LLW notes

Volume 16, Number 3 May/June 2001

Entergy Arkansas v. State of Nebraska

Central Commission Alleges New Evidence Shows Nebraska Officials Created False Pretexts

Nebraska May Ask Supreme Court to Review Denial of Sovereign Immunity

On June 7, the Central Interstate Low-Level Radioactive Waste Commission filed an application for leave to amend its complaint and to add parties defendant, as well as a memorandum brief in support of its application, in its lawsuit challenging the State of Nebraska's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. Shortly thereafter, attorneys for Nebraska announced that the state is considering asking the U.S. Supreme Court to review lower court rulings holding that Nebraska may be sued for allegedly acting in bad faith in fulfilling its obligations to host a regional disposal facility for member states of the Central Compact.

Possible Request for Supreme Court Review

The doctrine of sovereign immunity, if applicable, precludes a litigant from asserting an otherwise meritorious cause of action against a state and its officials unless the state consents to suit. On March 8, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit held that the doctrine of sovereign immunity does not shield the State of Nebraska from the Central Commission's lawsuit. (See *LLW Notes,* March/April 2001, p. 16.) In so doing, the appellate court upheld an April 15, 1999 decision of the U.S. District Court for the District of Nebraska that the state had waived its sovereign immunity under Articles IV.m.8 and IV.e of the Central Compact as to actions brought by the Commission to enforce obligations arising under

Continued on page 11

In This Issue

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Low-Level Radioactive Waste Forum, Inc.

LLW Notes
Volume 16, Number 3 May/June 2001
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LLW Notes is published several times a year and is distributed to the Board of Directors of the Low-Level Radioactive Waste Forum, Inc. - an independent, non-profit corporation. Anyone - including compacts, states, federal agencies, private associations, companies, and others - may support and participate in the LLW Forum, Inc. by purchasing memberships and/or by contributing grants or gifts. For information on becoming a member or supporter, please go to our web site at www.llwforum.org or contact Todd D. Lovinger - the LLW Forum, Inc's management contractor - at (202) 265-7990.

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

LLW
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Table of Contents

Key to Abbreviations

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

LLW Forum, Inc. Achieving Broad Success

During the first two quarters of 2001, the recently reorganized Low-Level Radioactive Waste Forum, Inc. set up offices and began operations as an independent, non-profit corporation. News Flashes were distributed on a variety of issues related to low-level radioactive waste management and disposal and three newsletters were published. In addition, liaison functions continued amongst states, compacts, federal agencies, operators, generators, and others. The winter meeting of the LLW Forum was held in Point Clear, Alabama from March 12 – 14, 2001. (See *LLW Notes,* March/April 2001, p. 4.)

Membership

Under its new structure, anyone—including compacts, states, federal agencies, private associations, companies, and others—may support and participate in the LLW Forum, Inc. by purchasing memberships and/or by contributing grants or gifts.

To date, eight of the nine operating compacts have joined the LLW Forum as members, as have seven of the eight host states, five unaffiliated states, one additional state, one federal agency and one operator. Members include the following:

Compacts
Appalachian Compact
Atlantic Compact
Central Compact
Midwest Compact
Northwest Compact
Rocky Mountain Compact
Southeast Compact
Southwestern Compact

Host States
Illinois
Nebraska
Pennsylvania
South Carolina
Texas
Utah
Washington

Unaffiliated States
Massachusetts
Michigan
New Hampshire
New York
Rhode Island

Associate Members
U.S. Department of Energy
Envirocare of Utah

Additional States
Maine

The following entities have provided grants or gifts or purchased materials subscriptions and are considered supporters of the LLW Forum:

Congressional Research Service
North Atlantic Energy Service Corporation
Nuclear Management Company, L.L.C.
U. S. Department of the Army
National Association of Attorneys' General
Nuclear Energy Institute
State of Connecticut

Continued on page 4

LLW Forum, Inc. Achieving Broad Success(continued from page 3)

Subscriptions

Recently, the LLW Forum, Inc. began selling annual subscriptions to its materials and publications including the newsletters, news flashes, summary report, meeting reports, and other written materials. Subscription prices vary depending upon the types of materials provided. In order to expedite processing, the LLW Forum, Inc. has devised a schedule of subscription rates which includes one copy-righted copy of each listed material. A complete rate schedule can be found on the LLW Forum's web site at www.llwforum.org. In addition, individualized subscription plans may also be negotiated on a case-by-case basis.

Next Meeting

The Rocky Mountain Low-Level Radioactive Waste Compact has volunteered to sponsor the fall meeting of the LLW Forum, Inc. That meeting will be held in Denver, Colorado from September 19 – 20 at the Executive Tower Hotel. Reservations can be made by calling (800) 525-6651 and asking for a room in the LLW Forum, Inc. block. Reservations must be made by August 20.

Meeting attendees must register in advance. There is no registration fee for members of the LLW Forum, Inc. Registration for non-members is $500. To register, please contact Vickie Green of the Rocky Mountain Compact at (303) 825-1912.

Management and Contact Information

The LLW Forum, Inc.'s new contact information is as follows:

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Email: llwforuminc@aol.com
Web: www.llwforum.org

For additional information about the LLW Forum, or to become a member or supporter of the organization, please contact Todd Lovinger at (202) 265-7990.

Atlantic Compact/South Carolina

RFP Issued re Barnwell Extended Care Fund

On May 1, the State of South Carolina Budget and Control Board, Materials Management Office released a Request for Proposals "to conduct an evaluation of the adequacy of the extended care fund for institutional control of the low-level radioactive waste disposal facility in Barnwell County, South Carolina." In particular, the contractor is expected to analyze the target amount of funds needed to conduct extended care activities at the facility and to make recommendations on related issues. Under the terms of the RFP, a final report is due by November 14, 2001, with follow-up presentations scheduled through June 30, 2002. Responses to the RFP were due by 2:30 p.m. on June 5, 2001.

In addition, the South Carolina State Budget and Control Board Low-Level Radioactive Waste Disposal Program has posted a new document to its web site regarding policies, procedures and the schedule for allocation of disposal capacity at the Barnwell facility in fiscal year 2001/2002.

Copies of the Extended Care Fund RFP and disposal capacity document can be obtained at http://www.state.sc.us/energy/llrwdisposal.htm.

Midwest Compact/Iowa

Iowa Imposes Fee on Transport of Radioactive Waste

On March 14, the Iowa Board of Health adopted a rule imposing fees for the transport of both high- and low-level radioactive waste across the State of Iowa. Three major interstates cross Iowa and large amounts of radioactive waste are transported on these roads. The fees collected under the rule will be used to support a program initiated by the Iowa Department of Public Health for proper response in case of an accident involving the transportation of radioactive waste in Iowa.

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

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

Continued on page 10

Northwest Compact / Utah

Public Comment Sought re Envirocare Request to Accept Containerized Class A Waste in Existing Cell

The Executive Secretary of the Utah Radiation Control Board is currently seeking public comment on Envirocare of Utah's request for an amendment to the company's existing license for the disposal of low-level radioactive waste at its facility in Tooele County, Utah. The requested amendment would allow Envirocare to receive and dispose of containerized Class A low-level radioactive waste in the existing landfill cell. Envirocare's previous amendment request for the existing cell did not contemplate disposal of containerized waste such as resins in the cell up to Class A limits. Typically, soil or debris-type waste would be disposed of in such a cell. The new amendment request clarifies, amends, and develops procedures for handling containerized Class A waste in the existing cell. (For additional information, see *LLW Notes,* January/February 2001, p. 8.)

Continued on page 9

Northwest Compact / Washington

Work Continues on Richland EIS

The State of Washington continues working on and evaluating comments and developing responses to the draft environmental impact statement (EIS) for the Richland, Washington low-level radioactive waste disposal facility. The state is also conducting additional research on disposal history and is evaluating Phase II facility investigation data. The EIS, which was originally slated for completion in March 2001, addresses three pending actions:

- renewal of the radioactive materials license for operation of the site,
- establishment of an annual cap on the amount of NARM that can be disposed of at the site, and
- approval of the US Ecology closure plan submitted in July 1996.

The draft EIS was first published in September 2000. Approximately 600 comments were received during the comment period and at the public hearings on this topic.

Continued on page 9

SW Commission Supports Envirocare Request

On June 1, 2001, Don Womeldorf—Executive Director of the Southwestern Low-Level Radioactive Waste Commission—sent the following communication to Sinclair:

"This is to express support of the Southwestern Low-Level Radioactive Waste Commission for the license application of Envirocare of Utah, which would allow disposal of Class A containerized waste. Approval of the license amendment will be in line with the Commission's current policy of moving low-level waste from the Southwestern Compact region to an appropriately-licensed disposal facility."

Southwestern Compact / California

California LLRW Bill Stalled

Senate Bill 243—legislation relating to the management and disposal of low-level radioactive waste in the State of California—did not meet the "house of origin" deadline and will become a "two-year bill." As such, it can not be taken up again until January 2002. Nonetheless, Senate rules require that, as a "two-year bill," SB 243 must pass the Senate to the Assembly no later than January 31, 2002 if it is to remain a viable legislative option. In order to bypass these restrictions, supporters of the bill would need to find another legislative vehicle on which to attach it or seek rule waivers for a hearing later this year.

The bill—which was introduced on February 14 by California State Senator Sheila Kuehl (D)—states the legislature's intent to, among other things

- prohibit shallow land burial of low-level radioactive waste;
- establish a temporary facility for the storage of waste generated by medicine, academia, and biotechnology; and
- restrict zoning of contaminated sites.

(See *LLW Notes,* March/April 2001, p. 11.) It was heard on May 7 by the Senate Environmental Quality Committee, at which time testimony was introduced by both opponents and proponents of the bill.

Dana Mount, Chair of the Southwestern Low-Level Radioactive Waste Commission, sent a letter to State Senator Kuehl on March 14 expressing his opposition to the legislation. The letter states as follows:

"This is to express my opposition to your bill, SB 243. It does not address the obligation of the State

Southwestern Compact Requests That California Provide LLRW Storage

At the April 6 meeting of the Southwestern Low-Level Radioactive Waste Commission in Sacramento, California, the Commissioner from Arizona made the following motion, which was amended and approved unanimously:

"I move that the Southwestern Low-Level Radioactive Waste Commission, by letter to the Governor and Legislative Leaders, request the State of California meet its contractual obligation to provide for the disposal of low-level radioactive waste for 30 years, and until such time, that California provide for the storage of the low-level radioactive wastes of the Party States of the Southwestern Low-Level Radioactive Waste Compact. The State of California may elect to pay the various affected licensees the costs of storage or to indemnify the affected licensees."

Letters transmitting the resolution were sent to the Governor and legislative leaders dated May 1, 2001. As of press time, no response to the letters had been received.

continued - California LLRW Bill

of California to the States of Arizona, North Dakota, and South Dakota, the other members of the Southwestern Low-Level Radioactive Waste Disposal Compact. As such, it fails to meet the requirements of Public Law 100-712, the Southwestern Low-Level Radioactive Waste Disposal Compact Consent Act. I object to technical aspects of the bill as well."

Governors, Commissioners, and Alternates of all of the compact member states were sent copies of Mount's letter. As of press time, a response had not been received from Kuehl.

Texas Compact / Texas

Texas Legislature Adjourns Without Addressing Issue of LLRW Management/Disposal

On Monday, May 28, the Texas Legislature adjourned without passing any of the bills which had been introduced relating to the management and disposal of low-level radioactive waste. Absent special circumstances, a new legislature will not be reconvened until January 2003.

The legislature did, however, pass H.B. 2912—legislation relating to the continuation and functions of the Texas Natural Resources Conservation Commission (TNRCC). This bill, commonly referred to as "sunset legislation," was a vehicle a few years back for abolishment of the Texas Low-Level Radioactive Waste Disposal Authority. It was signed by both the House and Senate and sent to the Governor on May 28, but did not contain any language relating to the development or siting of a low-level radioactive waste disposal facility.

For a brief description of the bills introduced during this legislative session, see LLW Notes, March/April 2001, pp. 1, 12 – 13, or see the May 9 News Flash titled, "News Briefs: Recent Activities in States/Compacts re LLRW Management and Disposal." To get more detailed information about the bills, go to www.capitol.state.tx.us.

Medical Crisis May Be Looming

Nicki Hobson, Executive Director of the National Association of Cancer Patients, recently gave a presentation at the annual meeting of Organizations United in which she discussed what she termed a "crisis" in cancer care in the United States. The crisis, according to Hobson, "is in America's inability to get radioactive medical isotopes into the hands of our medical researchers." In support of her claim, Hobson states as follows:

> [C]ancer patients are needlessly suffering and dying because the U.S., the most advanced nation in the world, does not have the domestic capability of producing a full range of medical isotopes. There currently is not even an adequate, stable supply of key isotopes needed to complete small scale clinical trials for promising new cancer treatments. Yet, a taxpayer-funded research reactor in Washington (Fast Flux Test Facility in Hanford) that could produce all the isotopes we need is in danger of being dismantled! We need a reversal of the flawed decision to shut down FFTF made by the Clinton Administration. It will save lives, and literally billions of dollars for Medicare and other health programs.

Organizations United is a consortia of health care and radiation science and technology organizations. Hobson made her remarks during a presentation about Former Secretary of Energy Bill Richardson's decision to decommission and demolish the Fast Flux Test Facility (FFTF) in Hanford, Washington—the only existing liquid metal, high temperature, reactor in the United States. The National Association of Cancer Patients and others would like to see Energy Secretary Spencer Abraham rescind that decision.

For additional information, please contact Nicki Hobson of the NACP at nohobson@aol.com.

Northwest Compact/Utah

Continued from page 6 - Public Comment Sought

How to Submit Comments Oral comments on the license amendment request will be accepted at two public hearings: on June 4 at the Utah Department of Environmental Quality in Salt Lake City and on June 7 at the Tooele County Health Department Auditorium. Written comments should be sent to the following address:

William J. Sinclair
Executive Secretary
Utah Radiation Control Board
P.O. Box 144850
Salt Lake City, UT 84114-4850

Written comments may also be sent by e-mail to

bsinclai@deq.state.ut.us.

Written comments must be received by 5:00 p.m. on June 14, 2001.

How to Obtain Background Information A copy of the Envirocare license amendment application, draft Statement of Basis, and draft Radioactive Materials License are available for review and downloading on the Department of Radiation Control's web site at

www.deq.state.ut.us/eqrad/drc_hmpg.htm.

Unrelated Pending Application The amendment request is being made separate from the company's license application to dispose of Class B and C low-level radioactive waste in a new landfill cell. That application has received tentative approval from the Executive Secretary of the Utah Radiation Control Board. (See January 5 News Flash titled, "Tentative Decision Issued to Approve Envirocare's Class A, B, and C License: Public Comment Sought.") Nonetheless, Envirocare recently announced that it would not pursue legislative approval for its B and C application this session due to timing factors. (See January 11 News Flash titled, "Envirocare Decides Not to Seek Legislative Approval for B and C Waste This Session: Local Poll Indicates Opposition to Application.") Under Envirocare's proposal, the existing cell will open in the interim while final decisions are being made concerning the new containerized Class A, B, and C cell.

For additional information, please contact William Sinclair or Dane Finerfrock at (801) 536-4250.

Northwest Compact / Washington

Continued from page 6 - Richland EIS

Relicensing Two options to the pending action of relicensing have been developed. The first is to deny the relicense request. The second would approve the relicensing request, but involves negotiation of a number of operational enhancements with the company at a later date. All options, however, presume shallow land disposal of packaged, stabilized waste.

Annual NARM Cap The draft EIS includes two alternatives to the pending action of an annual cap of 100,000 cubic feet. The first is 8,600 cubic feet, which represents the cap adopted prior to the settlement agreement between US Ecology and the Washington Department of Health. The second is 36,700 cubic feet—the average annual volume received from 1994 through 1998. The comments received indicate that the pulic does not want to see increased volumes of waste coming to the Richland facility.

Site Stabilization and Closure Plan The pending action is the site stabilization and closure plan submitted by US Ecology in 1996. This plan includes a multi-layer designed cover that calls for closure of eight trenches now and the remaining trenches would be closed in the year 2056. Six alternatives were developed that examine a variety of cover designs and closure schedules to identify the potential exposure levels when compared to the US Ecology proposal.

Midwest Compact / Iowa

Continued from page 5 - Iowa Imposes Fee

(4) $250 for the first rail car and $50 for each additional rail car in the train for transport of low-level radioactive waste.

b. All fees must be received by the Department of Public Health prior to shipment.

The rule originally had an effective date of May 9, but that date was deferred for 90 days. The American Council of Users of Radioactive Waste (ACURI) wrote a letter expressing concern about the rule and requesting that it be rescinded on May 29. Specifically, ACURI raised the following concerns, among others:

- it is unfair to single out radioactive waste shipments for special fees to support accident training, especially given that such shipments have far fewer incidents/mile than other hazardous materials in transport;
- transportation of radioactive materials is already regulated by the U.S. Department of Transportation and the Nuclear Regulatory Commission;
- accident response programs are already funded through federal agencies, to which fees are already paid by most shippers of radioactive waste; and
- the new rule and proposed fee collection and enforcement structure is burdensome and difficult to administer.

By letter dated June 11, the Iowa Department of Health responded to ACURI'S letter and made the following points:

- while the number of accidents involving shipments of radioactive waste may indeed be small, one accident can present a public health situation affecting crops, livestock and groundwater;
- the use of fees to mitigate an accident through response training is always in the public interest;
- Iowa is an NRC Agreement State and the Department of Transportation's role in the transportation of radioactive materials is limited to packaging, marking, labeling, and placarding;
- the registration fee will not be used to fund state programs, but rather county emergency response programs; and
- a system for vouchers, contracts, and invoicing is being established that should not impact schedule shipments.

In concluding the letter, the Iowa Department of Health stated that "this rule . . . will not be rescinded."

AEC Posts Favorable First Quarter, Expands Operations

Despite financial difficulties in the past, American Ecology Corporation (AEC) posted a profitable year in 2000, as well as a profitable first quarter in 2001. That marked the company's sixth consecutive profitable quarter. In addition, in July 2000 AEC opened the El Centro solid and industrial waste landfill adjacent to its permitted Resource Conservation and Recovery Act (RCRA) facility in Robstown, Texas. In February 2001, AEC acquired Envirosafe Services of Idaho, which operates a RCRA/TSCA waste treatment, storage and disposal facility in Grand View, Idaho. The company, which was renamed US Ecology Idaho in May 2001, treats and disposes of large volume, low-activity radioactive materials and hazardous waste from the Formerly Utilized Sites Remedial Action Program (FUSRAP) pursuant to a contract awarded by the Army Corps of Engineers.

AEC is the parent company of US Ecology—operator of the Richland, Washington low-level radioactive waste disposal facility and the designated operator for proposed facilities in the states of California and Nebraska.

Entergy Arkansas v. State of Nebraska

continued from page 1 - Commission Alleges New Evidence

the compact. (See *LLW Notes,* April 1999, pp. 7–13.) In April, Nebraska asked the entire Eighth Circuit Court to consider its appeal, instead of just the three-judge panel, but that request was denied.

Attorneys for the State of Nebraska, however, were widely quoted recently as saying that the state may ask the U.S. Supeme Court to review the issue. They claim that prior rulings have held that sovereign immunity waivers have to be explicit and that the appellate and district courts therefore read the waiver too broadly. The state is expected to make a decision on whehter or not to file a petition for a writ of certiorari with the Supreme Court by mid-July.

Application to Amend Complaint and to Add Parties Defendant

In its application, the Central Commission identifies three reasons for amending its claim against the State of Nebraska:

- Documents produced during the discovery process "show additional types and acts of bad faith by the defendants, including the former Director of the . . . [Nebraska Department of Environmental Quality (NDEQ)] and the State's contractors, in mandating the creation of false scientific, engineering, and financial pretexts for delays and denial of the facility license." In support of this claim, the commission cites, among other things, a memorandum from the prime consultant contractor of the State which was turned over by the defendants within the last sixty days. The memorandum describes, in part, an unannounced visit by NDEQ staff during which time "[t]hey spent their time trying to figure out how to spin responses, evaluations, and the SER/EIA so that they would support . . . [the NDEQ Director's] no go decision." The memordandum states that the NDEQ staff's "conclusion was that they must compose the decision document and then find the technical support or lack there of for the decisions."

- The types of relief requested by the plaintiff make it appropriate to add as defendants the offices of the Governor of Nebraska, the Director of the Department of Environmental Quality, and the Director of the Department of Health, Human Services, Regulation and Licensure, each in their official capacities only.

- Certain issues and circumstances relating to the claims have changed since the filing of the original complaint. The amended complaint updates the commission's allegations and removes prior cross-referencing and the incorporation of other pleadings.

As of press time, the State of Nebraska had not filed a response to the commission's application to amend the complaint and to add parties defendant.

Background: *Entergy Arkansas, Inc. v. State of Nebraska*

On December 21, 1998, Nebraska regulators announced their decision to deny US Ecology's license application. (See *LLW Notes,* January/February 1999, p. 8.) Nine days later, five regional utilities filed suit, arguing that Nebraska regulators violated the compact, state, and federal law—as well as a statutory and contractual obligation to exercise "good faith"—in their review of the license application. (See *LLW Notes,* January/February 1999, pp. 16–17.)

continued on next page

Entergy Arkansas v. State of Nebraska

continued from page 11 - Commission Alleges New Evidence

The Parties The utilities pursuing claims are

- Entergy Arkansas, Inc.;
- Entergy Gulf States, Inc.;
- Entergy Louisiana, Inc.;
- Wolf Creek Nuclear Operating Corporation; and
- Omaha Public Power District.

In addition, US Ecology has joined the action as a plaintiff.

The Nebraska Department of Environmental Quality and the Nebraska Department of Health and Human Services Regulation and Licensure (NDHHS) were named as defendants to the action, as were several of the departments' employees, contractors, and subcontractors. The Central Interstate Low-Level Radioactive Waste Commission was also originally named as a defendant in the suit, due to its nature as a necessary party, but subsequently realigned itself as a plaintiff.

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

Requested Relief In addition to the injunctive relief that was granted by the court in its April 15 order, the plaintiffs are asking that the court issue

- a declaratory order finding that the actions of the defendants other than the Central Commission constitute a violation of their "good faith" duty, a violation of the plaintiff utilities' rights to procedural and substantive due process under the U.S. Constitution, and a violation of the plaintiff utilities' statutory rights under the compact;
- a declaratory order finding that the state license review process is "unrectifiably tainted" and that the State of Nebraska should be removed from supervising and managing any further aspect of the license review process; and
- an award of money damages against individual defendants and the State of Nebraska.

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

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

Solicitor General Files an Amicus Brief Arguing Supreme Court Lacks Original Jurisdiction Over Suit Brought by Southeast Compact

On May 30, in response to an October 2000 invitation from the U.S. Supreme Court, the Solicitor General of the United States filed an amicus curiae brief in a lawsuit filed by the Southeast Interstate Low-Level Radioactive Waste Commission against the State of North Carolina. In the brief, the Solicitor General states that the case—which seeks the enforcement of sanctions against the compact's host state for failure to take appropriate actions toward the development and siting of a low-level radioactive waste disposal facility—does not fall within the Court's exclusive jurisdiction and should be resolved in another forum or through other means. Significantly, however, the Solicitor General concluded that the Court "would have exclusive jurisdiction over a suit brought by one or more of the States that are parties to the Southeast . . . Compact against North Carolina based on that State's alleged violations of the Compact." Nonetheless, since this action was filed by the compact commission and not by a member state, the Solicitor General argues that the Court should deny the Southeast Commission's motion for leave to file a bill of complaint.

The Solicitor General's Brief

In its brief, the Solicitor General presented three main arguments against the Court's exercise of exclusive original jurisdiction over the Southeast Compact's lawsuit:

- the Southeast Commission is merely an entity created by compact and is not a state under our constitutional structure;
- the commission does not have the authority to invoke the Court's exclusive original jurisdiction as the representative of states that are parties to the compact; and
- the commission has an alternative forum for pursuing its claim.

The Commission Is Not A State The Solicitor General points out that Congress has limited the Court's exercise of exclusive original jurisdiction to "controversies between two or more States" and rejects the commission's argument that it should be treated like a state for purposes of original jurisdiction. In so determining, the Solicitor General states as follows:

"The Constitution grants the States access to this Court's original jurisdiction precisely because they are 'the constituent elements of the Union.' The States entered the Union on the understanding that they were separate sovereigns and were surrendering only a portion of their sovereign powers. They retained, through the Compact Clause, a portion of their formerly unfettered authority to resolve interstate disputes through agreement. And they have, through the Eleventh Amendment, a portion of their sovereign immunity from suit. But they agreed to confer on this Court, through Article III's grant of original jurisdiction, judicial powers to resolve interstate disputes 'as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.'

continued on next page

Southeast Compact v. North Carolina

continued from page 13

"The States may, with Congress's consent, create Compact Clause entities. But those entities 'occupy a significantly different position in our federal system than do the States themselves.' Compact Clause entities lack the normal sovereign attributes of States, such as the power to enact general legislation, exercise police powers within defined borders, or organize courts of general jurisdiction. Because Compact Clause entities have no separate sovereign identity, they have no inherent claim to sovereign immunity. They similarly have no inherent right to invoke this Court's original jurisdiction in the way one of the States might do." (footnotes, citations and parenthetical phrases omitted)

In further support of its argument that compact clause entities can not invoke original jurisdiction, the Solicitor General points out that the compact clause entity's "political accountability is diffuse" and that it "lacks close ties to an identifiable body of citizens." Moreover, the Solicitor General notes that such entities can be disbanded easily. Therefore, according to the Solicitor General's position, compact clause entities have "none of the historical, legal, or functional *sovereign* attributes of a State."

The Commission Can Not Invoke Original Jurisdiction As The Representative of Member States to the Compact In its brief, the Solicitor General also rejected the Southeast Commission's argument that it "stands in the shoes" of the compact's member states and is therefore entitled to invoke original jurisdiction on behalf of those states. In so doing, the Solicitor General stated as follows:

"The Commission asserts that Congress may authorize an entity created by interstate compact to invoke this Court's original jurisdiction on behalf of the States that are parties to the compact. It is not clear, however, that Congress may do so. A Compact Clause entity is not a 'State' within the meaning of the Constitution, and the Commission has pointed to no source of authority for Congress to provide that a Compact Clause entity shall have (or be entitled to assert) the constitutional entitlements of a State in an Article III court as against a defendant that is one of the States of the Union. In addition, a suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment.

"There is no need to reach those constitutional issues here, however, because there is no sound reason to conclude that when Congress approved the Compact, it intended to allow the Commission to invoke this Court's original jurisdiction as a representative of the States that are parties to the Compact. The Compact allows the Commission to act in a representational capacity for certain purposes, but the Compact does not expressly grant the Commission power to invoke this Court's original jurisdiction or to sue a State." (footnotes, citations and parenthetical phrases omitted)

The Solicitor General specifically noted that Congress has narrowly confined the Supreme Court's original jurisdiction. Accordingly, it concluded that the compact's "mere mention" that the commission may appear before a court of law "falls far short of providing the Commission authorization to invoke this Court's original jurisdiction to sue a member State and to precipitate the constitutional questions that would arise from such a novel action."

In addition, the Solicitor General concluded that "in seeking to enforce the sanction, the Commission is not acting in a representative capacity, but is instead acting in its own right, as 'a

Southeast Compact v. North Carolina

legal entity separate and distinct from the party states.'" In support of this finding, the Solicitor General points out that the money which the commission seeks to recoup from North Carolina was paid to the state by the commission, not the other party states, and will be returned to the commission.

The Commission Has An Alternative Forum For Pursuing Its Claim The Solicitor General labeled "unsound" the Southeast Commission's argument that failure by the Court to exercise original jurisdiction will result in no alternative forum in which to litigate the commission's claims. Specifically, the commission had argued that it would be inappropriate to litigate the action in state court because, among other things, "[a] State cannot be its own ultimate judge in a controversy with a sister State." The Solicitor General points out, however, that "[t]he Court's rejection of original jurisdiction over a suit by the Commission would not . . . preclude one or more States that are parties to the Compact from bringing an original action . . . against another party State to enforce the Compact and seek an appropriate remedy." Moreover, the Solicitor General further notes that if litigation were pursued in a state court, the Supreme Court could review that court's decision through a writ of certiorari.

Next Step

The Solicitor General's brief merely represents the opinion of that office and is not conclusive. It will, however, be circulated to the justices for consideration along with briefs filed by the Southeast Commission and North Carolina. The commission is in the process of preparing a brief in response to that filed by the Solicitor General.

The Supreme Court is expected to decide whether or not to accept the case during a conference in late June.

Background

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

Original Jurisdiction Under Article III, Section 2 of the U.S. Constitution, the U.S. Supreme Court may exercise original jurisdiction over a lawsuit. In determining whether or not to do so, the Court has generally considered two factors: (1) the "nature of the interest of the complaining State," focusing mainly on the "seriousness and dignity of the claim," and (2) "the availability of an alternative forum in which the issue tendered can be resolved."

The Southeast Commission argues, with respect to the first factor, that serious public health concerns are at stake and that "the proper interpretation of an interstate compact is the archetypical matter warranting the Court's exercise of its exclusive,

continued on next page

Southeast Compact v. North Carolina

continued from page 15

original jurisdiction." Furthermore, the commission asserts that the Court "rarely has declined to exercise its original jurisdiction in . . . a dispute among sovereign states concerning the interpretation and enforcement of an interstate compact." As to the second factor, the compact asserts that there is no other "jurisdiction available in which a state would not be 'its own ultimate judge in a controversy with a sister State.'"

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

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

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

Hearing Held on Rocky Mountain Board's Enforcement Action Against Air Force

On April 23, the Rocky Mountain Board held the first day of hearings on its enforcement action against the U.S. Air Force for alleged violations of the compact's requirements regarding the obtaining of an export permit prior to shipping low-level radioactive waste from the region. Shortly thereafter, on April 30, the compact's Executive Director wrote to Rosalene Graham—Chief of the Safety/Rad Waste Team for the U.S. Army Industrial Operations Command in Rock Island, Illinois—concerning recent applications to export waste from three Air Force bases within the Rocky Mountain Compact region. The letter noted that a fee was received for one of the three applications and that application was subsequently reviewed and approved. No fees were received in conjunction with the other two applications and they are therefore deemed incomplete and not eligible for review. The letter further noted that the Board has, in the past, refused to process applications during an enforcement action but nonetheless did so in this case "as a demonstration of the Board's willingness to continue to allow the Department of Defense (DoD)/USAF to export its waste, so long as permits are obtained in accordance with Compact requirements and the Board's rules." The letter concluded by stating that the Executive Director would withdraw the complaint in the pending enforcement action "if the DoD/USAF would agree to obtain permits for all low-level radioactive waste that is covered by the Compact." No response to the letter has been received to date.

United States v. Anderson

Utah Ex-Regulator to Face Prosecution

On June 1, Larry Anderson—a former Director of the Utah Division of Radiation Control—asked U.S. District Court Judge Tena Campbell to withdraw a plea agreement previously reached with federal prosecutors. Instead, Anderson opted to stand trial on charges stemming from a six count indictment previously issued against him by the U.S. Attorney's office for the District of Utah on March 24, 1999. (See *LLW Notes,* March 1999, p. 8.) The indictment included charges of extortion, mail fraud, tax evasion, and the filing of false income tax returns. Under the terms of the plea agreement, Anderson admitted to mail fraud and tax evasion, while the charges of extortion and fraud were to be dismissed. Anderson was to serve one year in federal prison, to pay back taxes to the IRS, and to turn over equity in a townhouse, a credit union account, a golf club membership and a golf cart to the U.S. Government. Anderson refused to do so, however, reportedly in an attempt to protect his family's welfare. Anderson is reported to have had heart surgery and to be in poor health.

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

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

Skull Valley Band of Goshute Indians v. State of Utah

PFS and Skull Valley Indians Sue Utah re Spent Fuel Facility

In late April, the Skull Valley Band of Goshute Indians and Private Fuel Storage Limited Liability Company (PFS)—a coalition of nuclear utilities seeking to site a spent fuel facility on the Goshutes reservation—filed suit against officials of the State of Utah. The action, which was filed in the U.S. District Court for Salt Lake City, complains that six recently enacted state laws erect unfair and unconstitutional barriers to the plaintiffs' facility siting plans. In particular, the suit alleges that the laws unlawfully interfere with interstate commerce and infringe upon exclusive federal authority over the regulation of Indian affairs and nuclear power.

The plaintiffs allege that, among other things, the contested laws

- seek to block access to the Goshute reservation by closing state roads leading thereto;
- require PFS to post a $2 billion cash bond for the proposed facility;
- assert state regulatory authority over reservation lands;
- create unlimited liability by PFS' officers, directors and shareholders;
- criminalize actions necessary to plan for the possibility of storing spent fuel in the State of Utah;
- require PFS to comply with unfair state permitting requirements, including the payment of a $5 million application fee; and
- bar the storage of spent fuel in the State of Utah and void any private contracts relating to such storage.

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

NEI Assists NRC With Technical Q&A on Decommissioning and License Termination

The Nuclear Energy Institute is assisting the U.S. Nuclear Regulatory Commission on developing a list of "frequently asked questions" and responses related to site decommissioning and license termination. The project is intended to allow licensees to share experiences on issues that commonly arise during decommissioning and license termination.

As part of the project, NEI is asking licensees for questions or issues of concerns. NEI will then provide the questions, as well as draft answers, to the NRC for consideration. Information gathered during the project will be posted to a common database accessible to licensees. This will allow early decisions to be made on license termination issues.

For additional information, please contact the program manager—Paul Genoa of the Nuclear Energy Institute—at (202) 739-8034.

IAEA Activities Focus on Waste Issues

Two recent activities of the International Atomic Energy Agency (IAEA) highlight the significance of radioactive waste disposal issues in the future: the results of a survey of nuclear power plants and discussion at a seminar on the development of new small reactors.

Power Plant Survey The International Atomic Energy Agency Power Reactor Information System recently released a survey of nuclear power plants concluding, among other things, that the management and disposal of radioactive waste will constitute a major scientific and engineering challenge in the years to come. The survey found that there are currently 438 nuclear power plants operating as of the end of 2000. An additional 31 plants are currently under construction. The survey found that nuclear power provides approximately 16 percent of the world's electricity. Approximately 83 percent of the world's nuclear capacity can be found in industrialized countries.

Information from the IAEA survey, including 2000 nuclear power statistics, can be found on the agency's web site at www.iaea.org/worldatom.

Reactors Seminar In late May, the International Atomic Energy Agency held a seminar in Cairo, Egypt titled "Status and Prospects for Small- and Medium-Sized Reactors." The seminar examined, among other things, waste management and decommissioning concerns that will arise from the development of a new generation of small- and medium-sized reactors for power generation and other applications. Significantly, many of the new reactors will be located in remote regions lacking the technological and regulatory applications which control most modern reactors.

Information about the seminar can be found on the agency's web site at www.iaea.org/worldatom/Meetings/Planned/2001/infsr218progr.shtml.

Russian Parliament Approves Spent Fuel

On June 6, the lower house of the Russian Parliament—known as the State Duma—voted 243 to 125 in favor of legislation to allow the importation of spent nuclear fuel into the country for disposal. The bill is also expected to win the approval of the upper chamber of the Russian Parliament—known as the Federation Council—which is made up of regional leaders. Russian President Vladimir Putin is expected to then sign the bill into law.

The controversial legislation would change current Russian laws barring the importation of radioactive waste into Russia, thereby allowing the Russian Ministry of Atomic Energy to pursue billions of dollars worth of contracts for the disposal of spent fuel from a variety of countries including, among others, Japan, Taiwan, Switzerland, Germany, Spain, Korea and China. The U.S. government has remained officially neutral on the issue.

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

In response to the vote, Greenpeace called on U.S. President George Bush to veto any shipments of spent fuel originating in the United States to Russia. This, according to Greenpeace officials, could cause the entire program to fall apart.

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

U.S. Army Corps of Engineers

Audit Finds Army Corps Acted Appropriately re Buttonwillow Disposal

A recent government audit found that the U.S. Army Corps of Engineers acted in full compliance with all federal and state regulatory requirements when it disposed of 2,164 tons of building debris containing residual radiological contamination at a hazardous waste disposal facility in California. The 6,400 cubic yards of waste—which included trace amounts of uranium, thorium, and radium—came from the dismantlement of a World War II-era industrial facility in Tonawanda, New York, that separated uranium from ore as part of the Manhattan Project to produce the first atomic bomb. (See *LLW Notes,* May 1999, pp. 1, 31-33.) The waste was mainly in the form of broken concrete and wood. It was shipped to a facility in Buttonwillow, California, operated by the Safety-Kleen Corporation of Columbia, South Carolina (formerly known as Laidlaw Environmental Services).

The audit—which was conducted by the U.S. Army Audit Agency—was requested by the Assistant Secretary of the Army for Civil Works after officials from the State of California and several others questioned whether disposal of the waste at the Buttonwillow facility was proper. Specifically, the officials questioned whether radioactive waste from Formerly Utilized Sites Remedial Action Program (FUSRAP) cleanups can be disposed of at sites not licensed to accept radioactive waste from the U.S. Nuclear Regulatory Commission, but rather holding Resource Conservation and Recovery Act (RCRA) permits.

U.S. Department of Energy

New INEEL Manager Named

The head of the U.S. Department of Energy's National Engineering and Environmental Laboratory (INEEL)—Bernie Meyers—recently resigned. As of August 1, Bill Shipp—who currently serves as the Deputy General Manager and Chief Operating Officer at INEEL—will take over as the new President and General Manager for Bechtel BWXT Idaho, which operates INEEL for DOE. Shipp will also remain as a science and technical advisor to Idaho Governor Dirk Kempthorne (R) and as a laboratory director at INEEL. Paul Divjak will take over Shipp's previous position as Deputy General Mmanager of INEEL. Divjak currently serves as Vice President of Operations at the site.

continued - US Army Corps of Engineers

The auditors found that disposal of the Tonawanda waste at the Buttonwillow facility "was consistent with applicable legal requirements" and was a less costly disposal option. The Army Audit Agency did not release the full report, but a summary was provided by the Corps.

For additional information, please contact Arleen Kreusch of the Army Corps of Engineers at (716) 879-4438.

U.S. Nuclear Regulatory Commmission

IUC Petitions NRC for Additional Uranium Recycling

Earlier this year, the International Uranium Corporation (IUC) filed a petition with the U.S. Nuclear Regulatory Commission seeking to recycle 17,750 tons of sludge from the Molycorp Site in Mountain Pass, California. IUC proposes to extract uranium from the sludge, which was created from bastnasite ore processing at the site. The Sierra Club opposes IUC's petition, however, and has filed a request with the NRC for a hearing on the matter. The Sierra Club argues that the sludge contains large quantities of hazardous lead and only minute traces of uranium. To date, the State of Utah has not sought to formally intervene. On April 12, however, the State of Utah received a consultation request from NRC regarding a draft environmental assessment for the Molycorp amendment request. The NRC staff determined that an environmental assessment was necessary to document potential environmental impacts to this proposed action. The State of Utah provided comments on the draft environmental assessment to the NRC.

This is not the first time that IUC has sought a license amendment for uranium extraction. Indeed, in February 2000, NRC upheld a license amendment authorizing IUC to receive, process and dispose of particular alternate feed material from Tonawanda, New York, at the company's White Mesa Uranium Mill near Blanding, Utah. (See *LLW Notes,* March/April 2000, p. 37.) In so ruling, NRC concluded that mill tailings from Tonawanda qualified as feed material and are being processed primarily for their source material content. (See *LLW Notes,* March 1999, p. 24.) The State of Utah had challenged the license amendment, arguing that the acceptance of the Tonawanda alternate feed material at White Mesa constitutes "sham disposal" and that uranium extraction is only a pretext to allow the facility to offer cheap disposal rates, in violation of federal rules that allow alternate feed to be accepted only if processed "primarily for its source-material content." Utah also asserted that the amendment essentially allows IUC to circumvent the State of Utah's regulatory process. (See *LLW Notes,* August/September 1999, p. 10.) NRC rejected Utah's claims, finding that the license amendment was properly issued and that the mill tailings constitute 11e.(2) byproduct material. NRC specifically rejected Utah's argument that the amendment should not be issued because the monetary value of the recovered uranium would be much lower than the price charged for the extraction services. Economic factors, according to NRC, are not controlling.

Dominion Energy Requests License Extension for Virginia Plants

Recently, Dominion Energy requested that the U.S. Nuclear Regulatory Commisson grant an amendment extending by 20 years the licenses for the company's two nuclear power plants located in the State of Virginia. The move is widely considered to be the start of what many believe will be a long list of requests to the NRC for plant license extensions. Indeed, the Nuclear Energy Institute's Senior Vice President and Chief Nuclear Officer—Ralph Beedle—was quoted earlier this year as predicting that most, if not all, nuclear reactors will apply for license extensions in the coming years. (See *LLW Notes,* March/April 2001, p. 14.)

In a press release, Dominion officials hailed the companies' North Anna and Surry nuclear plants as the company's cheapest source of electricity. According to the press release, the plants "were economical to build, are maintained at the highest level of safety, and it makes sense that they should be available to meet the growing demand for

continued on page 22

U.S. NRC continued

NRC Proposes to Amend Decommissioning Trust Provisions

The U.S. Nuclear Regulatory Commission is proposing to amend its regulations on decommissioning trust provisions for commercial nuclear power plants. The purposes of the proposed amendments are to

- help safeguard decommissioning trust funds from investment risk;
- ensure licensees provide adequate information to NRC about their trusts; and
- provide safeguards against improper payments from such trusts.

NRC's proposal would require that decommissioning trust agreements be in an appropriate form for greater assurance that adequate decommissioning funds will be available. The proposal stems from the potential loss of state oversight of the terms and conditions of the trusts due to deregulation. The proposed amendment would provide uniform decommissioning trust terms and conditions for all nuclear power reactor licensees.

Additional information about the proposed amendment can be found on NRC's interactive rulemaking web site at ***http://ruleform.llnl.gov***.

NRC Issues Annual Assessments

Recently, the U.S. Nuclear Regulatory Commission issued annual assessment letters for the evaluation of all operating nuclear power plants pursuant to the revised reactor oversight process initiated on April 2, 2000. Under the program, each plant receives an assessment letter every six months—a mid-cycle review letter and the annual assessment letter. NRC will make refinements to its program based on lessons learned from the first year of initial implementation.

According to NRC, the revised reactor oversight process reflects the following important themes for all of NRC's activities:

- an even greater focus on safety;
- an effort to improve objectivity and timeliness;
- a commitment to stakeholder involvement; and
- improved transparency of agency activities for both licensees and the general public.

The assessment letters can be found at www.nrc.gov/OPA/ppr. Details about plant performance can be found at www.nrc.gov/NRR/OVERSIGHT/ASSESS/index.html.

continued from page 21 - Dominion

energy." The two plants together produce approximately one-third of Virginia's electric generating capacity. The North Anna plant's two reactor licenses are currently set to expire in 2018 and 2020. The Surry plant's two licenses expire 2012 and 2013.

According to NRC estimates, license renewal review will take approximately two years to complete. In addition to the Dominion applications, NRC is currently processing license renewal requests for five other reactors at three sites. Indeed, it has been reported that approximately one-third of currently operating plants have notified NRC that they plan to apply for renewal. To date, NRC has approved license extension requests for six reactors on three sites—the Calvert Cliffs Nuclear Power Plant near Lusby, Maryland; the Oconee Nuclear Station near Seneca, South Carolina; and the Arkansas Nuclear One plant. (See *LLW Notes,* May/June 2000, p. 25 and March/April 2000, p. 41.)

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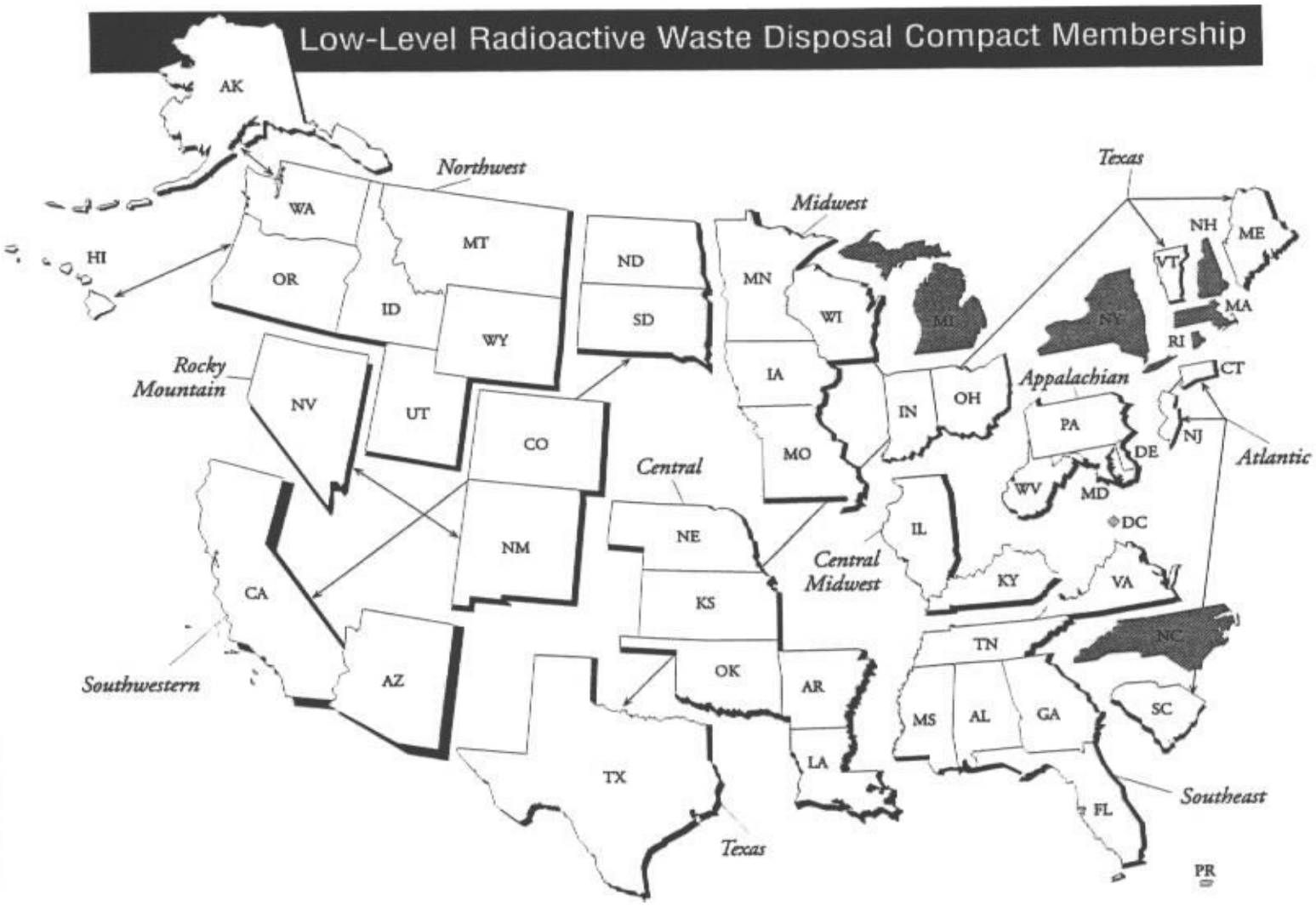
LLW Notes, LLW Forum Meeting Reports and the *Summary Report: Low-Level Radioactive Waste Management Activities in the States and Compacts* are distributed to The Board of Directors of the LLW Forum, Inc. As of March 1998, LLW Notes and LLW Forum Meeting Reports are also available on the LLW Forum web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

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



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