the construction of the fill and mitigation project approved by the 404 permit; (2) taking any further action on the fill and mitigation project US Ecology intends to carry out under the 404 permit; and (3) attempting to enforce any decision, rule, or regulation relating to US Ecology's planned fill and mitigation project.

Notice of Intent to Appeal and Motion for Stay of Judgment

On March 10, the State of Nebraska filed a notice of intent to appeal the court's decision to the Nebraska Court of Appeals and a motion asking the district court to issue a stay of its February 26 judgment. The motion to stay was based on two primary arguments: (1) that, pursuant to state statute, the judgment is automatically stayed upon the filing of the notice of intent to appeal, and (2) that the court should exercise its discretion to stay the case pending outcome of the appeal.

Statement by Nebraska's Governor In a press release issued on the same day, Nebraska Governor E. Benjamin Nelson expressed concern about several aspects of the court's ruling.

> I am very concerned that at this late date the Department of Health and Human Services [NDOH] is excluded from the licensing process. I hope that this does not cause delay in the licensing process or complicate an already complicated license review.

Court's Ruling on Motion to Stay On March 23, the district court issued an order denying the state's request for a stay of the February 26 judgment. In so ruling, the court found that Nebraska statute does not provide for an automatic stay because the referenced statutes were not intended to address cases in which injunctive and declaratory relief were provided and because they only address claims for money judgments against the state. Moreover, the court declined to exercise its discretionary authority to grant a stay.

> In this case, the ends of justice clearly dictate denial of the Defendants' application. Based on the normal course of events, this case will not be through the appellate procedure within the time allotted by the Army Corps of Engineers for US Ecology to exercise its rights under the 404 Permit it has been granted. Consequently, were I to grant the stay requested, the Plaintiff would be denied the benefit of its judgment. On the other hand, denying the requested stay will result in no harm to any party.

The court included clarifying language in its March 23 order which addressed concerns raised by the department about NDOH's involvement in the licensing process. The court stated that the February 26 judgment found NDOH lacks decision-making authority over the license application, but did not preclude the use of the agency's expertise in the license review process.

> While Department of Health and Human Services (NDOHH) may participate in the review process to the extent NDEQ finds helpful and useful, it is only NDEQ which has the decision-making and regulatory authority on US Ecology's application. I therefore held that NDOHH may not make decisions regarding the license application of US Ecology, but the Department of Environmental Quality (NDEQ) could rely on the expertise of the NDOHH during the review process, just as it could rely on the expertise of subcontractors NDEQ might employ.

—TDL

Committee to Bridge the Gap v. Babbitt

CBG Denied Additional Injunctive Relief re Ward Valley

On January 26, 1998, the U.S. District Court for the Northern District of California denied without prejudice a motion for injunctive relief recently filed by Committee to Bridge the Gap (CBG) and three private citizens. The motion, which was filed on December 19, 1997, pertains to a lawsuit that has been inactive for almost five years following the entry of a stipulation among the parties. The lawsuit seeks to enjoin federal officials from transferring federal land at Ward Valley, California, to the state for use in siting a low-level radioactive waste disposal facility based upon an environmental assessment and a finding of no significant impact issued by then-Secretary of the Interior Manuel Lujan. Secretary Lujan issued a record of decision in 1993 based upon the environmental assessment and finding of no significant impact. Incoming Interior Secretary Bruce Babbitt, however, subsequently attempted to rescind that record of decision.

The Issues

The plaintiffs argued that injunctive relief is necessary due to an imminent risk that the stipulation previously entered into by the parties in this action could be eviscerated by an adverse decision in one of two cases currently pending before other courts. Specifically, CBG argued that the courts in those cases could order transfer of the Ward Valley site upon a finding that Babbitt's rescission of the record of decision (ROD) was invalid. (See *LLW Notes*, February 1998, pp. 18–19.) Such action, according to CBG, would circumvent the stipulation in which Interior agreed, among other things, to rescind the record of decision, to undertake additional review of environmental impacts of the land transfer, and to provide at least thirty days' notice prior to several enumerated actions, including transfer of the land.

The two cases cited in CBG's motion were filed in 1997 by the California Department of Health Services and US Ecology against the U.S. Department of Interior (DOI) and others. The first of those cases, which was filed in the U.S. Court of Federal Claims, seeks reimbursement for US Ecology's past costs, lost future profits, and lost opportunity costs related to the planned Ward Valley disposal facility. (See *LLW Notes*, February 1998, pp. 19–21.) The other case, which was filed in the U.S. District Court for the District of Columbia, seeks to compel the Interior Department to transfer Ward Valley to the State of California. (See *LLW Notes*, March 1997, pp. 1, 16–20.)

The Decision

The court cited three reasons for denying CBG's request for a preliminary injunction:

1) An "actual existing threat" to the stipulation does not exist because the possibility that the District of Columbia district court will order Interior to transfer the land to the State of California is purely speculative at this time.

2) The granting of injunctive relief in this action could subject Interior to the conflicting orders of two district courts if a land transfer is ordered in the District of Columbia district court case.

3) The plaintiffs may be able to secure adequate relief by seeking to intervene in the other court actions.

CBG and Others Granted Intervenor Status in District of Columbia Court Action

On March 18, 1998, Committee to Bridge the Gap and the Bay Area Nuclear Waste Coalition (BAN Waste) were granted intervenor status in related lawsuits initiated by the California Department of Health Services and US Ecology against the U.S. Department of Interior. The suits—which were filed in the U.S. District Court for the District of Columbia—seek to compel the Interior Department to transfer land at Ward Valley to the state of California for use in siting the planned low-level radioactive waste disposal facility and to issue the patent approved by Interior four years ago. (See *LLW Notes*, March 1997, pp. 1, 16-20.)

Interior's Compliance and Jurisdictional Issues In its discussion, the court specifically noted that, to date, Interior has complied with the terms of the stipulation—Interior has taken no formal action regarding the land transfer and is undertaking additional review of the environmental impacts of the proposed transfer. Moreover, the court pointed out that it cannot simply "secure" its jurisdiction over future transfer of the land.

> Other district courts are not bound by the orders and decisions of this court ... The U.S. District Court for the District of Columbia therefore need not heed any injunction issued by this court. In a full review of the merits of the factual and legal issues presented by this case—one which this court has not undertaken—the District of Columbia court may find the rescission of the ROD invalid and may order the DOI to transfer the lands to the State of California.

The court further determined that if the Ward Valley lands were transferred to the state pursuant to an order of the District of Columbia court, the California court would most likely be unable to assert its jurisdiction over the state and require return of the lands pending a completed environmental review.

Alternative Avenues for Relief The court's discussion clearly notes, however, that the plaintiffs are not without any forum in which to pursue their claims.

> It is clear that in an "ideal world" any challenges to the transfer of ... [Ward Valley] lands should be decided in the same district court ... CBG has just that option here. For instance, CBG states that it has filed an amicus brief in the District of Columbia actions supporting the federal defendants' motion to transfer this action to this court. The plaintiffs may also try to take a more active role in the District of Columbia actions by filing a motion to intervene in those actions. The plaintiffs may also claim that they are necessary and indispensable parties to the pending actions in the Court of Federal Claims and the District of Columbia court under Fed. R. Civ. P. 19 since they apparently have a significant legally protected interest which may be harmed by the pending litigations.

In response to CBG's claims that intervening in the new actions will impose significant financial and logistical burdens upon the organization, the court stated that such burdens should not deter them "given the import, as they claim, of requiring a complete environmental review of the land transfer."

Denial is Without Prejudice In the conclusion of its order, the court specifically noted that its denial of the motion for a preliminary injunction is made without prejudice—meaning that CBG can refile if the situation changes and injunctive relief becomes necessary.

> If ... [Interior] acts in the pending actions before the Court of Federal Claims or the United States District Court for the District of Columbia in a manner inimical to the stipulated order of this court, the plaintiffs may once again file a motion for preliminary injunction in order to obtain appropriate relief.

—TDL

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Background: *Committee to Bridge the Gap v. Babbitt*

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

On January 19, 1993, then-Secretary Lujan signed a record of decision for the Ward Valley land transfer. However, incoming Interior Secretary Bruce Babbitt rescinded the record of decision on February 18, 1993. (See *LLW Notes*, February 1993, pp. 16–17.) Babbitt then instructed the Interior Department to reevaluate recent aspects of the Ward Valley land transfer process under NEPA. (See *LLW Notes*, March 1993, p. 11.)

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

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

Waste Control Specialists, L.L.C. v. U.S. Department of Energy

WCS Seeks Injunctive Relief That Would Bar DOE Use of Envirocare and Similarly Licensed Facilities

On February 17, 1998, Waste Control Specialists (WCS) filed a motion in the U.S. District Court for the Northern District of Texas seeking additional injunctive relief in its lawsuit against the U.S. Department of Energy and two of its officials. WCS alleges that the additional injunctive relief is warranted due to certain actions taken by DOE after entry of the original preliminary injunction, which actions WCS contends circumvent the terms and spirit of the injunction. (See *LLW Notes*, August/ September, 1997, pp. 15–17.) Accordingly, WCS is asking that a new injunction be issued (1) to bar DOE from using the Army Corps of Engineers as a contractor to dispose of the department's low-level or mixed radioactive waste in a manner that violates the original injunction, and (2) to enjoin DOE from shipping or otherwise disposing of its low-level or mixed radioactive waste within an Agreement State unless a proper memorandum of understanding or agreement has been entered into between DOE and such state. Such an injunction would effectively prohibit the further disposal of DOE waste at Envirocare absent the department's execution of a memorandum with the State of Utah.

DOE filed its opposition to the motion on March 6, 1998. In its brief, the department challenges WCS' claim that the supplemental motion is intended to enjoin activity that is in violation of the existing preliminary injunction. Instead, DOE argues, the supplemental motion seeks to enjoin activity that is not currently prohibited. DOE objects to the motion because it "would tie DOE's hands in performing statutorily required radioactive waste disposal activities, in a manner that is unrelated to and not necessary for the protection of WCS's interest on competing for future waste disposal contracts, and is based upon alleged statutory violations that WCS lacks standing to raise." In the alternative, DOE argues that the court should defer ruling on WCS' motion until the U.S. Court of Appeals for the Fifth Circuit issues a decision on the department's appeal of the district court's issuance of the original preliminary injunction.

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Appellate Court Rejects States' Amicus Filing
Texas Files Separate Amicus Brief

States' Filing

On March 11, the U.S. Court of Appeals for the Fifth Circuit denied, without comment, a motion by 16 states to file an amicus brief relating to DOE's appeal of the issuance of the original preliminary injunction in the WCS lawsuit.

The following states signed on to the amicus brief: Washington, Ohio, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, and Tennessee.

Texas' Filing

On March 25, the State of Texas filed a 22-page amicus brief arguing that the appellate court should vacate the preliminary injunction and order dismissal of WCS' complaint. The brief, whose admissibility has not been ruled upon by the court, contains the following concluding remark:

> Sound public policy dictates that DOE not be allowed to evade state jurisdiction under the guise of self-regulation while disposing of its radioactive waste at privately owned and operated waste disposal facilities. In light of that policy, the District Court's preliminary injunction should be reversed and vacated, and the matter remanded with instructions to dismiss the complaint.

Waste Control Specialists, L.L.C. v. U.S. Department of Energy (continued)

Alleged Unlawful or Improper Activity

Agency Relationship Between DOE and U.S. Army Corps of Engineers

WCS asserts that DOE is violating the terms of the original preliminary injunction by using interagency agreements with the U.S. Army Corps of Engineers to dispose of department wastes through corps contracts. For instance, on December 9, 1997—more than two months after the injunction was issued—the corps awarded a new contract to Envirocare of Utah for the disposal of wastes from DOE and others. The only bidders on the contract, which is worth up to $100 million dollars, were WCS, Envirocare of Utah, and Envirocare of Texas. WCS contends that the company's lack of a state license or NRC permit were dispositive in the corps' decision to reject WCS' bid. In support of this contention, WCS argues that the disposal contract makes clear that, although price and technical factors were of importance, having the "REQUIRED PERMITS" was essential. WCS alleges that its discussions with the corps indicate that the phrase "REQUIRED PERMITS" was interpreted to mean that the possession of a state or NRC license is mandatory.

WCS argues that the corps' rejection of its bid for lack of a state license or NRC permit violated the original preliminary injunction. WCS contends that the injunction applied to the corps in this instance because it expressly binds "the Defendants, their respective agents, employees, and attorneys, as well as all persons in active concert or participation with the Defendants." And although, according to the motion, DOE's general counsel earlier informed the court that the corps is not a DOE contractor and "has no relationship with the Department of Energy," WCS claims to have obtained documents evidencing 43 contracts between DOE and the corps, six of which relate directly to the disposal of low-level radioactive or mixed wastes. In addition, WCS contends that Alvin Alm testified in a deposition that, as a result of the original preliminary injunction, DOE may make greater use of the corps as a vehicle for disposing of the department's waste.

Failure to Proceed with Contracting Opportunities

WCS contends that, on the same day that the original preliminary injunction was issued, DOE instructed its field offices to place "all procurement actions involving waste disposal," including requests for proposals (RFPs), subcontracts, and draft RFPs, "on hold until further notice." WCS argues that such action by DOE violated the injunction's mandate that its issuance "shall not cause or justify the reissuance of any currently outstanding RFP."

> This DOE directive was made because DOE expected the issuance of the Preliminary Injunction and intended to evade the effect of the same by making shipments through the Corps and continuing to falsely represent, as its counsel did to this Court, that DOE has no relationship with the Corps.

Continued Stalling

WCS complains that, in the four months since issuance of the original preliminary injunction, DOE has not taken any action to implement the "national procurement" which departmental counsel argued would alleviate the problem of WCS' exclusion from the competitive bidding process. Moreover, WCS contends that DOE has effectively abrogated its responsibility to dispose of and oversee its radioactive waste, has ceased all procurement activity, and has taken no significant action on WCS' proposals.

> These failures evidence the creation of an artifice or scheme by DOE to avoid compliance with this Court's Preliminary Injunction while at the same time continuing with the clean-up of contaminated sites through an admitted monopoly.

Unlawful Disposal of AEA Wastes Within an Agreement State

WCS argues that the continued shipment of DOE low-level radioactive waste to a facility in Utah solely on the authority allegedly granted by a Utah state license is a violation of the Atomic Energy Act (AEA).

> Simply being an agreement state does not itself give the state authority to authorize disposal of DOE low-level or mixed radioactive wastes within its borders, since such authority rests exclusively with DOE under the AEA. For an agreement state to authorize disposal of DOE low-level or mixed radioactive wastes, it must first receive such authority from DOE pursuant to an agreement or memorandum of understanding between DOE and the state. Such agreement or memorandum of understanding, though it may assign to the state certain oversight responsibilities, must specifically reserve in DOE ultimate safety jurisdiction over (and ultimate safety responsibility for) DOE's wastes. The AEA does not permit DOE to evade or escape its safety responsibilities over its wastes merely by disposing of such wastes at a facility which happens to be licensed by an agreement state.

WCS points out that no memorandum of understanding or agreement exists between Utah and DOE concerning oversight and ultimate safety responsibility for DOE's wastes within the State of Utah.

Requested Relief

WCS is asking that the district court enjoin DOE, its agents, employees and attorneys, as well as all persons in active concert or participation with the department, from the following actions:

- shipping for disposal, directly or indirectly, any DOE low-level or mixed radioactive waste pursuant to any U.S. Army Corps of Engineers contract awarded after issuance of the original preliminary injunction or pursuant to any DOE instruction to the corps after issuance of the injunction, unless DOE and the corps have complied with all of the duties, obligations, limitations and directives imposed upon the department by the terms of the injunction; and

- shipping for disposal any DOE low-level or mixed radioactive waste to a facility in an Agreement State (as that term is used in the Atomic Energy Act) absent an applicable memorandum of understanding or agreement between DOE and such state that (1) appropriately assigns DOE's safety responsibilities over the department's AEA wastes to that state, (2) retains ultimate safety responsibility over such wastes with DOE, and (3) is in effect at the time of disposal.

In addition, WCS is seeking an order from the court to compel the defendants and their attorneys to make all parties who could be affected by any future orders aware of their existence. WCS contends that DOE failed to properly notify the corps of the original preliminary injunction and its prohibitions.

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Local Tribe Sues Officials of Texas Authority

On March 4, 1998, Ysleta Del Sur Pueblo—a federally recognized Indian tribe whose reservation is located in El Paso County, Texas—filed suit against the General Manager of the Texas Low-Level Radioactive Waste Disposal Authority and members of its Board of Directors. As part of the lawsuit, the tribe contends that it has an aboriginal right to possess a vast amount of land in the State of Texas, including property on which the Authority is proposing to construct and operate a low-level radioactive waste disposal facility. The tribe further asserts that the defendants, as agents and representatives of the State of Texas, are violating federal law by interfering with the tribe's aboriginal right of possession of the property. Accordingly, the tribe is requesting a judgment from the court which, among other things, ejects the defendants and their equipment from the property.

—TDL

Waste Control Specialists, L.L.C. v. U.S. Department of Energy (continued)

DOE's Written Response

Challenged Activity is Not Prohibited by Existing Preliminary Injunction

DOE argues that the facts contained in WCS' motion do not constitute a violation of the preliminary injunction because the injunction does not prohibit the disposal of DOE's radioactive waste pursuant to a contract between the U.S. Army Corps of Engineers and a commercial disposal company.

> The injunction does not prohibit any agency from disposing of any waste pursuant to either an existing contract, or a contract independently awarded by an agency other than DOE. The Corps did not act in concert with DOE when it awarded its waste disposal contracts. Although DOE is one of several agencies that can arrange for disposal of radioactive waste through delivery orders pursuant to the Corps' contract, this has no bearing upon the Corps' independence in issuing these contracts. And, while the Corps might be characterized as acting "in concert" with DOE if and when the Corps issues a delivery order for disposal of DOE waste pursuant to a DOE request, disposal of DOE waste is not itself prohibited by the injunction. The injunction's prohibitions address contract formation activities—such as issuing RFPs and awarding or denying contracts—not waste disposal activities themselves. Nevertheless, in response to an inquiry from WCS's attorney concerning the possibility that some DOE radioactive wastes might be transferred to the Corps for disposal, and in order to avoid any unnecessary or premature controversy concerning this matter, defendants' counsel advised WCS's counsel that, during the pendency of the preliminary injunction, DOE would not utilize any new delivery orders to dispose of radioactive waste pursuant to the Corps contracts without giving WCS at least 30 days advance notice ... To date, the need to give that notice has not arisen.

DOE further asserts that the fact that WCS is making a new claim to enjoin the conduct in question constitutes a "tacit admission" that the conduct is not presently prohibited.

WCS Lacks Standing to Challenge DOE's Actions Pursuant to the Atomic Energy Act

To the extent that WCS is seeking additional injunctive relief against actions that it claims are unlawful under the Atomic Energy Act, DOE argues that WCS lacks standing to raise such a challenge. Standing is a legal doctrine which requires that, in order to pursue a claim, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." The U.S. Supreme Court has held that, in the context of suits for judicial review under the Administrative Procedure Act, a litigant must show at the outset that he has in fact been injured by the agency action complained of and that the interest he seeks to vindicate is arguably within the "zone of interests" to be protected or regulated by the statute in question. DOE argues that WCS' motion meets neither of these tests.

First, DOE contends that WCS has not alleged an injury that is fairly traceable to DOE's allegedly unlawful conduct. The injury complained of, according to DOE, is the continuation of shipments of radioactive waste to an Agreement State without the necessary memorandum in such a manner as to "drain the pond of opportunities for the lawful disposal of DOE waste." DOE asserts, however, that if the disposal of its waste "drains the pond," it does not do so as a result of the lack of the allegedly required memorandum or of the use of a facility in an Agreement State. Moreover, DOE contends that the effect upon WCS is the same whether disposal occurs with or without the allegedly required memorandum and whether or not it occurs in an Agreement State. And DOE claims that the alleged injury is not likely to be redressed by the requested relief. "This relief would still leave DOE with potential disposal options including disposal at DOE-owned sites and disposal at privately-owned Agreement State sites after entry into the allegedly required memorandum of understanding or agreement."

DOE points out that any disposal opportunities that are being "drained" would not likely be available to WCS anyway because, even if DOE were to accept the company's proposal for use of its site, the proposal contemplates a substantial period of time for inspection, evaluation, and the development of alternative regulatory arrangements. "WCS's opportunity to perform and profit from waste disposal contracts with DOE would not be realized until after that period. Until then, disposal of DOE radioactive waste would have to occur only at other sites."

DOE also argues that the interest that WCS seeks to vindicate does not fall within the "zone of interests" sought to be protected by the referenced AEA statute. These provisions concern the protection of public health and safety, whereas DOE asserts that WCS' interest is in obtaining and profiting from radioactive waste disposal contracts.

Literal Reading of Prayer for Relief Would Preclude DOE from Shipping to WCS or to Many of its Own Sites

DOE claims that a literal reading of the injunctive relief requested by WCS would preclude the department from shipping low-level radioactive waste to any site in an Agreement State without the allegedly required memorandum, regardless of whether the state is involved in regulating the site.

> This, however, cannot be what WCS intends. If it were, the proposed injunction would preclude DOE from shipping low-level radioactive waste to its own sites that happen to be located in an agreement state, without first entering into an agreement with the state concerning the allocation of regulatory responsibility over the site. This would turn the reasoning contained in the Court's existing preliminary injunction decision on its head, by making the state's agreement a prerequisite to disposal at a DOE-owned site. Even more ironically, a literal application of the requested injunction would prevent shipment of DOE waste to WCS's own site in Texas, because Texas is an agreement state that is not willing to agree to take on regulatory responsibility for radioactive waste disposal at commercial sites such as WCS's.

Defer Ruling Pending Decision on Appeal

In the alternative, DOE argues that the court should defer ruling on WCS' motion pending a decision by the U.S. Court of Appeals for the Fifth Circuit on the department's challenge to the issuance of the original preliminary injunction by the district court. DOE is appealing the district court's decision on the following grounds, among others: that the court lacks jurisdiction over the subject matter of the complaint because the challenged decision does not constitute "final agency action" under the Administrative Procedure Act; that the challenged decision is committed to agency discretion by law and is therefore not subject to judicial review; and that federal law neither requires DOE to implement WCS' proposal nor prohibits the department's existing practices. Oral argument on the appeal is scheduled before the appellate court on April 7, 1998.

Additional Arguments by DOE Staff

In addition to the arguments contained in the department's brief, DOE staff cite language contained in the Low-Level Radioactive Waste Policy Amendments Act to support the department's position that it may dispose of its low-level or mixed radioactive wastes at a non-federal facility without specifically invoking its Atomic Energy Act authorities. In particular, DOE staff cite section 4 of the act, which contains provisions relating to requirements for the use of commercial disposal facilities for the disposal of federal waste. Staff point out that the language in section 4 does not include any reference whatsoever to a requirement of specific AEA authorization prior to DOE use of commercial facilities, despite the fact that such facilities were in operation at the time of the act's passage and additional such facilities were anticipated to be operable in the future.

—TDL

Most of the preceding information was contained in a News Flash distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates, and placed on the LLW Forum World Wide Web page on March 23, 1998.

Background: ***Waste Control Specialists, L.L.C. v. U.S. Department of Energy***

Plaintiffs Waste Control Specialists, L.L.C.

Defendants U.S. Department of Energy; James Owendoff, Acting Assistant Secretary for Environmental Management; and Mary Anne Sullivan, Deputy General Counsel for Environment and Civilian Nuclear Defense Programs

Court U. S. District Court for the Northern District of Texas

The Facts On September 20, 1996, WCS submitted a contingent bid to dispose of DOE radioactive waste from the department's Fernald site in response to a Request for Proposals (RFP) issued by DOE's Ohio Field Office. Since WCS contends that the disposal of DOE waste is not subject to state regulation, WCS proposed that DOE could either self-regulate the disposal operations at WCS' Texas facility or delegate the function by contract to an appropriate oversight body. WCS initially proposed that the Texas Natural Resource Conservation Commission (TNRCC) could perform such oversight functions. However, after TNRCC declined to do so, WCS provided alternative proposals, including the use of an oversight group consisting of Texas Tech University, Texas A&M University, and Integrated Resources Group (a private consulting firm and DOE contractor). WCS proposed that the oversight group could include or substitute DOE's Sandia National Laboratories, NRC, or even an arm of DOE itself.

On May 5, 1997, DOE rejected the WCS proposal, citing concerns regarding DOE's use of regulatory authority under the Atomic Energy Act (AEA) to approve a privately owned facility for DOE waste disposal before the award of a contract. On August 29, 1997, WCS filed suit.

The Issues WCS contends that DOE senior officials have not carefully or reasonably considered its proposal and that DOE's alleged concerns regarding delegation of the department's oversight responsibilities to a third party are not genuine. Instead, WCS alleges that the rejection was the result of political considerations and other factors.

WCS argues that DOE's rejection of the proposal causes WCS economic damage, stifles competition, and perpetuates an existing monopoly. The rejection, according to WCS, is unlawful as it is arbitrary, capricious, an abuse of discretion, or not in accordance with law.

WCS also contends that DOE's rejection evidences "a fundamental, arbitrary and capricious refusal by DOE to do any of its radioactive waste disposal business with WCS, for no lawful reason, while simultaneously demonstrating a fundamental, arbitrary and capricious eagerness to continue to do business with Envirocare in a manner contrary to law." WCS asserts that the rejection effectively prevents the company from prevailing in any bid for DOE radioactive waste disposal services and is, in legal effect, a de facto debarment.

Preliminary Injunctive Relief On October 6, 1997, the district court issued a preliminary injunction against DOE concerning the award of new contracts for low-level or mixed radioactive waste disposal services. In a harshly worded order, the court termed as "bogus" DOE's stated reasons for disqualifying a WCS bid to provide waste disposal services for the department's Fernald site in Ohio. The court also found that a "virtual monopoly" exists in the bidding for off-site disposal of DOE low-level and mixed wastes.

In addition, the court determined that although the AEA requires "persons" to obtain a license from NRC (or from an Agreement State) as a precondition to the disposal of low-level radioactive waste, the act specifically exempts the activities of DOE and its contractors from this requirement. Moreover, the court found that "neither the grant nor the refusal of a state low-level radioactive waste disposal license can constitute the basis for the qualification or the disqualification of a DOE contractor to dispose of DOE low-level or mixed radioactive wastes at a private site."

Appeal On November 25, 1997, the U.S. Department of Energy filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit. The appeal is still pending.

For additional information, see LLW Notes, August/September 1997, pp. 15–17.)

U.S. Department of Energy

DOE Seeks Comment re Use of Commercial Facilities

On Thursday, March 19, 1998, the U.S. Department of Energy issued a notice in the *Federal Register* of the department's intent to conduct an analysis of its policy regarding the disposal of low-level and mixed radioactive waste at commercial facilities (63 *Federal Register* 13,396). As part of this analysis, DOE is soliciting comments from the public and interested organizations on whether the department should (1) continue to use existing, licensed commercial disposal facilities; (2) pursue recent proposals by two private entities offering disposal options at existing hazardous waste disposal sites; or (3) in other respects change its policies or practices relating to the use of commercial facilities for the disposal of DOE waste. Comments on the policy analysis are due by May 18, 1998.

Copies of the Federal Register notice may be obtained on line via GPO Access at wais.access.gpo.gov.

Recent Proposals

The notice indicates that DOE has received proposals from Waste Control Specialists, LLC of Texas (WCS) and Laidlaw Environmental Services, Inc., of Colorado. The WCS proposal, as characterized in the *Federal Register* notice, calls for DOE "to regulate a commercial waste disposal facility through a disposal contract with the facility owner." The Laidlaw proposal, as the notice explains "would have DOE pay for some or all of a commercial facility's maintenance before any ... [low-level or mixed radioactive waste] is accepted, and would have DOE pay for the costs associated with obtaining licenses and appropriate regulatory approvals for the facility from the state in which the facility is located."

The notice specifically states that neither of the proposals involves the establishment of a disposal facility pursuant to the Low-Level Radioactive Waste Policy Act. It does, however, assert that "[t]he Department is interested in encouraging competition for ... [the disposal of its waste at commercial facilities]."

Inquiries and the Submission of Comments

The notice invites interested states, agencies, organizations, and the public to comment on the WCS and Laidlaw proposals—as well as on DOE's current policy and practices and on potential changes thereto—by directing communications to Jay Rhoderick, United States Department of Energy, EM-35, 19901 Germantown Road, Germantown, MD 20874-1290.

The notice specifically points out that "[i]f the Department's policy analysis results in a proposal that would require the preparation of an environmental analysis pursuant to the National Environmental Policy Act, an appropriate analysis will be prepared."

Background

DOE's Policy on Use of Commercial Disposal Facilities Prior to 1979, DOE made regular use of commercial facilities for the disposal of its low-level and mixed radioactive waste. In 1979, DOE changed its policy, using commercial disposal facilities on a limited basis and instead relying primarily on its own facilities for the disposal of these wastes. In recent years, however, DOE's use of commercial disposal facilities has increased, and in the future greater use of commercial disposal facilities may occur as DOE proceeds with the cleanup of its sites.

DOE's current policy concerning the disposal of its low-level and mixed radioactive waste is contained in DOE Order 5820.2A, Radioactive Waste Management (September 26, 1988). This order provides that such waste "shall be disposed of on the site at which it is generated, if practical, or if on-site disposal capability is not available, at another DOE disposal facility." The order requires the department to dispose of the waste at a DOE facility unless an exemption is granted for disposal at a commercial facility. DOE may approve exemptions from this policy for "[n]ew or alternate waste management practices that are based on appropriate documented safety, health protection, and economic analyses." Exemptions can be granted only if the proposed commercial disposal facility complies with all applicable federal, state and local requirements, and possesses all of the necessary permits, licenses and approvals for disposal of the specific waste involved—including a license issued by the Nuclear Regulatory Commission or by an Agreement State. Moreover, the state and compact in which the commercial facility is located must be consulted before approval of the exemption and must be notified prior to the shipment of any waste.

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U.S. Department of Energy (continued)

Disposal Access and Volumes According to the *Federal Register* notice, since the 1950s, DOE has disposed of approximately 3 million cubic meters of low-level radioactive waste from its weapons production activities in disposal facilities located at DOE sites and disposed of approximately 200,000 cubic meters of such waste at commercial disposal facilities. In addition, approximately 40,000 cubic meters of DOE mixed waste from its weapons production activities has been disposed of primarily at commercial facilities.

DOE's cleanup activities have increased significantly since the late 1980s, resulting in the disposal of approximately 1.2 million cubic meters of low-level and mixed radioactive waste to date. Approximately 250,000 cubic meters of this was high-volume low-activity waste that has been disposed of at commercial facilities—with Envirocare of Utah receiving most of the waste.

DOE projects that future cleanup activities will generate approximately 31 million cubic meters of low-level and mixed radioactive waste. The department expects to dispose of the large majority of this waste at DOE facilities. However, DOE projects that approximately two million cubic meters of this waste may be eligible for disposal at commercial facilities under the department's current policy.

Waste Control Specialists Waste Control Specialists—which owns and operates a hazardous waste disposal facility in Andrews County, Texas—has proposed to expand its business to include the disposal of DOE low-level and mixed radioactive waste. The State of Texas, pursuant to its authority as an Agreement State, has licensed WCS to store, process and treat low-level and mixed radioactive waste. (See *LLW Notes*, December 1997, pp. 16–17.) Texas cannot, however, license WCS to dispose of low-level radioactive waste because state law provides that a radioactive waste disposal license may be issued only to a "public entity" specifically authorized by law for radioactive waste disposal. To address these limitations, WCS submitted a proposal to DOE in late 1996 to dispose of DOE low-level and mixed radioactive waste without a state license. Under the WCS proposal, the facility would operate under contract with DOE, would be regulated by DOE pursuant to its authority under the Atomic Energy Act of 1954, and would accept radioactive wastes only from DOE. The WCS proposal suggested that DOE's regulatory role could be performed through a contract with an entity or group of entities with nuclear engineering and environmental expertise. At the end of the facility's operational phase, title would be transferred without cost to the federal government or to the State of Texas.

For additional information about the WCS proposal and litigation initiated by WCS against DOE as a result thereof, see LLW Notes, August/September 1997, pp. 15–17 and a News Flash published on March 23, 1998. The Federal Register notice affirms that "the Department's policy analysis could be affected by, and may have to await the resolution of, this litigation."

Laidlaw Environmental Services Laidlaw Environmental Services owns and operates an existing commercial hazardous waste disposal facility (Deer Trail—also known as Last Chance) near Denver, Colorado. The Deer Trail Facility is not currently licensed to accept low-level and mixed radioactive waste for disposal. Laidlaw has proposed, however, to expand its services to include the disposal of DOE low-level and mixed radioactive waste—specifically from DOE's Rocky Flats Environmental Technology Site. Laidlaw's proposal is divided into two phases.

- Phase I would obligate the payment of federal funds to Laidlaw to maintain the facility in a condition ready to receive DOE waste and to reimburse Laidlaw for its expenses related to obtaining the necessary state licenses and permits to dispose of such wastes. (Colorado is an Agreement State, but does not have the same statutory licensing restrictions as the State of Texas.) Laidlaw would, in turn, be obligated to construct an appropriate disposal cell at its facility to receive such wastes and would commit to proceed with Phase II.

- Phase II would involve the actual shipment of DOE low-level and mixed radioactive waste to the Deer Trail Facility.

—TDL

Most of the preceding information was contained in a News Flash distributed to Forum Participants and Alternate Forum Participants, Federal Liaisons and Alternates, and placed on the LLW Forum World Wide Web page on March 26, 1998.

U.S. Nuclear Regulatory Commission

NRC Deems Envirocare's Amended Employment Policies Acceptable

Commission Responds to Other NRDC Allegations

In February, the U.S. Nuclear Regulatory Commission sent out two pieces of correspondence related to allegations by the Natural Resources Defense Council (NRDC) against Envirocare of Utah that were contained in a petition filed under 10 CFR 2.206 on December 12, 1997. (See *LLW Notes Special Edition*, December 1997, p. 19.) In the first letter, NRC informed Envirocare of its determination that the company's revised employment protection policies and agreement are "acceptable" and encouraged Envirocare to immediately advise both current and former employees of the revisions. The second letter, which was addressed to NRDC, responded to specific allegations contained the section 2.206 petition.

Background

NRDC's Section 2.206 Petition The petition requested that NRC take enforcement action against Envirocare including, among other things, the suspension of Envirocare's licenses issued by the State of Utah and NRC, an investigation of possible criminal violations under the Atomic Energy Act (AEA), and an investigation of the adequacy of Utah's whistleblower protection program. The request for such action was based upon allegations that Envirocare's employee-related practices and contractual provisions violate federal law and NRC's whistleblower protection regulations, that Envirocare's standard employment contract includes provisions which prevent employees from disclosing unsafe practices and violations, and that persons who have provided information that is adverse to Envirocare's interests "fear for their very lives and for the lives of their families."

Request for Amendments to Envirocare Policies Following NRDC's filing of an earlier Section 2.206 petition and separate letter of complaint concerning issues similar to those raised in NRDC's December 12 petition, NRC sent a letter to Envirocare on December 8, 1997. The letter requested that the company amend its whistleblower protection policy, environmental compliance program, and employment agreement to be consistent with the Energy Reorganization Act and submit the amended policies to NRC staff for review. Envirocare responded by letter dated January 21, 1998, including copies of the revised policies.

For information concerning Envirocare's and NRC's initial response to these allegations, see LLW Notes, February 1998, pp. 38–40.

NRC Finds Envirocare's Policies to be Acceptable and Encourages Notification

On February 9, Joseph Holonich, Chief of the Uranium Recovery Branch of the Division of Waste Management of NRC's Office of Nuclear Material Safety and Safeguards, sent a letter to Charles Judd, President of Envirocare of Utah. Holonich's letter announced the results of NRC's review of Envirocare's response to the commission's December 8 request that the company amend its employment policies and agreement. In the letter, Holonich stated that NRC staff find Envirocare's proposed changes to its employment protection policies and employment agreement to be "acceptable," but noted that NRC's review of the NRDC petition and of Envirocare's corresponding response is continuing.

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U.S. Nuclear Regulatory Commission (continued)

In addition to informing Envirocare of the acceptance of its policy and agreement revisions, Holonich's letter encouraged Envirocare to immediately inform its employees of the revisions.

> The NRC understands, through recent communication with Envirocare staff, that Envirocare has not yet informed either its current or its former employees of its revised employee protection policies. The reasons, as we understand, for not informing its current and former employees of these revisions were: (1) the uncertainty associated with NRC's acceptance of the January 21, 1998, revisions; and (2) not wishing to confuse its current/former employees relative to its employee protection policies by providing several versions of the policies prior to NRC's final acceptance. Now that NRC has indicated its acceptance of Envirocare's revised policies, the staff encourages Envirocare to immediately follow through with the company's plans, as described in its January 21, 1998, letter, to advise both its current and former employees of the revised employee protection policies. In addition, the staff requests that NRC be notified when Envirocare has completed its current/former employee notification process.

According to Envirocare officials, all current employees have now been notified of the revised whistleblower protection policy and employment agreement. Former employees "were contacted by certified mail to inform them that the Employment Agreement that was signed while employed at Envirocare was never intended to keep them from raising safety concerns."

In addition, Holonich's letter requested that NRC staff be informed of "any nuclear safety concern brought to Envirocare's attention (within one year of the date of this letter) by any present/former employee as a direct result of its revised employee protection policies."

NRC Responds to NRDC's Request to Take Action Against Envirocare

On February 18, Richard Bangart, Director of NRC's Office of State Programs, sent a letter to Thomas Cochran, Director of NRDC's Nuclear Program, responding to certain of the allegations contained in NRDC's section 2.206 petition. In his response, Bangart acknowledged the seriousness of the claims and allegations contained in NRDC's petition and stated that they are being reviewed and investigated by NRC. However, he indicated that NRC has determined that "the information available to the staff at this time does not justify the immediate suspension of Utah's authority to regulate Envirocare." Under the AEA, NRC may suspend its agreement with a state without notice or hearing only in an emergency situation that requires immediate action to protect public health and safety, and only if the state has failed to take action within a reasonable period of time to contain or eliminate the source of the danger. Bangart made clear, however, that both NRC and the Utah Division of Radiation Control share information about inspection and enforcement issues related to Envirocare.

In the letter, Bangart rejected NRDC's claim that Agreement States must adopt and enforce whistleblower protection policies at least as stringent as those of NRC. "Under the procedures implementing the Commission's Policy Statement on Adequacy and Compatibility of Agreement States (62 FR 46517, September 3, 1997), Agreement States are not currently required to have whistleblower protection regulations to be compatible with NRC's program." Instead, concerns about state protection policies are assessed on a case-by-case basis. Bangart noted, however, that although Agreement States are not currently required to have whistleblower protection policies as a matter of compatibility, the Energy Reorganization Act of 1974 provides a remedy whereby employees of Agreement State licensees may file a complaint with the Department of Labor for alleged discrimination in response to the raising of safety concerns. In addition, in response to NRDC's petition, NRC staff intend to review NRC's policy and consider whether Agreement States should be required to have protection policies that are subject to the adequacy and compatibility provisions.

Bangart's letter explained that the Office of State Programs would be separately addressing the issues raised by NRDC concerning the adequacy of Utah's Agreement State program "because such matters do not fall within the scope of matters ordinarily considered under 10 CFR 2.206."

—TDL

NGA to Peña re DOE Use of Commercial Facilities

On February 4, the National Governors' Association sent the following letter to Energy Secretary Federico Peña about litigation on DOE use of commercial low-level radioactive waste disposal facilities. (See related story, this issue.)

We write concerning the case of *Waste Control Specialists LLC vs. the United States Department of Energy* … This case raises issues of the utmost concern to states, and we urge you to carefully consider our views in your deliberation on these important matters.

The case involves the plaintiff's claim that it has been unfairly excluded from consideration for a DOE contract for radioactive waste disposal. Waste Control Specialists LLC (WCS) requested that the court require the Department of Energy (DOE) to consider it for such a contract, notwithstanding the fact that under the law of Texas, a Nuclear Regulatory Commission (NRC) agreement state, the company cannot get a license for the disposal of radioactive waste. In short, the company proposed a loophole through which private parties could dispose of federally generated low level radioactive waste without a license from either the NRC or the state. On October 3,1997, United States District Judge Joe Kendall found for WCS and issued a preliminary injunction in the case, enjoining the DOE from denying any bid by WCS for low level radioactive waste disposal on grounds that the company is not licensed by the state of Texas or the NRC. DOE has appealed this decision.

While we support DOE's appeal, we are very troubled by DOE's assertion that "the district court correctly found that ... WCS's December Proposal can be lawfully implemented." On the contrary, we believe that the WCS proposal cannot be lawfully implemented, and that any creation of a loophole to allow its implementation would run directly counter to the public interest.

The district court seems to have relied on a belief that DOE could (indeed, must) grant WCS a contractor exemption from disposal site licensing requirements. This decision was erroneous for several reasons. First, the NRC -- not DOE -- has the authority to license sites for the disposal of low level radioactive waste. Thus DOE can neither license nor exempt the WCS facility. Nor can the NRC exempt WCS from regulation as a DOE contractor, since exemptions from disposal site licensing are available only to contractors working for DOE "at a United States government owned or controlled site." The term "controlled site" was defined by the court in U.S. v. New Mexico (455 F. Supp. 993, 997) as including such a degree of control over procurement systems, property management, disposal practices, etc., that the contractor must be the virtual "alter ego" of the Department. It is self evident that the WCS site is not and will not be owned or controlled by the United States government under these terms. And finally, the district court ignored the plain language of other relevant, more recent, and more specific statutes relating to the disposal of low level radioactive waste. Specifically, the court ignored the Low Level Radioactive Waste Policy Amendments Act of 1985, which provides that:

> Low-level radioactive waste owned or generated by the federal government that is disposed of at a ... non-federal disposal facility ... shall be subject to the same conditions, regulations, (and) requirements ... in the same manner and to the same extent as any low-level radioactive waste not generated by the federal government. (42 U.S.C. section 2021 d(b)(I)(B))

We believe it obvious that the WCS site is not a federal site, and that any federal low-level waste disposed there is subject to the laws of the state of Texas.

Not only does DOE lack the legal authority to approve the scheme proposed by WCS, the scheme itself runs directly counter to the public interest, and we will offer our strongest resistance to it. Allowing DOE contractors to dispose of low radioactive level waste in unlicensed facilities would only compound the problems the nation already faces as the result of decades of self-regulation by DOE. Such self-regulation has been shown over many decades to be unworkable and insufficient. It runs counter to current initiatives to externally regulate DOE facilities, including the recently enacted memorandum of understanding between DOE and NRC. Most importantly, it ignores the legitimate role of the states in regulating the disposal of these wastes. States have a fundamental right to protect their citizens and the environment within their borders, and we will continue to insist that the federal government act in a manner consistent with this right.

We have enclosed a copy of the Governors' policy position concerning environmental compliance at federal facilities, and ask that you work with us as you consider your next steps addressing the issues raised by the WCS lawsuit.

New Materials and Publications

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

LLW Forum

PA *Interstate Agreement for the Uniform Application of Manifesting Procedures.* Low-Level Radioactive Waste Forum. February 1998. An agreement to establish uniform procedures for disposal responsibility for decontamination and incineration wastes and to avoid the creation of orphan wastes due to the adoption of contrary approaches by different states and compacts.

PAEL *LLW Forum Meeting Report.* Afton Associates, Inc. February 1998. Proceedings from the LLW Forum winter meeting, February 10-13, 1998. (Distributed on March 18, 1998.)

States and Compacts

Northeast Compact/ Connecticut/New Jersey

Northeast Interstate Low-Level Radioactive Waste Commission 1997 Annual Report. Northeast Compact Commission. Outlines the Northeast Compact Commission's significant activities for FY 1997, contains an independent auditor's report of the commission's financial statements, and includes reports from the compact's member states. To obtain a copy, contact the Northeast Compact Commission at (860)633-2060.

Northwest Compact/Washington

PA *Utility Decommissioning Impact on LLRW Disposal Needs*. Presented by Bill Sinclair, Utah Division of Radiation Control, at the LLW Forum meeting in San Diego, California, February 10, 1998. Contains information "extracted from Appendix P of the Envirocare license renewal application most recently revised on December 9, 1997." (Distributed at the LLW Forum meeting.)

PA Detailed map of the proposed location for a spent nuclear fuel storage facility in Utah on the Skull Valley Goshute Reservation. Presented by Bill Sinclair, Utah Division of Radiation Control, at the LLW Forum meeting in San Diego, California, February 1998. (Distributed at the LLW Forum meeting.)

Southwestern Compact/ California

Letter from Peter Baldridge, Senior Staff Attorney, California Department of Health Services to Edward Hastey, State Director, U.S. Bureau of Land Management, regarding the proposed Land Use Permit for the Ward Valley infiltration study. February 5, 1998. (See related story, this issue.)

Letter from Peter Baldridge, Senior Staff Attorney, California Department of Health Services, to Edward Hastey, State Director, U.S. Bureau of Land Management, stating DHS's concerns with the delays at Ward Valley and DHS's determination in obtaining a notice to proceed with the infiltration study. March 13, 1998. (See related story, this issue.)

Unaffiliated States

Massachusetts

The Massachusetts Low-Level Radioactive Waste Management Board's 1997 Annual Report to the Commonwealth. November 30, 1997. Massachusetts Low-Level Radioactive Waste Management Board. Summary of activities during FY 1997. To obtain a copy, contact the Management Board at (617)727-6018.

Rocketdyne Worker Health Study

The following documents were distributed at the LLW Forum meeting in San Diego, California, February 1998.

PA *Twenty Important Questions About the Worker Health Study and Radiation Activities at Rocketdyne*. A selection of comments from peer reviewers of the study. Peer reviewers are national experts in radiation epidemiology, radiation health effects, radiation oncology, health physics, statistics and public health. (Distributed at the LLW Forum meeting.)

PA *Rocketdyne Worker Health Study.* Hard copies of slides presented by Phil Rutherford, Manager, Radiation Safety, Rocketdyne Propulsion and Power, at the LLW Forum meeting in San Diego, California on February 11, 1998.

PA *Santa Susana Field Laboratory Epidemiological Study: Report of the Oversight Panel.* September 1997. Report that claims to have found that workers at Santa Susana Field Laboratory have experienced excess deaths due to work-related exposure to radiation. To obtain a copy of this report, contact the Oversight Panel at (310)478-0829.

PA *Presenting the Rocketdyne Worker Health Study.* September 1997. Color brochure pertaining to epidemiology and evaluating the results from the Rocketdyne Worker Health Study. For more information about this publication, contact the Boeing Company at (800)808-1160.

PA *Rocketdyne Worker Health Study: Summary.* California Department of Health Services, Occupational Health Branch. Summary of the Rocketdyne Worker Health Study including background information. For further information about this document, contact California's Department of Health Services at (800)970-6680.

The following documents and additional information are available on Phil Rutherford's web site at http://home.earthlink.net/~pdrutherford/epistudy.html.

Point-by-Point Rebuttal of the Advisory Panel Statement on the Rocketdyne Worker Health Study.

Summary: Rocketdyne Worker Health Study

Federal Agencies

Department of Energy (DOE)

Accelerating Cleanup: Paths to Closure (DOE/EM-0342). February 1998. Report providing a projection of the technical scope, cost and schedule required to complete the project of cleaning up the radioactive, chemical and other hazardous waste left after 50 years of U.S. production of nuclear weapons. To obtain a copy of this report, contact the DOE distribution center.

Department of Interior (DOI)

Tritium in Unsaturated Zone Gases and Air at the Amargosa Desert Research Site, and in Spring and River Water, near Beatty, Nevada, May 1997 (OFR-97-778). U.S. Geological Survey (USGS). May 1997. To obtain a copy, contact the USGS at (800)435-7627. (See related story, this issue.)

Nuclear Regulatory Commission (NRC)

Human Performance in Radiological Survey Scanning (NUREG/CR-6364). March 1998. Report on the human error factor when using radiological survey instruments to detect residual contamination in the field. To obtain a copy of this report, contact the NRC public document room.

U.S. Nuclear Power Plant Operating Cost and Experience Summaries (NUREG/CR-6577). February 1998. Report providing historical operating cost and experience information on U.S. commercial nuclear power plants. To obtain a copy of this report, contact the NRC public document room.

Letter from Shirley Ann Jackson, Chairman, Nuclear Regulatory Commission, to United States Senator Olympia Snowe (R-ME) stating that the Commission "opposes the approval of amendments to S. 270 [The Texas Compact consent legislation] that would incorporate the exclusion condition or an undefined discrimination clause into the Texas compact bill." March 20, 1998.

U.S. Congress

Letter from United States Senator Frank Murkowski (R-AK), Chairman, Committee on Energy and Natural Resources, to Janet Reno, Attorney General, Department of Justice (DOJ), stating his disappointment that trespassers at the proposed low-level radioactive waste disposal facility in Ward Valley, California are refusing to allow environmental tests to begin and requesting comments to specific questions regarding DOJ's involvement in this matter. March 24, 1998. (See related story, this issue.)

Letter from United States Senator Frank Murkowski (R-AK), Chairman, Committee on Energy and Natural Resources, to Bruce Babbitt, Secretary, Department of the Interior, stating his disappointment that trespassers at the proposed low-level radioactive waste disposal facility in Ward Valley, California are refusing to allow environmental tests to begin and requesting comments to specific questions regarding DOI's involvement in this matter. March 24, 1998. (See related story, this issue.)

Other

Health Effects of Exposure to Radon: BEIR VI. February 1998. National Research Council. Report assessing the risks posed by exposure to radon and other alpha emitters. To obtain a copy of this report, contact the National Research Council at (202)334-2138.

—RTG

To Obtain Federal Government Information

by telephone

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

by internet

- EPA Listserve Network • Contact Terri Dickson at (202)260-9581 or e-mail (leave subject blank and type help in body of message) . . . . . .listserver@unixmail.rtpnc.epa.gov
- U.S. Government Printing Office (GPO) (for the *Congressional Record*, *Federal Register*, congressional bills and other documents and access to more than 70 government databases) .http://www.gpo.gov/su_docs/
- DOE's National Low-Level Waste Management Program, Document Information http://199.44.46.229/radwaste/
- GAO homepage (access to reports and testimony) . . . . . **http://www.gao.gov/**

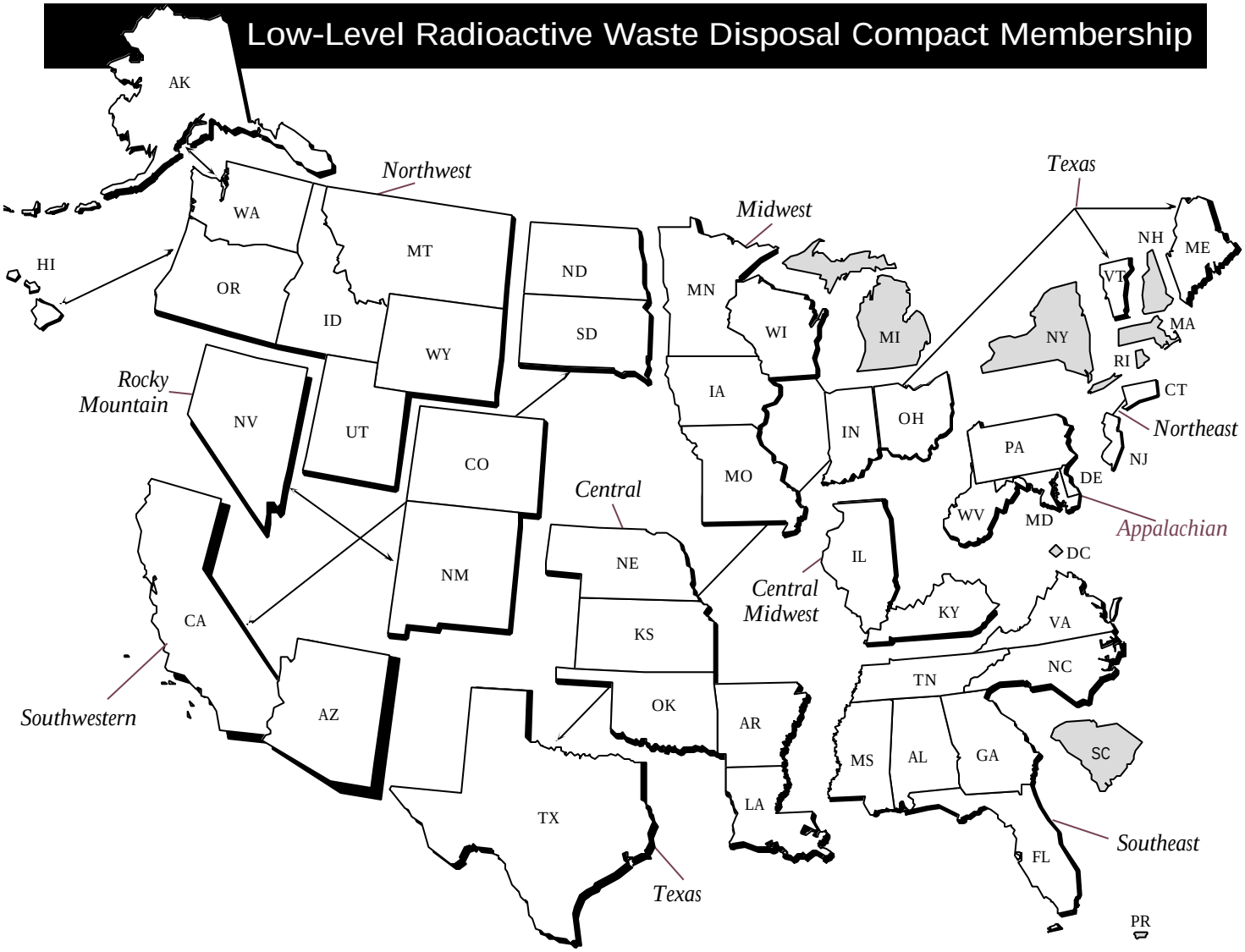
To access a variety of documents through numerous links, visit the LLW Forum website at http://www.afton.com/llwforum

Accessing LLW Forum Documents on the Web

LLW Notes, LLW Forum Meeting Reports and the *Summary Report: Low-Level Radioactive Waste Management Activities in the States and Compacts* are distributed to state, compact, and federal officials designated by LLW Forum Participants or Federal Liaisons. As of March 1998, *LLW Notes* and *LLW Forum Meeting Reports* are also available on the LLW Forum web site at http://www.afton.com/llwforum. The S*ummary Report* and accompanying *Development Chart*, as well as *LLW Forum News Flashes*, have been available on the LLW Forum web site since January 1997.

As of March 1996, back issues of these publications are available from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, (703)487-8547.

Low-Level Radioactive Waste Disposal Compact Membership



Appalachian Compact
Delaware
Maryland
Pennsylvania *
West Virginia

Central Compact
Arkansas
Kansas
Louisiana
Nebraska *
Oklahoma

Central Midwest Compact
Illinois *
Kentucky

Midwest Compact
Indiana
Iowa
Minnesota
Missouri
Ohio
Wisconsin

Northwest Compact
Alaska
Hawaii
Idaho
Montana
Oregon
Utah
Washington * •
Wyoming

Rocky Mountain Compact
Colorado
Nevada
New Mexico

Northwest accepts Rocky Mountain waste as agreed between compacts.

Northeast Compact
Connecticut *
New Jersey *

Southeast Compact
Alabama
Florida
Georgia
Mississippi
North Carolina *
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
Vermont

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

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

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