LLWnotes

Volume 13, Number 4 May 1998

Waste Control Specialists, LLC v. U.S. Department of Energy

Appellate Court Dismisses Texas Case re DOE Use of Private Facilities

But Agrees State or NRC License Not Needed

On May 14, the U.S. Court of Appeals for the Fifth Circuit ordered dismissal of a lawsuit filed by Waste Control Specialists, a Texas-based company that provides waste management services, against the U.S. Department of Energy. In so doing, the court also reversed the grant of a preliminary injunction issued against DOE by a lower court in the same case. The lawsuit addresses DOE's authority to use private, commercial low-level radioactive waste disposal facilities.

Background

Appellate Court Hearing A hearing was held in the appellate court on April 7 to address DOE's challenge to a preliminary injunction issued by the U.S. District Court for the Northern District of Texas on October 10, 1997. The injunction places certain limitations on the awarding of new DOE contracts for low-level or mixed radioactive waste disposal services. (See *LLW Notes*, August/September 1997, pp. 15–17.) DOE appealed the district court's decision to issue the injunction 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.

District Court Hearing The district court postponed a hearing that was intended to address WCS' February 17 motion for supplemental injunctive relief. In the motion, WCS alleges that additional injunctive relief is warranted due to certain actions taken by DOE after entry of the original preliminary injunction. WCS contends that these actions circumvent the terms and spirit of the injunction. (See *LLW Notes*, March 1998, pp. 25–30.)

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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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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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Midwest Compact and Michigan Become First Signatories of the Interstate Manifesting Agreement

Since the endorsement of the Interstate Agreement for the Uniform Application of Manifesting Procedures by the full LLW Forum on February 13, 1998, the Midwest Interstate Low-Level Radioactive Waste Commission and State of Michigan have both signed on to the agreement. Stanley York, Chair of the Midwest Compact, signed the agreement on behalf of the compact on April 9. He was preceded by Dennis Schornack, Commissioner of the Michigan Low-Level Radioactive Waste Authority, who signed on behalf of the state on April 1. Now that two entities have joined the agreement, it is formally in effect.

Background on Interstate Agreement

NRC Rule On March 27, 1995, at the request of states and compacts, the U.S. Nuclear Regulatory Commission issued a final rule titled "Low-Level Waste Shipment Manifest Information and Reporting." (60 Federal Register 15,649). In general, the rule requires the use of standard waste reporting forms for the shipment of commercial low-level radioactive waste by the nation's generators, collectors, and processors.

State and Compact Latitude In most instances, the rule provides specific information on how to identify the entity to be listed as the generator of commercial low-level radioactive waste on the manifest form. However, the rule affords states and compacts latitude to take an alternative approach in identifying the generator with regard to discarded sealed sources and waste resulting from either decontamination processes or incineration.

Purpose and Provisions The interstate agreement was drafted by an LLW Forum working group in order to provide uniform guidelines regarding disposal responsibility for waste resulting from incineration and decontamination processes. (The agreement does not address sealed sources because Forum Participants were not able to reach consensus on disposition of this waste stream, at this time, and because the issue does not appear to be ripe for a decision.) In general, the agreement provides that both decontamination and incineration wastes should be attributed to the original generators of the waste whenever possible. Consistent with the Interregional Access Agreement for Waste Management executed by most states and compacts, the interstate manifesting agreement also provides that the parties will not impede the return of waste shipped outside their borders for decontamination or incineration if it can be attributed back to the original generator.

—TDL

Chem-Nuclear to Issue Revised Long-Term Plan for Barnwell

Short-Term Plan for FY '98-'99 Also Under Development

A revised transaction summary for Chem-Nuclear Systems' long-term plan to ensure access to the commercial low-level radioactive waste disposal facility in Barnwell, South Carolina, will be mailed to a test group of customers on May 18, 1998. Comments from the test group will be incorporated into a final version, which is expected to be distributed in late May or early June 1998. (See *LLW Notes*, March 1998, p. 3.) If the plan is successful, it will be implemented beginning July 1, 1999.

In a related effort, Chem-Nuclear officials are also preparing a plan to mitigate the projected shortfall in state tax revenue from assessments on waste disposed of at the facility in FY '98-'99. A projected $10-million shortfall for FY '97-'98 is already being addressed, in part through voluntary financial contributions from nuclear utilities. (See *LLW Notes*, March 1998, p. 1.)

—CN

Southwestern Compact/California

DOI: Conclusive Beatty Findings "May Never Be Reached"

Tribes Urged to Enter Agreement re Ward Valley Testing

The following excerpts are from an April 27 letter from Kevin Gover, Interior Assistant Secretary for Indian Affairs, to Nora Helton, Chair of the Fort Mojave Indian Tribe. Gover's letter is a formal response to proposals made by the Fort Mojave Indian Tribe during an April 9 conference call and in an April 16 letter.

> The first item you proposed is that the Department [of Interior] adjust the timing for the three remaining elements of the Supplemental Environmental Impact Statement ("SEIS") by first completing a thorough analysis of the Beatty, Nevada disposal facility ("Beatty"). The Department's position regarding a request that would delay the tritium testing at Ward Valley and extend the overall timeframe for completing the SEIS has not changed. The Department will not grant a moratorium on the tritium testing at Ward Valley. Additionally, as I stated during the conference call on April 9, 1998, Beatty is an ongoing research project of the U.S. Geological Survey and, due to unrecorded site specific activities at Beatty, conclusive findings as to the disposal facility at Beatty may never be reached. Even if conclusive findings were available regarding Beatty, the land at Ward Valley has specific characteristics that would prevent the use of Beatty information at Ward Valley.

Even if conclusive findings were available regarding Beatty, the land at Ward Valley has specific characteristics that would prevent the use of Beatty information at Ward Valley.

Tribal Participation Contingent Upon Agreement

> The Department is willing to offer cooperating agency status, definition and rights to be determined, to the five Colorado River Indian tribal governments, but only as part of a Memorandum of Agreement (MOA) that will put everyone, including the Department, on a scheduled time frame for completion of the SEIS. In addition, any financial assistance to enable the tribes to participate in the sacred sites and environmental justice aspects of the SEIS, including the $20,000 from the Environmental Protection Agency, is dependent on the Department and the tribes reaching agreement on a MOA ...
>
> I hope that the Department's position, which has not waivered [sic] during our government-to-government consultations, regarding the tritium testing will not prevent the tribes from entering into an MOA to ensure their participation in the SEIS. However, if the Alliance is unwilling to enter into an MOA, the Department will have to move forward with the remaining three elements of the SEIS—the tritium testing, environmental justice and the sacred site studies—without the tribe's participation.

—LAS

Beatty Information a Justification for the SEIS

In October 1995, then-Deputy Interior Secretary John Garamendi rejected a proposed agreement for the transfer of the Ward Valley site to the State of California because it limited the ability of the U.S. Department of Interior to oversee the state's regulation of the Ward Valley facility. (See *LLW Notes*, Oct. 1995, pp. 14-16.) Garamendi then announced in February 1996 that the U.S. Bureau of Land Management would prepare a second Supplemental Environmental Impact Statement (SEIS) and would conduct further testing to establish the safety of the Ward Valley site. (See *LLW Notes*, March 1996, pp. 14-18.)

Among the stated justifications for the second SEIS were reports prepared by the U.S. Geological Survey (USGS) about the low-level radioactive waste disposal facility in Beatty, Nevada, even though—by Interior's own account—USGS had concluded that the reports were "too inconclusive to be relevant" to the Ward Valley site.

Garamendi also announced in February 1996 that Interior would not take any action on the land transfer until completion of the SEIS, which was expected to take one year. In January 1997, the California Department of Health Services filed suit against the U.S. Department of the Interior to compel the Interior Department to transfer the Ward Valley site to DHS. (See *LLW Notes*, March 1997, pp. 1, 16-17.)

—LAS

For a detailed explanation of events leading up to California DHS' filing of the lawsuit, see LLW Notes, March 1997, pp. 18-20.

EPA Approves Opening of WIPP

On May 13, federal regulators at the U.S. Environmental Protection Agency approved a plan to store weapons waste in a vast subterranean complex—known as the Waste Isolation Pilot Plant (WIPP)—near Carlsbad, New Mexico. The project has been delayed for more than two decades by legal and regulatory hurdles. The transuranic wastes that would be permanently stored at the site, which is owned by the U.S. Department of Energy, are currently being held in temporary storage at more than 10 sites around the country.

The EPA certification applies to the storage of radioactive waste and chemicals. A separate Resource Conservation and Recovery Act permit would need to be issued by the New Mexico Environment Department before the facility could begin accepting mixed wastes.

Barring additional delays, shipments to WIPP could begin as early as June 19. However, environmental groups have vowed to use legal action to attempt to block the shipments, and the Attorney General of New Mexico continues to oppose the facility.

—TDL

Southwestern Compact/California (continued)

Three California Legislators Accuse DHS of Circumventing State Law re Ward Valley

In April, three members of the California State Legislature wrote to the U.S. Secretary of the Interior to complain about the procedure employed by the California Department of Health Services (DHS) in its attempt to purchase federal land in Ward Valley, California, for use in siting a low-level radioactive waste disposal facility. The Interior Department transmitted the letter to DHS which provided a written response denying the legislators' allegations and affirmatively claiming authority to receive the land. A brief summary of the correspondence follows.

California Legislators' to Interior

In an April 14 letter to Interior Secretary Bruce Babbitt, three members of the California State Legislature allege that the procedure employed by the California DHS to attempt to purchase Ward Valley "appears to be illegal, and may be specifically designed to circumvent the California State Legislature." The legislators argue that a recent legislative staff review of the land acquisition process revealed that DHS has no authority to purchase the land and no legitimate source of funds with which to do so. The letter was signed by John Burton, President Pro Tempore of the California State Senate; Antonio Villaraigosa, Speaker of the California State Assembly; and Sheila Kuehl, Speaker Pro Tempore of the California State Assembly.

Lack of Authority to Request Land Purchase In the letter, the legislators assert that California statutes vest land acquisition authority in the Board of Public Works and authority to hold title in the Department of General Services. The planned Ward Valley purchase, according to the legislators, was never brought to the Board of Public Works for approval and was therefore requested without authority.

> In making the request to Interior to purchase Ward Valley, DHS wrongfully implied that it had authority to acquire land for the State when it knew that state law vested that authority in the Board of Public Works acting through General Services. In other words, DHS has no lawful authority to apply to purchase Ward Valley from Interior, and the applicant suing Interior is a state agency with no authority to enter into a land sales contract with the federal government.

Lack of Funds to Purchase Land In addition, the legislators claim that DHS had no source of legitimate funds with which to purchase the land.

> To circumvent the authority of the Legislature to control the state budget, DHS asked its licensee, US Ecology, to make a "gift" of payment for the land and recoup its costs through dumping fees. Knowing that legislative approval of an appropriation would be difficult in light of the environmental concerns raised by the State Lands Commission, DHS tried to circumvent the requirements of legislative approval. Rather than ask the Legislature for an appropriation, it asked US Ecology for a "gift." This conduct violates yet another provision of state law. California statutes require that gifts of money be received by the State Treasurer after approval by the State Controller. Before the money can be spent however, the Legislature must be given thirty days notice in the event that it wishes to object to the expenditure of the money. The Legislature is required to be notified through a letter, called a Section 28 letter, that is sent to the legislative budget committees; no gift of money can be spent unless these requirements are met.

The legislators allege that, during FY '92-'93, no Section 28 letter was ever sent regarding the planned Ward Valley land purchase.

Request for Action The legislators are asking that the Interior Department cease all activity concerning Ward Valley and return to DHS its "unauthorized request" to purchase Ward Valley.

> Circumventing the State Legislature is a grave matter. It would be advisable for the Department of the Interior to refuse to involve itself any further with such conduct.

Interior Department Seeks Views of California Department of Health Services

On April 16, John Leshy, Solicitor of the U.S. Interior Department, transmitted the state legislators' letter to S. Kimberly Belshé, Director of the California Department of Health Services. In accompanying correspondence, Leshy described the legislators' letter as raising "significant questions relating to the pending [land transfer] request" and stated that the Interior Department "intend[s] to give the Legislature's letter the serious consideration it deserves" and to "resolve the questions it raises as promptly as possible."

Leshy's letter invites DHS to provide its views on the issues raised in the legislators' letter, "specifically including the review by the Legislature's staff."

Department of Health Services Responds to Interior

In an April 22 letter, John Pierson, DHS' Deputy Director and Chief Counsel, provides the Interior Department with DHS' response to the legislators' letter.

Pierson begins his response by pointing out that a letter from three political legislators does not constitute action on behalf of the state legislature itself. Pierson then goes on to question the legislators' political motives.

> The past three years have demonstrated that DOI is perfectly capable of fabricating reasons not to complete the [Ward Valley land] transfer, and one might question why these individual legislators and their unspecified "staff" have gone to so much trouble at this late hour to fabricate another reason and transmit it to Secretary Babbitt, rather than communicate directly with DHS.

DHS' Authority to Request Land Purchase Putting these issues aside, however, Pierson asserts that "[t]here is no question that DHS has the lawful authority to obtain the Ward Valley site from DOI pursuant to its application for direct sale." Citing the California Code, Pierson argues that DHS is authorized to accept grants of interest in real property upon approval of the Department of Finance, which approval Pierson contends DHS previously secured.

> No authorization by the State Public Works Board or the Department of General Services is required to accept such a grant. The legislators' analysis ineptly focuses too narrowly on Government Code section 15853, which would have provided an alternative method to acquire the land had the legislature appropriated funds for that purpose. That section, however, did not provide the exclusive means for the transfer of title to the State.

Pierson cites the Low-Level Radioactive Waste Policy Act and California Health and Safety Code as additional support for DHS' authority to request the land transfer.

Source of Funding for Planned Land Acquisition Pierson argues that state law does not require that DHS pay for the land and that, in fact, the legislature specifically mandates that US Ecology account to DHS for all past and projected Ward Valley land acquisition expenses. Indeed, Pierson cites a California statute concerning the "expeditious establishment and operation by the private sector of a low-level radioactive waste disposal facility," in support of his contention that the legislature expected that US Ecology would pay the costs of land acquisition.

continued on page 8

Southwestern Compact/California (continued)

Pierson contests the legislators' argument that state law requires US Ecology to pay for the land by "donating" the purchase price to the state and argues that no such "donation" occurred.

> Pursuant to instructions received directly from ... [the Interior] Department, US Ecology wired the purchase to an account designated by DOI. California Government Code section 16302, cited by the legislators' analysis, applies only to donations of money to the State. The provisions are, therefore, inapplicable to US Ecology's transfer of funds to DOI because there was no need for receipt of any money by the State Treasurer, or legislative approval to spend any money under Section 28 of the annual Budget Act.

Moreover, Pierson argues that if US Ecology's payment of the purchase price is construed as a "gift," such action is authorized by state statute without any involvement by the State Public Works Board or the Department of General Services. "Thus, regardless of whether the transfer that DHS applied for is a grant of land directly to DHS, or a gift of land from US Ecology to DHS, in either case only the approval of the Director of Finance is required." Pierson claims that DHS has obtained such approval.

Purpose of Letter and Impact on Litigation Pierson complains that the legislators' letter and analysis appear to be an attempt to provide Interior with additional defenses in litigation currently pending before the U.S. Court of Federal Claims and the U.S. District Court for the District of Columbia. (See *LLW Notes*, February 1998, pp. 20–21, 25 and *LLW Notes*, April 1997, pp. 18–19.)

> For example, the specious allegation that no common law contractual obligation can inure to the State in the absence of contract approval by the Department of General Services appears deliberately calculated to attack the pending claims made by DHS before the U.S. Court of Federal Claims based upon expressed and implied contract.
>
> Similarly, the claim that DHS lacks the authority to acquire the land appears intended to distract both courts by giving Secretary Babbitt a post-hoc justification of his rescission of Secretary Lujan's land transfer decision. As we have clearly indicated, DHS has the legal authority to receive the Ward Valley site. The haste with which the U.S. Attorneys defending these cases notified the courts of the legislators' letter suggests how desperately the defense is in need of arguments to obfuscate the issues in these cases. We are confident that both courts will reject and repudiate such a transparent attempt by your client at historical revisionism.

Pierson concluded his letter by promising that, "[r]egardless [of] what DOI does with the legislators' letter, DHS will continue to pursue its judicial remedies so that the public health and safety can be protected, and the purposes of the [Low-Level Radioactive Waste Policy Act] and state law fulfilled."

Related Court Action

On May 8, the U.S. Court of Federal Claims issued an order in lawsuits filed by DHS and US Ecology denying a motion by the United States for additional briefing on the issue of California's authority to enter into a contract with the Interior Department. In its order, the court stated as follows:

> The threshold issues in this case are whether the previous Secretary of Interior was authorized to contract on behalf of the Untied States, and whether he took all of the steps necessary to create a contract. The issue of authority on the part of the State of California is not properly before this court at this time. It is not clear what basis we would have for making a determination under state law whether the Governor was authorized to act; we must proceed on the assumption that he was.

—TDL

State Legislators Discuss Siting Options, Prospects

A panel discussion entitled "State Low-Level Radioactive Waste Disposal Projects: When to Continue, When to Stop," was the lead topic for a meeting of the Low-Level Radioactive Waste Working Group of the National Conference of State Legislatures (NCSL) on the morning of April 3. Also on the agenda were presentations concerning the commercial low-level radioactive waste disposal facility in Barnwell, South Carolina, and a status report on potential plans for at national summit on low-level radioactive waste. The working group met in Seattle, Washington, in conjunction with NCSL's Assembly on State Issues.

Panel on State Projects

The panel comprised legislators or legislative staff from Ohio, North Carolina, Texas, Idaho, Washington, and Utah, as well as representatives of Entergy, Chem-Nuclear Systems, EnviroIssues, and the Nuclear Energy Institute (NEI).

Following is a brief description of the panelists' remarks. The description is necessarily summary in nature and is not intended to reflect everything said at the meeting.

Ohio Senator Gary Suhadolnik, who chairs the working group, noted the long lead time involved in establishment of disposal facilities and emphasized the need to avoid a potential crisis in the future. He also reviewed events that led to the cessation of the siting process in Ohio and commented on the likelihood of legislative changes within the state to reflect the altered situation.

North Carolina Representative George Miller commented upon the history of facility development in North Carolina, culminating in the current funding impasse.

Texas Representative John Hirshi expressed his opposition to the Texas Compact and to the disposal site selected by the Texas Low-Level Radioactive Waste Disposal Authority. He argued that development of disposal capacity should be left instead to the private sector.

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Discussion Questions

Participants in the panel discussion were requested to address the following topics:

- Are state agencies ill-suited to site LLRW facilities?
- Are there good public policy reasons why state governments should operate LLRW facilities?
- Does federal law constrain the range of state options?
- Is there evidence that the private sector would be more successful with siting?
- Are regional compacts preventing the private sector from meeting market demands for disposal?
- Would an open-market approach preserve regional "equity"?
- Does every facility need to follow the same path, or can we have government-run facilities in some states and private-sector operations in other states?
- Who should make these decisions: policymakers, state agencies, investors?
- Is guaranteed disposal access an attainable goal?
- What economic or cost factors should be considered by decision-makers? How important are these factors to the compacts today?
- What are the liabilities (financial and other) for discontinuing siting activities?

Responses to the discussion questions from all members of the NCSL LLRW Working Group will be compiled by DOE's National Low-Level Waste Management Program for distribution to the working group.

NCSL (continued)

Idaho Representative Jack Barraclough summarized the national history of commercial site operation since 1979. He then praised the safety of the Ward Valley site from a scientific standpoint, and advocated its development along with that of the Texas Authority's proposed site. Ideally, he said, the commercial disposal facilities at Hanford and Barnwell would remain open, and one new site—possibly chosen by a DOE panel—would be developed in the Northeast.

Washington Representative Shirley Hankins, whose district includes the Hanford reservation, suggested that the Northwest Compact should eventually open the Hanford facility to additional states in order to enhance state revenues. She conceded, however, that this policy is opposed within the state executive branch.

Utah Mark Bleazard, a legislative fiscal analyst, said that Utah prefers commercial development of disposal facilities. He noted that the financial benefits to Utah from disposal facilities operating within the state are not proportional to those reaped by South Carolina from the operation of the Barnwell facility. State legislators are therefore considering what might constitute a reasonable fee for Utah to receive. (See related story, page 27.)

Entergy John Etheridge of Entergy, a major generator, characterized waste disposal as an emotional issue exacerbated by declining disposal volumes and rising costs. He pointed out that, despite the declining disposal volumes, generators are not necessarily paying less for waste management than previously. Rather, they are transferring spending from disposal to processing.

Etheridge also observed that, although there currently appears to be more than enough disposal capacity, some facilities take only limited wastes, and other facilities are only "short-term" options available for the next 25-30 years. He therefore argued that the compact process is currently the only system comprehensive enough to provide for long-term disposal.

Chem-Nuclear George Antonucci commented that the Low-Level Radioactive Waste Policy Amendments Act is flexible enough to allow a system with any number of compacts if states decide to consolidate. At this time, he noted, only 11 states send their waste to a compact site. He then asserted that equity, which has been a driver in the compact system, is becoming less important than economics.

EnviroIssues Pat Serie argued that since concerns about equity gave rise to the compact system, it would be unwise to disregard these concerns and rely on just a few disposal sites. Harking back to Barraclough's remarks, she said that ideally the two or three new sites closest to development should move forward, and the existing sites should continue to operate. Bargains should be struck with the host states involving tradeoffs with hazardous waste management and other issues in order to ensure equity in a broader context.

NEI Paul Genoa supported Serie's view that equity can be achieved without every state necessarily doing the same thing. As an example, he noted that historically eastern states have hosted heavy industry, while western states have provided raw materials. He expressed the hope that, in the future, states could work together to develop new models for ensuring equity and providing waste disposal.

Genoa concurred with Antonucci about the flexibility of the compact system, the growing importance of economics, and the discrepancy between the potential and actual use of the system. He also suggested that private industry may face fewer barriers than government agencies when actually developing disposal capacity.

General discussion followed, with panelists and attendees exchanging views on transportation; equity; the closure of the low-level radioactive waste disposal site in Beatty, Nevada; the role played by courts in decisions affecting waste management; and efforts by Waste Control Specialists (WCS) to win a contract to dispose of DOE waste at WCS' facility in Texas. (See *LLW Notes*, March 1998, pp. 25–30.)

Meeting South Carolina's Revenue Requirements for Barnwell

Genoa explained the mechanism by which many of NEI's member utilities will make voluntary financial contributions to Chem-Nuclear to help offset a projected shortfall in surcharges collected on waste disposed of at Barnwell in FY '97-'98. (See *LLW Notes*, March 1998, p. 1.) The majority of these surcharges are used by the State of South Carolina to support education.

Antonucci then reported on Chem-Nuclear's plans for ensuring that South Carolina will receive adequate revenues from operation of the Barnwell facility over the long term. (See *LLW Notes*, March 1998, p. 3.)

LLRW National Summit

Senator Suhadolnik gave an account of a meeting that he, Cheryl Runyon of NCSL, and Sandra Birk of DOE's National Low-Level Waste Management Program (NLLWMP) had with Tom Curtis and Ann Beauchesne of the National Governors' Association (NGA) to discuss holding a national summit regarding low-level radioactive waste management. Suhadolnik and Curtis jointly reported that, in the course of the meeting, it was decided that while such a summit may be beneficial at some future date, this year is not the best time.

Curtis pointed out that if the proposed disposal sites in California, Texas, and Nebraska open, the national waste management system will take on a very different appearance. He emphasized the flexibility of the compact system, and advised that it be allowed more time to work.

Future Activity

The next meeting of the working group was tentatively set for July 20 in Las Vegas, Nevada. The agenda will include a discussion of environmental justice.

For further information, contact Cheryl Runyon of NCSL at (303)830-2200 x252. For information on the previous LLRW Working Group meeting, see LLW Notes, August/September 1997, p. 10.

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House Commerce Committee Chair to EPA re Environmental Justice

The following excerpt is from a May 8 letter from House Commerce Committee Chair Tom Bliley to EPA Administrator Carol Browner.

> The Committee on Commerce has within its jurisdiction the responsibility for conducting oversight of certain programs of the Environmental Protection Agency ("EPA"). To that end, the Committee is interested in gaining a better understanding of EPA's environmental justice policy and the process used to develop the interim guidance for that policy …
>
> In recent weeks, newspaper articles in *The Detroit News* on April 19 and 26, 1998 have identified the existence of certain reports and EPA documents regarding EPA's environmental justice policy, which *The Detroit News* reportedly has in its possession and which raise questions about the representations made by EPA to the Committee to date … For example, it was reported in the April 19 article that EPA documents reveal that "state regulators were deliberately shut out of the plan because they 'might slow down the process.'" In that same article, *The Detroit News* also reported that EPA documents showed that the Agency's decision to issue its proposal as guidance was designed—at least in part—to avoid requirements that agencies perform a cost-benefit analysis on certain regulations.
>
> These articles also raise concerns that go beyond the development process to the merits of EPA's interim guidance. The April 19 article reports that *The Detroit News* has obtained confidential EPA documents that acknowledge the government's awareness of the potential damage this policy could have on economic development and urban revitalization in our inner cities. In addition, the April 26 article identifies two studies commissioned by EPA in 1992 and 1993 which found, according to EPA staff, that there was little—if any—basis for believing minorities were exposed to more pollution because of their race … Most troubling, however, is the assertion in the April 26 article that "[l]awyers for the EPA and Justice Department even have challenged the legal underpinnings of the whole policy, arguing the plan is based on a flawed interpretation of the 1964 Civil Rights Act."
>
> In light of these articles, I am concerned that the Committee has not received a full accounting of EPA's environmental justice policy in briefings to date, and therefore I am requesting another briefing from EPA on this important issue.

For further information, see "New Materials and Publications."

NCSL Working Group Membership/Attendance

Attendance

State Legislators and State Legislative Staff

Idaho	Rep. Jack Barraclough*
Nevada	Sen. Jack Regan
North Carolina	Rep. George Miller
Ohio	Sen. Gary Suhadolnik**
	Sen. Charles Horn*
Texas	Rep. John Hirshi
Utah	Mark Bleazard*
Virginia	Del. Gladys Keating
Washington	Rep. Shirley Hankins*
Washington	Andrea McNamara
Wyoming	Sen. Robert Peck*

Other State Officials

Northwest Compact/ Washington	Michael Garner
Texas Compact	Lawrence Jacobi

State Organizational Representatives

LLW Forum/Afton Associates	Cynthia Norris*
National Governors' Association	Tom Curtis*

NCSL and NLLWMP Staff

NCSL	Jeff Dale*
NCSL	Cheryl Runyon*
NLLWMP	Sandra Birk*
NLLWMP	William Newberry

Other Interested Parties

Center for Energy and Economic Development (GA)	George Bullock
Chem-Nuclear Systems	George Antonucci
Davis, Wright, Tremaine (representing Envirocare)	Lynda Brothers
Entergy, Inc.	John Etheridge
EnviroIssues	Pat Serie
Nuclear Energy Institute	Paul Genoa
US Ecology	Barry Bede
Yankee Co.	Bill Riethle*

** *Chair, LLRW Working Group*
* *LLRW Working Group member*

Additional Working Group Members

Besides those in attendance at the meeting, the following persons are members of the LLRW Working Group:

State Legislators and State Legislative Staff

Arkansas	Sen. James Scott
California	Assemblyman Keith Olberg
Colorado	Sen. Ken Arnold
Connecticut	Rep. Edward Graziani
Illinois	Sen. William Mahar
Indiana	Sen. Beverly Gard
Iowa	Rep. Sandy Griener
Kansas	Rep. Carl Holmes
Michigan	Rep. James Middaugh
Nebraska	Sen. Chris Beutler
	Sen. Don Preister
Nevada	Assemblyman Bob Price
New Mexico	Rep. G. X. McSherry
New Hampshire	Sen. Richard Russman
New York	Assemblyman Martin Luster
	Sen. James Seward
North Carolina	Rep. Joe Hackney
	Rep. John Nichols
Ohio	Rep. William Schuuck
Oklahoma	Sen. Paul Muegge
Pennsylvania	Terrance Fitzpatrick
Puerto Rico	Sen. Freddy Acevedo
South Carolina	Sen. Thomas Moore
Texas	Sen. John Montford
Utah	Sen. Craig Peterson
Virginia	Del. Taylor Murphy
Wisconsin	Sen. Brian Burke
Wyoming	Sen. Robert Peck

Other Interested Parties

Association of Waste Hazardous Materials Transporters	Cynthia Hilton
DOE Office of Congressional and Intergovernmental Affairs	Charles Pray
Morgan, Lewis & Bockius (DC)	Don Silverman
North Carolina, Governor's Washington Office	Jim McClesky
U.S. House of Representatives, Resource Committee	Deborah Lanzone

—CN

States and Compacts

Rocky Mountain Compact

On June 1, 1998, the Rocky Mountain Low-Level Radioactive Waste Board will hold a hearing on a proposed amendment to the board's rules. The change would clarify that NORM waste from oil and gas production within the Rocky Mountain Compact region may be placed in oil and gas wells without designating such wells as regional facilities.

The Rocky Mountain Compact legislation includes NORM/NARM in its definition of low-level radioactive waste and generally prohibits low-level radioactive waste from being disposed of within the region except at a designated regional facility.

For further information, contact Leonard Slosky of the Rocky Mountain Board at (303) 825-1912.

—CN

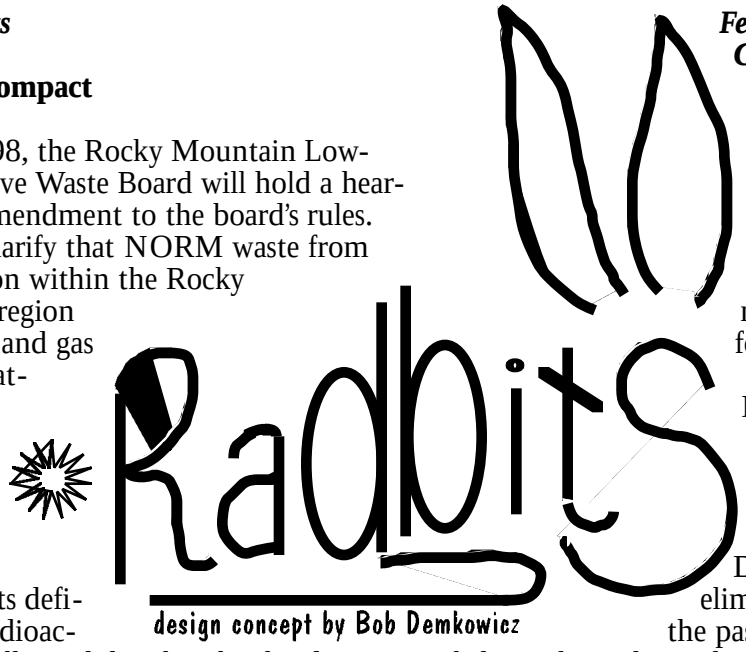
International

On April 24, the U.S. Nuclear Regulatory Commission approved a license for DSSI to import liquid low-level radioactive waste from Canada, process it, and then return the resultant ash back to Canada. NRC is currently considering three other license applications—one each from Chem-Nuclear, Allied Technologies, and GTS Duratek—to import waste from a nuclear reactor in Taiwan for processing.

—TDL

Recent press reports indicate that, on March 10, the cabinet of the Marshall Islands government authorized the "execution of the agreement with Enviro-Safe Technologies, Inc. to conduct a feasibility study regarding the establishment and operation of a low-level radioactive waste disposal facility in the Marshall Islands, subject to final review and amendments by the Office of the Attorney General." According to the press accounts, the feasibility study is being conducted at no cost to the government.

—TDL



Federal Agencies and Committees

U.S. Department of Energy

House Republicans have structured a proposed $1.7 trillion non-legislative spending plan for FY '99 that would include the elimination of the Departments of Commerce and Energy. Many of their functions, like nuclear waste storage, would be transferred to other agencies. DOE has been targeted for elimination several times over the past few years, but the proposals have always been abandoned due to resistance from the administration and vocal members of Congress. The plan, which contains proposals for specific tax and spending cuts, is advisory and does not require the President's signature.

—TDL

On May 18, DOE announced a proposal in response to lawsuits filed by nuclear utilities because of the federal government's failure to accept spent nuclear fuel by January 1998. The deadline is contained in standard contracts which the department and all U.S. nuclear utilities previously signed.

The proposal, which is an attempt to avoid billions of dollars in potential damage claims that courts might impose on DOE, would allow those utilities that settle their legal claims against DOE to postpone a portion of their payments into the Nuclear Waste Fund. The utilities would be allowed to invest the money that they are saving and then repay the fund at a five-percent interest rate when the department is ready to begin accepting waste. Some of the extra money available could be used to cover costs of on-site storage incurred as a result of not being able to dispose of the waste beginning in 1998.

DOE has asked the utilities to respond by June 15.

—TDL

State and Compact Events

June	Event	Location/Contact
Appalachian Compact/ Pennsylvania	Pennsylvania LLRW Advisory Committee meeting	Harrisburg, PA Contact: Rich Janati (717)787-2163
	Appalachian States LLRW Commission annual meeting	Harrisburg, PA Contact: Marc Tenan (717)234-6295
Central Compact/ Nebraska	Central Interstate LLRW Commission annual information forum	Lincoln, NE Contact: Don Rabbe (402)476-8247
	Central Interstate LLRW Commission annual meeting: ratify actions taken at previous telephone meetings; amend the export application fee schedule	Lincoln, NE Contact: Don Rabbe
Rocky Mountain Compact	Rocky Mountain LLRW Board regular meeting: public hearing on a board rule amendment to clarify that NORM waste from oil and gas production in the compact region may be placed in oil and gas wells without designating such wells as regional facilities under the compact; consideration of interregional agreement on waste processing	Albuquerque, NM Contact: Tracie Archibold (303)825-1912
Northeast Compact/ Connecticut/ New Jersey	Northeast Interstate LLRW Commission meeting: updates of commission work in progress, LLRW management in the member states, update of out-of-region LLRW activities	Norwalk, CT Contact: Janice Deshais (860)633-2060
	Connecticut Hazardous Waste Management Service Board of Directors special meeting to act on the Plan of Operations and Budget for FY ’98-99	Hartford, CT Contact: Ronald Gingerich (860)244-2007
Northwest Compact/ Washington	Northwest Interstate LLRW Commission meeting: member state reports; US Ecology activities overview; Envirocare activities overview; summary of LLW Forum meeting	Seattle, WA Contact: Mike Garner (360)407-7102
Southwestern Compact/ California	Southwestern LLRW Commission meeting	Costa Mesa, CA Contact: Don Womeldorf (916)323-3019
Massachusetts	Massachusetts LLRW Management Board meeting	Boston, MA Contact: Carol Amick (617)727-6018 x25

New York City v. Clinton
Snake River Potato Growers v. Rubin

Supreme Court Hears Oral Argument re Line-Item Veto Challenge

On April 27, the U.S. Supreme Court heard oral arguments in two consolidated cases posing a challenge to the constitutionality of President Bill Clinton's use of the line-item veto authority previously granted to him by the U.S. Congress. After hearing arguments, the Court took the issue under advisement. A ruling is due by the end of June.

This case may be of interest to Forum Participants not only for its impact on federal agency budgetary matters, but also for its potential impact on the President's ability to veto state-sponsored legislation that could be attached to appropriations measures.

Arguments

During the hour-long arguments, the U.S. Solicitor General asserted that the Line-Item Veto Act is constitutional and that it does not impermissibly upset the balance of power among different branches of the government.

> What the president is doing is not repealing a law that Congress has enacted, but he is exercising a discretionary authority that Congress has granted him.

The Solicitor General also argued that the cases should be dismissed because the parties bringing them do not have standing. Standing is a legal doctrine which provides that a party must have a sufficient stake in an otherwise justiciable controversy to be eligible to bring suit. In the instant cases, the Solicitor General argued that none of the plaintiffs will be directly affected by the law's operation.

The plaintiffs' attorneys, however, contended that the law violates the constitutional process for turning a piece of legislation into law and allows the president to produce "a truncated statute that Congress didn't pass." At least some of the justices seemed to agree, questioning whether Congress may delegate its power.

Background

The Line-Item Veto Act (Pub. L. No. 104-130) was passed by Congress in 1996. It gives the President the authority to cancel in whole, at any time up to five days after signing a bill into law, any dollar amount of appropriation, any item of new deficit spending, or any limited tax benefit contained in the bill.

Shortly after the act's passage, six members of Congress filed suit in the U.S. District Court for the District of Columbia challenging the act as unconstitutional. The court agreed, striking down the law on April 10 as violative of the separation of powers doctrine of the U.S. Constitution. The Supreme Court reversed the lower court's decision, however, dismissing the action upon a finding that the appellees lacked standing to file suit. (See *LLW Notes*, August/September 1997, pp. 24–25.)

The current cases were filed in the U.S. District Court for the District of Columbia in 1997. The district court issued an opinion on February 12, 1998, declaring the President's line-item veto authority to be unconstitutional. As the act provides for a direct, expedited appeal to the U.S. Supreme Court, the defendants filed a jurisdictional statement asking the Court to note probable jurisdiction shortly after the district court rendered its decision.

—TDL

Ysleta Del Sur Pueblo v. Jacobi

Texas Court Refuses to Dismiss Suit re Aboriginal Rights to LLRW Site

On April 30, the U.S. District Court for the Western District of Texas issued an order denying the defendants' motion to dismiss a lawsuit involving claims of aboriginal rights to the proposed site for a low-level radioactive waste disposal facility in Hudspeth County, Texas. The suit was filed by Ysleta Del Sur Pueblo (Pueblo), a federally recognized Indian tribe, on March 4, 1998. It seeks to compel the Texas Low-Level Radioactive Waste Disposal Authority to vacate and remove all of the Authority's equipment from the planned site. Members of the Authority's Board of Directors and its General Manager, Lawrence Jacobi, are named as defendants to the action.

The Complaint

In the action, the Pueblo asserts an aboriginal right to possess the land upon which the Texas Authority proposes to site a disposal facility and claims that this aboriginal right supersedes any claims to the land made by the defendants. In support of its action, the Pueblo recounts the history of the tribe, noting that it was originally situated in Isleta, New Mexico, but received population accretions from other pueblos, including the aboriginal occupants of the subject property.

As a basis for its claim, the Pueblo points to provisions in the Treaty of Guadalupe Hidalgo, dated February 2, 1848, which the tribe claims guarantees the protection of title held by Mexican citizens to lands in the United States. The Pueblo also relies upon the Indian Non-Intercourse Act, which restricts the conveyance of lands held by Native Americans.

The Pueblo is requesting the following relief from the court:

- ejection of the defendants from the subject property;
- an order for the defendants to remove their equipment from the subject property;
- court costs and attorneys fees; and
- such other relief as the court deems appropriate.

House Votes to Request Conference with Senate on Texas Compact

On May 12, the U.S. House of Representatives approved, by voice vote, a motion to request a conference with the U.S. Senate on the Texas Compact consent legislation—H.R. 629 and S. 270. A conference is required in order to reconcile differences in the versions of the bill that were previously approved by the House and Senate earlier this year. (See *LLW Notes*, August/September 1997, pp. 1, 38–39.)

Named to the conference committee were:

Thomas Bliley, Jr. (R-VA)
Dan Schaefer (R-CO)
John Dingell (D-MI)
Ralph Hall (D-TX)
Joe Barton (R-TX)

All five representatives named to the conference committee are members of the House Commerce Committee, which has jurisdiction over the bill. Bliley is Chair of that committee, and Dingell the ranking minority member. Schaefer and Barton both chair commerce subcommittees—Energy and Power, and Oversight and Investigations, respectively. Hall is the Ranking minority member on the Energy and Power subcommittee. Barton and Hall were both sponsors of the bill, H.R. 629, which was introduced on February 6, 1997.

The Senate is expected to follow a similar procedure shortly, after which time a conference will take place.

—TDL/RTG

Motion to Dismiss

The defendants argued that the case should be dismissed due to a lack of subject matter jurisdiction and due to the plaintiff's failure to join the State of Texas as a party pursuant to Rule 19. Subject matter jurisdiction refers to a court's competence to hear and determine cases of the general class to which the proceedings in question belong. Rule 19 requires that, in most cases, parties who are "indispensable" to an action must be named as a party thereto.

The defendants cite the following three reasons in support of their contention that the court does not have subject matter jurisdiction and that the state must be named as a party to the action:

- the State of Texas is the real party in interest in this action because the Texas Low-Level Radioactive Waste Disposal Authority, on behalf of the State of Texas, is the title owner of record of the property at issue;

- the State of Texas has not consented to be sued and has not waived its Eleventh Amendment immunity to suit; and

- it appears from the face of the complaint that the State of Texas is an indispensable party to this action that must be joined in accordance with Rule 19, but that cannot be joined due to its Eleventh Amendment immunity from suit.

The Eleventh Amendment divests federal courts of jurisdiction to hear suits against states. Actions against a state or state agency are barred unless Congress has abrogated the state's immunity or the state has expressly waived its immunity to suit in federal court. Congress must make its intention to abrogate a state's immunity "unmistakably clear." Furthermore, Eleventh Amendment immunity cannot be circumvented merely by naming an individual government official as a party defendant rather than the state itself.

The defendants also claim that, on two separate occasions, the Supreme Court has expressly held that Congress lacks the authority under the Indian Commerce Clause to abolish states' Eleventh Amendment immunity. The Indian Non-Intercourse Act, which is the statute under which the plaintiffs claim jurisdiction, was enacted under the Indian Commerce Clause.

Court's Order

In denying the defendants' motion to dismiss, the district court specifically found that the absence of the State of Texas as a party to the action does not prejudice the state's interests or those of the other parties. Moreover, the court held that even if the state were joined in the action, Eleventh Amendment immunity would not apply.

In so holding, the court focused on a legal fiction created by the Supreme Court known as the *Ex parte Young* exception to Eleventh Amendment immunity. Under this exception, a party may maintain a suit against a state if the action seeks prospective relief against state officials who act in violation of the Constitution or federal laws. The court found that the *Ex parte Young* exception applies to this case because the plaintiffs are not seeking to completely divest the state of its control over the land in dispute, but rather are seeking prospective declaratory and injunctive relief to preclude the defendants from violating the Pueblo's use and enjoyment of the land. According to the court, "[t]he Pueblo validly seeks access to the federal judicial system in order to assert its aboriginal property rights."

In so ruling, the court specifically rejected the defendants' argument—contained in their motion to dismiss—that the *Ex parte Young* exception does not apply to the action at hand. The defendants argue that this is not an action for prospective relief, but rather an action to quiet title of the state to the property at issue. The court rejected this argument, noting that the Pueblo clearly concedes the state's civil and criminal jurisdiction over the land and that the disputed land is not a special land that has been historically considered to be uniquely sovereign.

The court did acknowledge, however, that the *Ex parte Young* exception "has drawn quite a deal of criticism (and confusion)." But the court finds the exception to represent "a balance between the Eleventh Amendment goal of protecting states from suit and the need to prevent violations of federal law." To date, the exception has been applied on a case-by-case basis and has been described by the Supreme Court as an "exercise in line-drawing."

—TDL

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

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 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 also proposed that the oversight group could include or substitute DOE's Sandia National Laboratories, the U.S. Nuclear Regulatory Commission, 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 to approve a privately owned facility for DOE waste disposal before the award of a contract. Shortly thereafter, on August 29, 1997, WCS filed suit.

The Issues WCS contends that DOE senior officials have not carefully or reasonably considered the company's 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 company's proposal causes WCS enormous economic damage, stifles competition, and perpetuates an existing monopoly.

The rejection, according to WCS, is unlawful on the grounds that 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 radioactive wastes.

In conducting its review, the court determined that although the Atomic Energy Act requires "persons" to obtain a license from NRC (or from a state if such authority has been delegated thereto) 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. Attorneys General from sixteen states filed a motion for leave to file an amici brief on behalf of DOE, but the court denied the motion on March 11, 1998. The Attorney General of the State of Texas filed a separate motion for leave to file an amicus brief, but the court denied that motion, too.

—TDL

Waste Control Specialists, L.L.C. v. U.S. Department of Energy (continued from page 1)

Issues

Agency Deference In framing the issues, the appellate court noted that both parties agree that WCS' proposal for DOE regulation of its site could be lawfully implemented, but that the parties disagree on whether DOE has the discretion to require a state or NRC license as a prerequisite for bidding on a DOE disposal contract. The court specifically found that DOE is not entitled to deference on its policy requiring such a license because the policy is only set forth in a memorandum which is not the product of a formal rulemaking, the memorandum does not address the issue of utilizing self-regulation of a site in place of state or NRC licensing, and DOE's interpretation of the policy was not enunciated prior to the initiation of the lawsuit.

Agency Discretion In reviewing the district court's issuance of a preliminary injunction, the appellate court agreed with the lower court's finding that "[t]he existence of a state or NRC license is neither a necessary prerequisite nor a sufficient basis for the receipt by a DOE contractor of low-level or mixed radioactive wastes for disposal at a private site." However, the appellate court determined that this finding does not in and of itself justify the granting of the preliminary injunction. Instead, the appellate court held that the real issue is whether DOE may require a state or NRC license as part of the grounds for awarding a disposal contract.

If DOE chooses to regulate, or "control", the private waste disposal sites, then the sites are exempt from NRC and state licensing requirements. Where, however, DOE does not exercise such control, the NRC and the agreement states retain their power to regulate commercial sites providing a service to DOE. Nothing in the statute indicates that DOE must exercise regulatory authority over such sites.

Appellate Court's Decision

The appellate court held that the issue of whether or not a state or NRC license is required for the acceptance of DOE waste at a private facility depends on who "controls" (or regulates) the site—DOE or the contractor. The court determined that DOE control of the site is discretionary—DOE can not be compelled to exercise regulatory authority over a site.

> If DOE chooses to regulate, or "control", the private waste disposal sites, then the sites are exempt from NRC and state licensing requirements. Where, however, DOE does not exercise such control, the NRC and the agreement states retain their power to regulate commercial sites providing a service to DOE. Nothing in the statute indicates that DOE must exercise regulatory authority over such sites. (citations omitted)

Accordingly, the court found that while WCS would not need a state or NRC license to accept DOE waste at its Texas facility should DOE choose to "control" or regulate the site, the court determined that—contrary to WCS' assertions—DOE can not be compelled to do so. In other words, DOE has the discretion to determine whether to regulate the WCS site. If DOE determines not to regulate the site, then WCS can be required to obtain an NRC or agreement state license.

The appellate court rejected alternative arguments by WCS that other statutes—such as DOE's enabling statute in the Department of Energy Organization Act or the overall federal procurement policy—mandate that DOE must facilitate competition by regulating private facilities. According to the court, "[n]either of these statutes ... direct the DOE to promote competition to the exclusion of other concerns, such as safety and state involvement."

Court Action and Next Steps Based on its findings, the appellate court reversed the grant of the preliminary injunction by the district court and ordered dismissal of the lawsuit against DOE. In a press release issued on May 19, however, WCS indicated that it "will likely petition the Appeals Court for rehearing to bring to the Court's attention information that WCS believes warrants remand of the case to the District Court, rather than dismissal." WCS has 45 days from the issuance of the decision to file a request for rehearing.

continued on page 20

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

Members of Congress on the Issue

On March 30, 1998, the Utah congressional delegation wrote to Energy Secretary Federico Peña about "grave consequences" that the WCS lawsuit could have on the department's nuclear cleanup program and on the operation of commercial sites currently accepting DOE low-level radioactive waste for disposal. In addressing WCS' motion for supplemental injunctive relief, the letter states as follows:

> The stakes on this issue were raised significantly with the recent motion by Waste Control Specialists to file an Amended Complaint that would greatly expand the existing injunction to prevent the shipment of all DOE waste to facilities that are licensed by the NRC and agreement states. As summarized in recent trade press articles, this proposed dramatic expansion of the underlying injunction could "wreak havoc" because it would "shut down DOE's waste program." Compliance agreements for cleaning up several DOE nuclear sites could not be met without the use of existing NRC-licensed commercial disposal sites. Further, waste shipments to commercial disposal sites could be stopped from urban and residential sites under the Formerly Utilized Sites Remedial Action Program (FUSRAP) managed by the Army Corps of Engineers. One such licensed commercial disposal site in our state—Envirocare—would lose a substantial portion of its business resulting in workforce disruptions and a significant adverse economic impact in Utah.

The letter concludes by encouraging DOE "to continue its efforts to vigorously contest this proposed expansion of the Texas injunction" and by urging the department and other federal agencies "not to impose a de facto moratorium on waste shipments while the court action is pending."

The five signatories to the letter are Senator Robert Bennett (R), Senator Orrin Hatch (R), Representative Merrill Cook (R), Representative James Hansen (R), and Representative Chris Cannon (R).

—TDL

Amendment Expected to Be Offered to Defense Authorization Bill re DOE Use of Commercial Facilities

It is anticipated that an amendment will be offered to the Defense Authorization bill that would restrict the ability of the U.S. Department of Energy to dispose of its radioactive waste at commercial facilities absent a state- or NRC-issued license. The anticipated amendment is expected to be offered in response to recent court rulings in *Waste Control Specialists v. U.S. Department of Energy* which indicate that such licenses are not currently required by law if DOE "controls" the facility. The Defense Authorization bill is expected to be considered at the end of May.

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	April 5, 1998 June 17, 1998	The City of Los Angeles filed an amicus curiae brief with the district court in support of the Interior Department and Secretary Babbitt. Oral arguments are scheduled on defendants' motion to dismiss the action.
Cohn v. Connecticut Hazardous Waste Management Service (See *LLW Notes*, April 1994, p. 25.)	Claims that the Connecticut Hazardous Waste Management Service's selection process resulted in a taking of private property without due process and just compensation.	Connecticut Superior Court, Judicial District of Hartford/New Britain at Hartford	March 1998 April 21, 1998	The Board of Directors of the Hazardous Waste Management Service voted to accept a stipulation agreement whereby the plaintiff would withdraw the action in exchange for certain consideration. The court accepted the stipulation agreement and entered it on the docket.
New York v. Clinton and *Snake River Potato Growers v. Rubin* (See related story, this issue.)	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	April 27, 1998	Oral arguments were held.

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 holding that DOE must take title to commercial spent fuel by 1998 and allowing state regulators to place contributions to the Nuclear Waste Fund into escrow.	United States Court of Appeals for the District of Columbia Circuit	May 7, 1998	The Court of Appeals refused to order DOE to begin accepting commercial spent fuel and instead directed plaintiffs to seek contractual remedies.
Santini v. Connecticut Hazardous Waste Management Service (See *LLW Notes*, October 1994, p. 9.)	Involves a claim that the Connecticut Hazardous Waste Management Service's site designation prevented the plaintiffs from completing property development.	Connecticut Superior Court, Judicial District of Hartford/New Britain at Hartford	February 20, 1998 to March 5, 1998 April 22, 1998 April 29, 1998 August 27, 1998	The trial was held. Post-trial briefs were filed. Response briefs were filed. Deadline for the court to issue its decision.
Stilp v. Hafer (See *LLW Notes*, February 1998, pp. 22, 25.)	Challenges the legislative procedures used in Pennsylvania to pass Act 12 of 1988, known as the Low-Level Radioactive Waste Regional Disposal Facility Act.	Supreme Court of the Commonwealth of Pennsylvania	February 25, 1998	The Appalachian States Low-Level Radioactive Waste Commission requested leave to file an amicus curiae brief in support of the Commonwealth of Pennsylvania.
US Ecology v. United States and *California Department of Health Services v. United States* (See *LLW Notes*, April 1997, pp. 18–19.)	Involves a breach of contract claim for failure to sell federal land in Ward Valley to California for use in siting a low-level radioactive waste disposal facility.	United States Court of Federal Claims	May 8, 1998	Court issued an order denying defendant's motion for additional briefing on California's authority to enter into a contract.

Case Name	Description	Court	Date	Action
Waste Control Specialists, LLC v. U.S. Department of Energy (See *LLW Notes*, March 1998, pp. 25–30.)	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	Not Scheduled	The court postponed a hearing re WCS' February 17 motion for supplemental injunctive relief pending appellate court hearing and decision.
		United States Court of Appeals for the Fifth Circuit	April 1998	The Court of Appeals denied a request by the State of Texas to file an amicus curiae brief.
			April 7, 1998	A hearing was held to address DOE's challenge to the district court's issuance of a preliminary injunction.
			May 14, 1998	Appellate court issued an order reversing the preliminary injunction and dismissing the case.
			June 29, 1998	Deadline for filing a petition for rehearing.
Yselta del Sur Pueblo v. Jacobi (See related story, this issue.)	Involves claims of aboriginal rights to the planned site of a low-level radioactive waste disposal facility in Hudspeth County, Texas.	United States District Court for the Western District of Texas	March 4, 1998	Complaint was filed in district court.
			March 1998	Defendants filed a motion to dismiss the action.
			April 30, 1998	The district court issued an order denying defendants' motion to dismiss the action.

NAS/NRC Board on Radioactive Waste Management Meets in Washington, D.C.

On March 19–20, the Board on Radioactive Waste Management (BRWM) of the National Academy of Sciences' National Research Council met in Washington, D.C. The specified theme for the open session, which was held on March 19, was "New Developments in National Radwaste Management Activities and Policies." During this session, the board heard from several different speakers on a variety of topics, including a presentation by Holmes Brown, LLW Forum Facilitator, on the status of commercial low-level radioactive waste disposal activities in the states and compacts.

The following items constituted the remainder of the BRWM agenda for the open session:

- spent fuel and high-level waste disposal, Yucca Mountain
- weapons plutonium disposition
- DOE weapons complex cleanup
- National Research Council, Board on Radiation Effects Research
  - BEIR-VII: effects of low-level ionizing radiation
  - NORM

For further information, contact the BRWM at (202)334-3066.

Current Members of the BRWM

Michael Kavanaugh *Chair*
Malcolm-Pirnie, Inc.

John Ahearne *Vice-Chair*
Sigma Xi, The Scientific Research Society
Duke University

Robert Budnitz
Future Resources Associates, Inc.

Andrew Caputo
Natural Resources Defense Council

Mary English
Energy, Environment & Resources Center
The University of Tennessee

Darleane Hoffman
Lawrence Berkeley Laboratory

James Johnson, Jr.
School of Engineering
Howard University

Roger Kasperson
Geography and Government
Clark University

James Leckie
Department of Civil Engineering
Stanford University

Jane Long
Mackay School of Mines
University of Nevada, Reno

Charles McCombie
Consultant, Switzerland

Robert Meyer
Keystone Scientific, Inc.

William Mills
Oak Ridge Associated Universities (retired)

D. Warner North
NorthWorks, Inc.

Martin Steindler
Argonne National Laboratory (retired)

John Taylor
Electric Power Research Institute, Inc. (retired)

Mary Lou Zoback
U.S. Geological Survey

—RTG

Central Compact/Nebraska

LLRW Legislation Enacted in Nebraska

On April 14, Nebraska's unicameral legislature adopted a bill, LB 1174, to alter the state's Low-Level Radioactive Waste Disposal Act and to require a study concerning compact membership. The bill was subsequently signed by Nebraska Governor E. Benjamin Nelson on April 18. Because the bill was adopted on an emergency basis, it became effective immediately upon the Governor's approval.

Specific provisions of the new legislation are discussed below.

Cash for Host Community Improvements

Funding for the Community Improvements Cash Fund already established in state law is extended one more year in the amount of $300,000. As before, moneys for the fund are to be collected by the Central Compact from non-host member states and remitted to Nebraska for distribution to incorporated municipalities within ten kilometers of the proposed disposal site and to the host county, which distributes the funds to political subdivisions in the county.

Postponement of Construction During Public Education Program

State statute is amended to require that "[i]f and until" a low-level radioactive waste disposal facility is licensed, "no further construction contracts shall be let or actual construction begun, other than filling the identified wetland, before the Department of Environmental Quality (DEQ) has conducted a six-month public education program to inform the people of the [host] county and the people of the state of the exact characteristics of the facility to be built …"

Host state Senators indicated during legislative debate that facility development would not necessarily be delayed by the temporary construction moratorium, because it would occur during an anticipated case hearing process on any licensing decision.

The wetland referenced in the legislation is a 0.98-acre depression on the site of the proposed facility. Filling the wetland was ruled permissible by the District Court of Lancaster, Nebraska, in February. (See *LLW Notes*, March 1998, p. 19.) The State of Nebraska is appealing this ruling.

Study of Compact Withdrawal

The Executive Board of the Legislative Council, with the Natural Resources Committee of the legislature, is directed to "conduct an interim study on the legal consequences of withdrawing from the Central Interstate Low-Level Radioactive Waste Compact."

A companion bill approved by the legislature and signed by the Governor appropriates $150,000 for the study from surcharge rebate funds already transferred from the Central Compact to the Nebraska Department of Environmental Quality.

Other Legislative Proposals

The legislation enacted represents a compromise with supporters of two other legislative initiatives: LB 1023, a proposed ten-year moratorium on facility construction after licensing (See *LLW Notes*, February 1998, p. 10), and LB 552, a bill to withdraw the state from the compact. Neither of these was approved.

The bills are available on the State of Nebraska's web site at http://www.unicam.state.ne.us/Bills.htm.

—CN

Regulators Reviewing Comments

Nebraska's Low-Level Radioactive Waste Program is currently reviewing public comments on the *Draft Safety Evaluation Report* and the *Draft Environmental Impact Analysis* for the proposed low-level radioactive waste disposal facility in Boyd County. The program released the documents in October 1997, commencing a comment period that culminated in public hearings on February 2-5, 1998. (See *LLW Notes*, Winter 1997, p. 3.) Program staff will prepare responses to the comments as necessary and incorporate them into the documents, which will be revised and issued as the *Environmental Impact Analysis* and the *Safety Evaluation Report*. As of press time, no date for issuance of these documents had been scheduled by the program.

For further information, contact Carla Felix of the Nebraska DEQ at (402)471-3380.

Northwest Compact/Washington

Utah Issues Draft License for Envirocare

The Executive Secretary of the Utah Radiation Control Board has made an initial decision to relicense the commercial low-level radioactive waste disposal facility operated by Envirocare of Utah. In conjunction with this decision, the Executive Secretary and staff of the Division of Radiation Control in the Utah Department of Environmental Quality have prepared both a draft *Safety Evaluation Report* and a draft radioactive materials license for the facility.

Public Comment A public comment period on the relicensing and the related documents began on April 14. As of May 14, public comment is also being sought on a major modification to Envirocare's groundwater discharge permit, which must be revised to reflect changes resulting from the relicensing process. Combined public hearings on these matters will be held in Salt Lake City and Tooele County—location of the Envirocare facility—on June 4. The deadline for all comments is June 15, 1998.

License Changes Significant differences between Envirocare's existing license and draft license include

- higher concentration limits (up to class A limits) on some radionuclides,
- uniform cover design,
- determination of waste acceptability on a per container basis at receipt,
- enhancements to construction quality assurance/control procedures, and
- allowance of receipt of non-listed radionuclides with concentrations up to 500 picocuries per gram on a case-by-case basis.

Background Envirocare submitted a license renewal application to the Division of Radiation Control on January 29, 1996. As part of the application review process, state regulators subsequently issued four rounds of interrogatories, to which the company responded. The complete application now consists of seven three-inch binder volumes.

Division of Radiation Control officials were assisted in their extensive review of the license application by Rogers and Associates of Salt Lake City, Utah.

For further information, contact Bill Sinclair of the Division of Radiation Control at (801)536-4484. Copies of the draft Safety Evaluation Report and the draft Radioactive Materials License may be ordered from the Division of Radiation Control at a cost of $20.00 and $6.50, respectively.

A copy of the draft license is also available on the Division of Radiation Control's web site at

http://www.eq.state.ut.us/eqrad/drc_doc.htm.

—CN

Utah Legislature Votes to Study Taxes for In-State Disposal Facilities

During the 1998 general session, the Utah legislature enacted S.B. 144, which provides for legislative study of fees, taxes, and siting for commercial waste facilities. The pertinent section of the act reads as follows:

> Section 1. Legislative study of commercial waste disposal issues.
>
> (1) Since the Legislature has discovered significant issues related to commercial waste facilities in the state, the Legislature finds a detailed analysis is in order related to fees, taxes, and siting concerning these facilities.
>
> (2) (a) It is the intent of the Legislature that during the 1998 Legislative Interim the Revenue and Taxation Interim Committee shall study the issues of fees, taxes, and siting regarding commercial waste disposal facilities in the state.
>
> (b) This study shall be conducted under the direction of and in consultation with the Legislative Management Committee, with the interim committee making a final report to the Legislative Management Committee not later than October 31, 1998.

In accordance with the legislation, the Revenue and Taxation Interim Committee has met several times to take testimony on this issue and will continue to do so.

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

—CN

U. S. Environmental Protection Agency

EPA Finds No Serious Problems at Envirocare

Waste Shipments to Continue

On April 13, the U.S. Environmental Protection Agency announced that their nine-month evaluation of the Envirocare of Utah facility found "no serious non-compliance with environmental regulations." The facility can therefore continue to receive shipments from EPA, which sends large volumes of wastes from Superfund sites and other hazardous waste cleanup projects to Envirocare. EPA's review was conducted by the agency's Denver-based National Enforcement Investigations Center.

According to a prepared statement by EPA project manager Carl Daly, investigators did discover 18 matters that require further attention, but these results are "consistent with regulatory findings at similar waste management facilities across the country." Eight of the issues, involving mainly record-keeping and testing, technically could be considered non-compliance, Daly said, but "whether they are depends partly on what Envirocare has done since the conditions were noted and partly on any enforcement response" from Utah regulators or EPA. The remaining issues involve less important matters. Daly indicated that EPA would provide its findings in writing to the Utah Department of Environmental Quality "for their consideration as to possible follow-up."

Because of the potential for enforcement action by Utah, EPA has not publicly released the list of specific problems. The agency has, however, categorized them as falling generally into the following areas: monitoring or inspection (5), testing of wastes (5), records management (3), treatment of wastes (3), and miscellaneous (2). Daly described the problems as "things the facility would want to correct," but said that they "pose no immediate threat to public health or the environment."

Subsequent to EPA's announcement, Envirocare President Charles Judd issued a statement expressing pleasure with the results of the investigation and asserting that the company had "made improvements in the management of [its] mixed waste operations throughout EPA's evaluation."

—CN

U.S. Nuclear Regulatory Commission (NRC)

NRC Rejects Envirocare's SNM License Application

In a March 4 letter, John Hickey, Chief of NRC's Low-Level Waste and Decommissioning Projects Branch, declared that NRC is rejecting Envirocare's license application for special nuclear material. The letter, which is addressed to Kenneth Alkema, Director of Government Affairs for Envirocare of Utah, states:

> The application does not contain adequate information to provide a basis for NRC to review Envirocare's operations for compliance with 10 CFR Part 70. As described in the enclosed acceptance review, we identified significant deficiencies and omissions. The applicant should consider the enclosed list of deficiencies and information in the draft [Standard Review Plan (NUREG-1520)] as guidance in revising the application. Upon submission of a revised application, we will conduct an additional acceptance review.

Under NRC regulations, Envirocare may submit a revised license application for NRC review.

Background: License Application

On December 5, 1997, Envirocare of Utah filed an application with the NRC for a license to increase the quantity of special nuclear material (SNM) that it can possess on site. (See *LLW Notes*, Dec. 1997, p. 19.) SNM includes plutonium, uranium 233, and uranium 235. Under federal regulations, private entities regulated by Agreement States are not allowed to possess and process more than 350 grams of uranium 235 prior to burial in a disposal cell without an NRC license.

Findings of Previous "Apparent Violation"

On June 26, 1997, the NRC issued a confirmatory order directing Envirocare of Utah to stop receiving shipments of waste containing uranium 235, except for those shipments that were en route on or before June 11. (See *LLW Notes*, July 1997, p. 35.) The action was taken in response to the results of a June 10 inspection of the facility, during which NRC staff determined that more than 2,400 grams of uranium 235 were being held in temporary storage at Envirocare.

In an April 21 letter to Envirocare of Utah President Charles Judd, Ellis Merschoff, the NRC Regional Administrator for NRC Region 4, transmitted the following account of an NRC inspection and investigation of Envirocare of Utah.

> This refers to the special inspection that was concluded on October 9, 1997, and the investigation conducted by NRC's Office of Investigations (OI) that was concluded on February 6, 1998, at the South Clive, Utah, disposal facility. The inspection and the investigation were initiated to review whether your South Clive facility was in possession of special nuclear material in excess of the limits specified in 10 CFR Part 150, and, if so, to determine whether there was willful violation of the NRC's regulations ...
>
> Based on the results of the inspection, one apparent violation, with three specific examples, was identified and is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. This apparent violation involves your possession of special nuclear material in quantities that exceeded the limits specified in 10 CFR 150.10 and 150.11 between May and September 1997. Although three specific examples were identified, it appears that similar noncompliance occurred on numerous occasions since 1995 ...
>
> Based on the investigation conducted by OI, the NRC is concerned that this apparent violation involves careless disregard for the NRC's regulatory requirements ...
>
> Because the State [of Utah] is also pursuing this issue, we plan, at this time, to postpone our decision regarding what enforcement action should be taken by the NRC until the conclusion of the State's enforcement process.

NRC's Demand for Information

The April 21 letter also demanded certain information "in order to have assurance that [Envirocare of Utah] will comply with NRC requirements given the potential willfulness involved." Specifically, the letter instructed Envirocare to identify

- the reason for the apparent violation, including the careless disregard; or, if contested, the basis for disputing the apparent violation, including the careless disregard aspect;
- the corrective steps that have been taken and the results achieved;
- the corrective steps that will be taken to avoid further violations; and
- the date when full compliance will be achieved.

Envirocare Statement re NRC's Findings

Following NRC's demand for information, Envirocare of Utah released the following statement.

> Envirocare of Utah has received a letter requesting information from the Nuclear Regulatory Commission (NRC) relating to its management of special nuclear material (SNM). The issues raised by the NRC are the same as those raised by the Utah Division of Radiation Control (DRC) last year, and the NRC's letter to Envirocare is a continuation of the process of resolving these issues.
>
> In 1992, Envirocare of Utah filed a petition with the NRC to clarify that the definition of SNM does not include material with low concentrations that pose no possible threat of criticality. As of this date no resolution has been reached.
>
> While NRC agrees that there is no risk of criticality with this material, they have not yet acted on the petition ... Until the petition is acted upon, it is Envirocare's intent to fully comply with existing regulation.
>
> The NRC identified "one apparent violation" but has delayed enforcement. No health, safety or security issues were involved ... Envirocare has been working with the DRC and the NRC to resolve any outstanding issues. This action is a normal part of the process to reach final resolution.

continued on page 30

NRC Policy re "Willfulness" and "Careless Disregard"

> Willful violations are by definition of particular concern to the Commission because its regulatory program is based on licensees and their contractors, employees, and agents acting with integrity and communicating with candor. Willful violations cannot be tolerated by either the Commission or a licensee. Licensees are expected to take significant remedial action in responding to willful violations commensurate with the circumstances such that it demonstrates the seriousness of the violation thereby creating a deterrent effect within the licensee's organization. Although removal of the person is not necessarily required, substantial disciplinary action is expected.
>
> Therefore, the severity level of a violation may be increased if the circumstances surrounding the matter involve careless disregard of requirements, deception, or other indications of willfulness. The term "willfulness" as used in this policy embraces a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements ... In determining the specific severity level of a violation involving willfulness, consideration will be given to such factors as the position and responsibilities of the person involved in the violation (e.g., licensee official or non-supervisory employee), the significance of any underlying violation, the intent of the violator (i.e., careless disregard or deliberateness), and the economic or other advantage, if any, gained as a result of the violation.

Source: "General Statement of Policy and Procedure for NRC Enforcement Actions" (NUREG-1600)

U.S. NRC (continued)

NRC re Envirocare Petition

In a letter dated May 14, Carl Paperiello, Director of NRC's Office of Nuclear Material Safety and Safeguards, addressed future NRC action on Envirocare's petition request. The following is excerpted from the letter, which was addressed to Charles Judd, President of Envirocare of Utah, Inc.

> This letter relates to your petition dated October 1, 1992, which requested a rulemaking to include a categorical exemption from the special nuclear material (SNM) mass limits in 10 CFR Part 150 for persons generating or disposing of low specific activity waste containing SNM not capable of forming a critical reaction. This letter also addresses your July 15, 1997, and August 11, 1997, letter to Chairman Jackson which requested that the rulemaking be expedited and that an exemption from the 10 CFR Part 70 licensing requirements be granted.
>
> The staff has consulted with the Commission regarding your petition. The Commission has directed the staff to focus its limited resources on review of your Part 70 license application. Therefore, rather than take further action on your 1992 petition request at this time, the staff intends to focus on review and final disposition of your license application, which we expect to receive shortly.

—LAS

For further information, see "New Materials and Publications."

Anderson/Semnani Conversations re Envirocare Dispute Made Public

Tapes of conversations between former Utah state regulator Larry Anderson and Envirocare owner Khosrow Semnani have become the latest evidence to be released in several legal disputes concerning Envirocare of Utah, Inc. and others. Anderson is suing Semnani and Envirocare for allegedly failing to pay for consulting services related to the licensing and operation of the company's low-level radioactive waste disposal facility. The defendants—who acknowledge that Semnani made payments to Anderson in the past, but assert that Anderson extorted the money rather than earned it—are countersuing. (See *LLW Notes*, January 1997, pp. 1, 5–8.)

Envirocare is also involved in litigation with Waste Control Specialists, Inc. and Nuclear Fuel Services (NFS), among others. (See *LLW Notes*, July 1997, pp. 20–22, and *LLW Notes*, May/June 1997, pp. 22–24.) NFS recently filed a motion in its litigation requesting that that the Third District Court in and for Salt Lake County, Utah, impose "the harshest sanctions" possible against Envirocare and its attorneys for allegedly concealing information about the tapes in responses to discovery requests in order to avoid disclosing potentially damaging information.

The tapes, which were made by Anderson without Semnani's knowledge, are of poor quality. Both parties have taken the tapes to sound specialists to better understand the conversations, and both parties have vastly different accounts of the contents of the tapes and their implications.

—TDL

NRC: Congress Can Best Solve Decommissioning Impasse

Agreement States' Group Adopts Position re Cleanup

In an April 9 letter to EPA Administrator Carol Browner, NRC Chairman Shirley Ann Jackson acknowledged that fundamental differences exist between EPA and NRC pertaining to the regulatory standards for the cleanup of radioactively contaminated sites. The letter states:

> We recognize that the resolution of the differences between EPA and the NRC is a matter of policy that can best be solved by Congressional action and last September, I submitted a legislative proposal to the Congress for its consideration. Dual regulation is wasteful of both government resources and the resources of American citizens to whom the regulations apply. We continue to believe, consistent with the standards of the international community, that the approach used in NRC's cleanup rule provides all the regulation necessary for adequate protection of public health and safety and the environment.

Organization of Agreement States' Position Statement

In a March 30 letter to NRC Chairman Shirley Ann Jackson, Roland Fletcher, Chair of the Organization of Agreement States (OAS), transmitted a position statement outlining issues pertaining to cleanup standards. OAS is composed of representatives of the radiation control programs of the thirty NRC Agreement States, which have agreements with NRC to authorize state regulation of the use of radioactive materials within their borders. The cover letter declares that the position statement is supported by the majority of OAS members.

The position statement generally endorses the regulatory approach favored by NRC.

The OAS position statement embraces the following general principles:

Adequate protection of public health and safety and the environment is the appropriate basis for establishing standards for cleanup of contaminated sites. The contaminated sites should be cleaned up or engineered so the sites may be used for protection of public health and safety and the environment. Also, site cleanup (decontamination) should be done in a cost-effective manner. If cleanup is not feasible in a cost-effective manner, then access to the site should be restricted so the standard for protection of public health and safety and the environmental will not be exceeded.

A national solution is needed for the problem of sites contaminated with radioactive material. The cleanup standard must have a sound technical basis which has broad scientific support. The Organization of Agreement States (OAS) formulated this position statement to provide perspective, suggest a solution, and propose the basis of an appropriate cleanup standard.

> The position statement endorses the following concepts:
>
> - a total dose standard is appropriate,
> - consistency among federal agencies and regulatory standards is needed,
> - an all-pathways cleanup standard is recommended, and
> - states need flexibility in regulatory approaches.

—LAS

For further information regarding the interaction between EPA and NRC on regulatory standards for the cleanup of radioactively contaminated sites, see LLW Notes, Winter 1997, pp. 33-35. For further information, see "New Materials and Publications."

U.S. NRC (continued)

NRC re Low-Level Radioactive Waste Disposal

NRC has released for comment a public information document addressing the decommissioning process for nuclear power plants. Using a question-and-answer format, the document attempts to provide information in a clear and non-technical manner. Several questions and answers—including the following excerpt—pertain to commercial low-level radioactive waste management.

Comments are due by October 1, 1998.

For further information, see "New Materials and Publications."

Is low-level waste disposal safe?

LLW facilities are sited in areas that are away from surface water and where the groundwater is located sufficiently beneath the trenches to minimize nuclide migration. Sites and the surrounding areas are monitored using a system of wells to determine if there is any leakage of radioactivity into the groundwater.

A combination of natural site characteristics and engineered safety features is used to assure the safe disposal of LLW. In addition, restrictions of types and amounts of waste disposed of at a site, as well as the analysis performed as part of the licensing to demonstrate compliance with performance objectives in NRC regulations, increase the safety of LLW disposal.

The natural characteristics of an LLW disposal site are relied on in the long term, and they should promote disposal site stability and attenuate the transport of radionuclides away from the disposal site into the general environment. Sites generally must possess the following characteristics: (1) relatively simple geology; (2) well-drained soils free from frequent ponding or flooding; (3) lack of susceptibility to surface geological processes such as mass wasting, erosion, slumping, and landslides; (4) a water table of sufficient depth so that groundwater will not periodically intrude into the waste or discharge on site; (5) lack of susceptibility to tectonic processes; (6) no known potentially exploitable natural resources; (7) limited future population growth or development; and (8) capability of not being adversely impacted by nearby facilities and activities.

Engineered barriers are manmade structures designed to improve the site's natural ability to isolate and contain waste. They consist of various engineered system components, including the following: (1) a layered earthen cover, (2) a disposal vault, (3) a drainage system, (4) waste forms and containers, (5) backfill material, and (6) an interior moisture barrier and low-permeability membrane.

Regulations specify the allowable radiation dose from the LLW facilities to the workers and to the public.

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

DM **Meeting Packet: LLW Forum meeting, May 27-29, 1998.**

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

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

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

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

— *Envirocare's Draft Radioactive Material License.* Utah Department of Environmental Quality, Division of Radiation Control. April 1998. To obtain a copy of the draft license, visit the State of Utah's Division of Radiation Control web site at http://www.deq.state.ut.us/eqrad/drc_doc.htm.

— *Public Summary: The Health Effects of Exposure to Indoor Radon* (Prepublication Copy). February 1998. National Research Council of the National Academy of Sciences. A summary of the National Research Council's report, *Health Effects of Exposure to Radon: BEIR VI*, which assesses the risks posed by exposure to radon and other alpha emitters. When the final version of this report is complete, it may be purchased from the National Academy Press at (202)334-3938.

States and Compacts

Massachusetts

1996 Massachusetts Low-Level Radioactive Waste Survey Report. March 1998. Massachusetts Low-Level Radioactive Waste Management Board. This report profiles and categorizes the LLRW produced, stored, treated, and shipped for disposal in 1996 by Massachusetts generators. To obtain a copy of this report, contact the Massachusetts Low-Level Radioactive Waste Management Board at (617)727-6018 or by e-mail at LLRW@state.ma.us.

Federal Agencies

Nuclear Regulatory Commission (NRC)

Proposed Standard Technical Specifications for Permanently Defueled Westinghouse Plants (NUREG-1625). March 1998. This report has been published to provide the general public and the nuclear community with an opportunity for comment. Comments are due by August 6.

Staff Responses to Frequently Asked Questions Concerning Decommissioning of Nuclear Power Reactors (NUREG-1628). April 1998. NRC is requesting public comment on this draft report which provides information to the public on decommissioning.

"Acceptance Review, Envirocare of Utah, Inc., Part 70 License Application Dated December 5, 1997." This review was transmitted by letter dated March 4, 1998 from John Hickey, Chief, Low-Level Waste and Decommissioning Projects Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, Nuclear Regulatory Commission, to Kenneth Alkema, Director, Government Affairs, Envirocare of Utah, Inc. The letter states, "based on our review, we conclude that the application does not meet the requirements of Section 70.22 and accordingly, we are rejecting the application." (See related story, this issue.)

continued on page 34

NRC (continued)

Letter from Ellis Merschoff, Regional Administrator, Nuclear Regulatory Commission, to Charles Judd, President, Envirocare of Utah, regarding a special inspection and investigation at the South Clive, Utah, disposal facility. April 21, 1998. (See related story, this issue.)

Letter from Shirley Ann Jackson, Chairman, NRC, to Carol Browner, Administrator, EPA, regarding the differences between NRC and EPA in regards to cleanup of radioactive contamination at Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) sites. April 9, 1998. (See related story, this issue.)

Standard Format and Content of License Termination Plans for Nuclear Power Reactors. (DG-1078.) This draft guide is being developed to provide guidance on developing license termination plans for nuclear power reactor licensees who wish to terminate their licenses and release their sites. Public comments are being solicited and should be submitted by June 30.

U.S. Congress

1997 Findings and Recommendations, Report to the U.S. Congress and the Secretary of Energy. U.S. Nuclear Waste Technical Review Board. April 1998. This board, which was created by Congress, evaluates "the technical and scientific validity of the [DOE's] program for managing the permanent disposal of the nation's spent nuclear fuel and high-level radioactive waste." To obtain a copy of this report, or for further information regarding the U.S. Nuclear Waste Technical Review Board, visit the board's web site at www.nwtrb.gov or call (703)235-4473.

Letter from U.S. Representative Tom Bliley (R-VA), Chairman, House Commerce Committee, to Carol Browner, Administrator, Environmental Protection Agency, requesting a number of documents from EPA regarding EPA's "environmental justice policy, and more specifically, the development of the Interim Guidance for Investigating Title VI Administrative Complaints." May 8, 1998. To obtain a copy of this letter, contact the House Commerce Committee at (202)225-2927. (See related story, this issue.)

Other

D *Organization of Agreement States Position Statement Regarding Cleanup Standards.* This document was transmitted by letter from Roland Fletcher, Chairman, Organization of Agreement States, to Shirley Ann Jackson, Chairman, Nuclear Regulatory Commission. March 30, 1998. To obtain a copy of this document, contact NRC's Public Document Room.

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/**

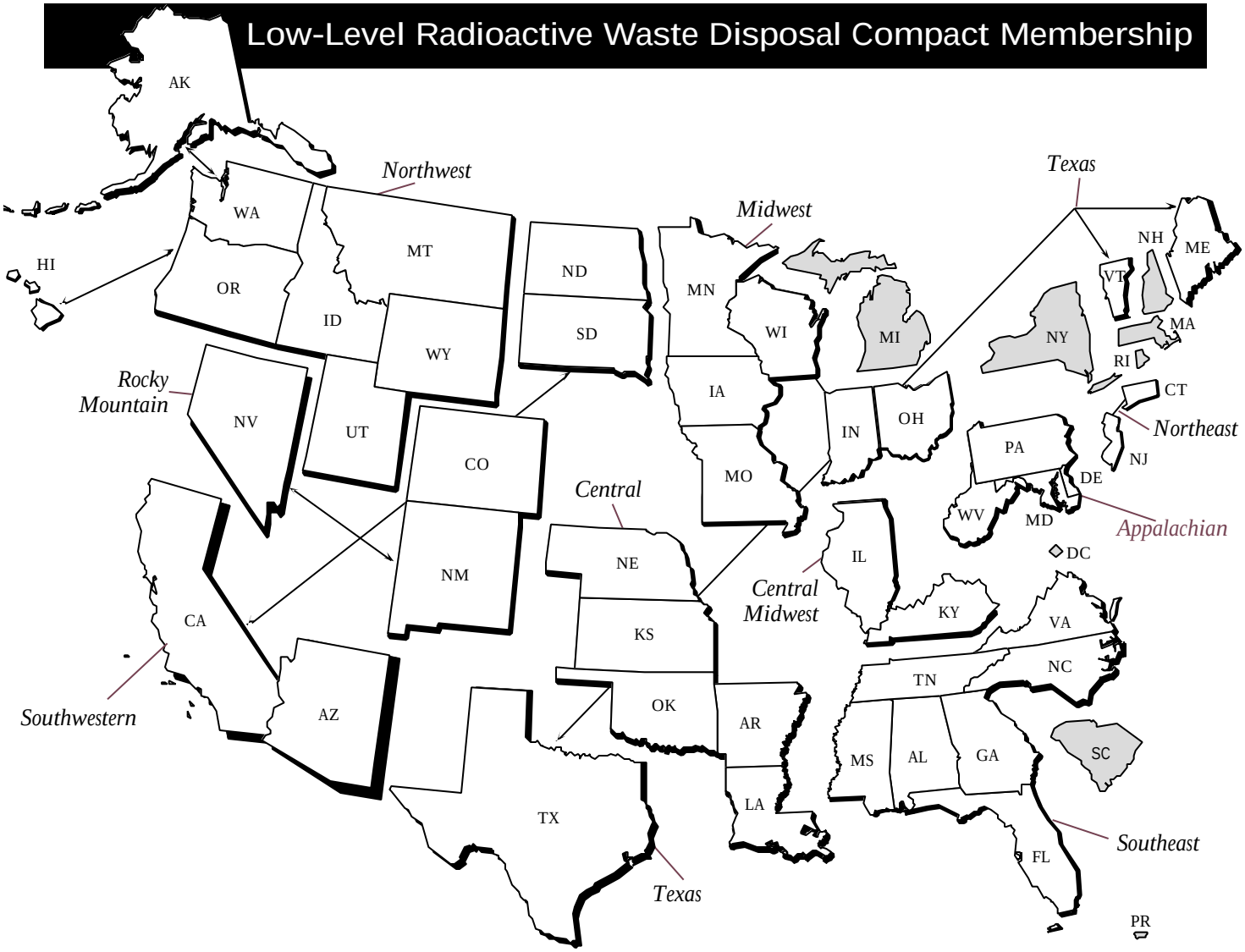
To access a variety of documents through numerous links, visit the LLW Forum web site at http://www.afton.com/llwforum

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 *Summary Report* and accompanying *Development Chart*, as well as *LLW Forum News Flashes*, have been available on the LLW Forum web site since January 1997.

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