LLW notes

Volume 19, Number 2 March/April 2004

Atlantic Compact/South Carolina

South Carolina House Approves Additional Waste to Barnwell in FY 2004-05

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

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

Current long-term commitments indicate that there is a relatively small amount of uncommitted space left for out-of-region generators through 2008. According to the South Carolina Budget and Control Board, volume projections by customers who have not entered into long-term commitment agreements with South Carolina

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

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

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LLW FORUM, INC

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Key to Abbreviations

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

March 2004 LLW Forum Meeting Held in Seattle, Washington

September 2004 Meeting to be in Buffalo, New York

The winter 2004 meeting of the Low-Level Radioactive Waste Forum, Inc. was held on March 15 – 16 in Seattle, Washington. The meeting, which was sponsored by the State of Washington/Northwest Compact, was held at the Red Lion Hotel. A meeting of the Executive Committee took place on Monday morning, March 15, just prior to the regularly scheduled meeting.

Agenda

During the course of the meeting, attendees heard many interesting presentations and discussed recent developments in the field of low-level radioactive waste management and disposal. Presentations were made on the following topics, amongst others, during the course of the meeting:

- new developments in states, compacts, federal agencies, and industry;
- new legislation in Texas for the siting and development of a disposal facility—including the process and timeline for operator and site selection;
- plans for the U.S. Nuclear Regulatory Commission's review of the planned Yucca Mountain license application;
- issues facing the Hanford nuclear reservation;
- the U.S. Department of Energy's evolving policies and procedures for low-level radioactive waste management and disposal;
- the Environmental Protection Agency's advanced notice of proposed rulemaking on alternative disposal options for low-activity and mixed low-level radioactive waste;
- updates on the status of the Envirocare, Waste Control Specialists, and Barnwell facilities;
- preliminary findings and stakeholder feedback on the General Accounting Office's upcoming low-level radioactive waste disposal report; and
- status update on the Manifest Information Management System (MIMS).

MIMS Resolution

During the course of the meeting, LLW Forum members unanimously passed the following resolution regarding DOE's work on MIMS:

Whereas, members of the Low-Level Radioactive Waste Forum, Inc. (LLW Forum) recognize the significant value afforded by the continued operation of the Manifest Information Management System (MIMS); and

Whereas, members of the LLW Forum find MIMS to provide benefits to a wide array of entities including the low-level radioactive waste compacts, state and federal agencies, members of the industry, the public, and other stakeholders; and

Whereas, the U.S. Department of Energy (the department) continues to provide financial and technical support vital to the continued operation of MIMS;

Now therefore be it resolved that the members of the LLW Forum express their sincere appreciation and gratitude to the department for its past and present work on MIMS and encourage the department to continue funding and technical support for this vital program in the future.

Executive Committee and Officers

During the course of the meeting, the Board of Directors of the LLW Forum elected new officers and a new Executive Committee as follows:

Chair, Jack Spath
Past-Chair, Stanley York
Chair-Elect, Susan Jablonski
Treasurer, Terrence Tehan
Member, Bill Sinclair
Member, Kathryn Haynes
Member, Mike Garner
Member, Marcia Marr

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Central Compact/State of Nebraska

Nebraska Considers Building Waste Facility to Settle Central Compact Lawsuit

Nebraska officials have been quoted in local press as saying that the state is considering various alternatives—including the siting and construction of a regional low-level radioactive waste disposal facility—to settle a lawsuit filed by the Central Interstate Low-Level Radioactive Waste Commission which yielded a $151 million judgment award against the state. Moreover, officials from Kimball County have been quoted as expressing an interest in possibly hosting such a facility. (Kimball, a town of about 2,500 people in the southwestern corner of the Panhandle, was one of the counties previously being considered to host a facility before Boyd County was chosen.) Kimball Mayor Greg Robinson was quoted as saying, "My personal opinion . . . is that we should certainly take a look at it."

In regard to the potential for siting a facility as a means of settling the lawsuit, however, a spokesperson for Governor Mike Johanns said that many settlement options are being discussed and that "[i]t would be premature to talk about any specifics because there are none." Following the lower court's initial ruling against the state, Johanns had said that he believes it would be possible to build a safe site in Nebraska. "Afterall, we are generating waste in this state," said Johanns.

Some Nebraska officials, including state Senator Don Pederson, are also calling for the state to rejoin the Central Compact so as to avoid a scenario in which the state is forced to build a regional facility and then not allowed to use it. The state withdrew from the compact in August 1999. In regard to the issue, Nebraska Attorney General Jon Bruning was recently quoted in the local press as saying that "[i]t's a long shot that it could be built here and Nebraska (would be) unable to use it, but it is a possibility."

Discussions about considering siting a facility in order to settle the lawsuit arose as part of the state budget process. Some lawmakers have suggested that the state will need to raise taxes to pay the award if a settlement is not reached. Approximately $6,400 in interest charges are accruing daily on the award during the appeals process, with interest charges rising to approximately $43,000 per day after the appeals expire.

Background

The lawsuit, which was recently upheld by the U.S. Court of Appeals for the Eighth Circuit, involves a challenge of the state's actions in reviewing US Ecology's license application for a regional low-level radioactive waste disposal facility in Boyd County. On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes*, September/October 2002, pp. 1, 15-17.) The court awarded the compact commission over $151 million in damages. The state filed a notice of appeal on October 30, 2002. The Eighth Circuit heard oral arguments on the appeal on June 12, 2003. (See *LLW Notes*, May/June 2003, p. 12.) The appellate court upheld the lower court's judgment on February 18, 2004. (See LLW Forum News Flash titled, "Eighth Circuit Affirms District Court Decision in Favor of Central Compact: Summary Analysis," February 24, 2004.) The State of Nebraska filed a petition for rehearing en banc on March 2. (See LLW Forum News Flash titled, "Nebraska Files Petition for Rehearing En Banc," March 11, 2004.)

Northwest Compact/State of Utah

Tooele County Commission Denies Cedar Mountain Permit Application

Earlier this week, the three-member Tooele County Commission denied an application for a temporary conditional use permit by Cedar Mountain Environmental, which is seeking to site another low-level radioactive waste disposal facility in Tooele County, Utah. In so doing, they upheld a September 2003 decision—by a vote of 6 to 1—by the Tooele County Planning and Zoning Commission to recommend that the permit application be denied. Cedar Mountain submitted a siting application to the Utah Division of Radiation Control on January 30, 2003. (See *LLW Notes*, January/February 2003, p. 9.)

The proposal is to build a facility within Section 29, T1S, R11W of approximately 315 acres immediately north of Envirocare of Utah's low-level radioactive waste disposal facility. A portion of the proposed site, which is within the boundaries of the Tooele County Hazardous Waste Industries Zone, is currently occupied by Envirocare's earth moving contractor—Broken Arrow.

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

By ordinance, Tooele County requires that waste companies must demonstrate that there is a need for such a facility before a conditional-use permit may be granted. Commissioners said that they rejected Cedar Mountain's proposal because the company did not demonstrate the need for another low-level radioactive waste disposal facility. Envirocare, which provides approximately $5 million annually to Tooele County in gross receipts tax revenue (not including property taxes), argues that there is not enough waste to make both facilities profitable. Judd disagrees, asserting that his company could bring an additional $2 million to the county in annual revenues.

Even if Cedar Mountain were to win county approval, the company still has several hurdles ahead. Besides needing approval from the county and state regulators, the proposal would need to be approved by the legislature and the governor of Utah. In addition, a moratorium is currently in effect on proposals such as Judd's until a task force completes a two year study, which is expected to be completed in November 2004 and presented to the legislature in 2005.

Companies to Apply for New Plant License

It was recently announced that seven companies have determined to jointly apply for a license to build a new commercial nuclear power plant. The companies—five energy firms and two reactor vendors—emphasized however that none of them have made a commitment to actually build a new plant, but rather are taking the initiative to test the government's streamlined licensing process. Under the process, NRC would for the first time approve a generic reactor design and consider in one process both a construction permit and operating license.

If an application is submitted, it would be the first new reactor application filed in three decades. (Three utilities have previously submitted applications for early site approval for new reactors, but none have sought construction and operating approval.) According to the announcement, the companies plan to commit $7 million a year to the effort under a cost-sharing program with the U.S. Department of Energy.

They hope to have the application process completed by 2008 and to get license approval from the U.S. Nuclear Regulatory Commission by 2010. After that, any company or combination of participants would be able to use the permit to proceed with a construction plan.

Four of the country's largest electricity-generating companies are included in the consortium: Chicago-based Exelon Corporation, which owns 17 reactors; Entergy Nuclear, a unit of New Orleans-based Entergy Corporation, operator of 11 reactors; Baltimore-based Constellation Energy; and Atlanta-based Southern Company. The consortium also includes EDF International North America, Inc., a subsidiary of Electricite de France, which owns interests in a number of American fossil fuel plants and 58 reactors in France, and two reactor vendors, General Electric and Westinghouse Electric Company. (Westinghouse is a subsidiary of the British nuclear company BNFL.) The vendors both have next-generation reactor designs pending before the NRC.

New Liaison to IAEA Named

President George W. Bush recently named James Cunningham as the U.S. representative to the International Atomic Energy Agency. Cunningham currently serves as deputy representative of the United States to the United Nations. His nomination to the IAEA must be confirmed by the U.S. Senate.

Cunningham previously worked as deputy chief of mission at the U.S. Embassy in Rome. Prior to that, he served as a political officer for the U.S. mission to the United Nations.

(Continued from page 1)

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

The budget passed the House by a vote of 80 to 35. It will now go to the Senate for consideration and ultimately to Governor Mark Sanford. The current legislative session in South Carolina is scheduled to end in June.

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Next Meeting

The next meeting of the Low-Level Radioactive Waste Forum will be held in Buffalo, New York from September 20 - 21, 2004. The meeting, which is being sponsored by the State of New York, will be held at the Hyatt Regency. Registration materials and a meeting bulletin will be available shortly on the LLW Forum's website at www.llwforum.org.

For additional information, please contact Todd D. Lovinger, Executive Director of the LLW Forum, at (202) 265-7990.

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

Nebraska Files Petition for Rehearing En Banc: Summary Analysis

On March 2, the State of Nebraska filed a petition for rehearing en banc in regards to the U.S. Court of Appeals for the Eighth Circuit's February 18 decision affirming a lower court's ruling in a case filed by the Central Interstate Low-Level Radioactive Waste Commission against the State of Nebraska. The case involves a challenge of the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes*, September/October 2002, pp. 1, 15-17.) The court awarded the compact commission over $151 million in damages. The state filed a notice of appeal on October 30, 2002. The Eighth Circuit heard oral arguments on the appeal on June 12, 2003. (See *LLW Notes*, May/June 2003, p. 12.)

For additional information about the lawsuit and procedural history, see related story on pages 12-15.

Overview of State's Argument

In its petition, the State of Nebraska states as follows:

> Nebraska, for purposes of this petition, does not dispute that it could be compelled to perform its obligations expressed in the compact. The Court could compel Nebraska to perform its compact obligations through an array of prospective equitable remedies appropriately imposed based on the district court's findings of fact. Nebraska does dispute the panel's affirmance of the district court's orders (1) awarding money damages and (2) denying Nebraska's demand for a jury trial in this matter.

In support of its petition for rehearing en banc, the state put forth three main arguments: (1) the state did not expressly waive its sovereign immunity from an award of money damages, (2) money damages are not appropriate either at law or at equity, and (3) the denial of a jury trial was in error.

No Express Waiver of Sovereign Immunity from an Award of Money Damages

Nebraska argues in its petition that the appellate court incorrectly applied its previous decisions on sovereign immunity and that its decision on this issue is contrary to the standard set by the Supreme Court for determining waiver of sovereign immunity.

The Issue of Sovereign Immunity from a Claim for Money Damages was not Previously Resolved Nebraska asserts that the appellate court incorrectly disposed of the state's claim of sovereign immunity from money damages on the basis of an earlier decision by the court in Entergy II which the court held resolved the issue against Nebraska based on its commitments in the compact. According to Nebraska, however, the court in Entergy II "incorrectly read a waiver as to damages into Entergy I, when in fact Entergy I presumed there was no waiver as to money damages." As a result, Nebraska charges that "[t]he decision in Entergy II is utterly inconsistent with the panel's language from Entergy I." In support of this argument, Nebraska cites the following language from Entergy I that it claims presumes that Nebraska would be immune from money damages:

> The importance of preliminary injunctive relief is heightened in this case by the

> likely unavailability of money damages should the Commission prevail on the merits of its claims. Relief in the form of money damages could well be barred by Nebraska's sovereign immunity. (citation omitted)

The Court's Reliance on Prior Supreme Court Cases is in Error Nebraska further asserts that the appellate court's reliance on prior Supreme Court cases to support its finding that money damages may be awarded is misplaced, as "those decisions are inapplicable as they involved claims made by one state to a compact against another compact state." Furthermore, Nebraska points out that the monetary damages sought by the Central Commission were incurred by the generators, none of whom are a party in their own capacity in the action at hand. "As the Commission is not a sovereign state and this is not a direct action before the Supreme Court," asserts Nebraska, "then the Commission's claims for monetary damages are barred by Nebraska's sovereign immunity."

The Panel Improperly Applied the Law of the Case Doctrine Nebraska also challenges the appellate court's reliance on the "law of the case" decision in Entergy II as being in direct conflict with a rule in the Eighth Circuit against using interlocutory orders as law of the case. According to Nebraska, "[i]t is well settled in this Circuit that the law of the case doctrine 'applies only to issues decided by final judgments.'" As a result, Nebraska claims that the appellate court erred in relying on interlocutory orders in Entergy I and Entergy II to deny the state's claim of sovereign immunity from money damages.

The Standard for Finding a Waiver of Sovereign Immunity Established by the Supreme Court has not Been Met in this Case Nebraska argues that the Supreme Court and Eighth Circuit "have repeatedly held that a finding of Eleventh Amendment waiver by a State is appropriate only if it is clearly and unequivocally expressed" and that "a court should indulge every reasonable presumption against waiver." The appellate court nonetheless, according to Nebraska, erroneously applied "the implication approach" which Nebraska argues is disfavored by the Supreme Court:

> . . . nothing in the Compact authorizes the Commission to recover money damages on its own behalf. If so, then Nebraska's agreement to the Compact is not an unequivocal waiver of immunity from money damages that would allow the Commission to pursue or obtain such relief against Nebraska. (footnote omitted)

Money Damages are not Appropriate Either at Law or at Equity

Nebraska argues that the monetary damage award was in error because the compact does not authorize the commission to pursue on its own a claim for monetary relief against one of the member states. And, even if a waiver can be assumed based on the state's entry into the compact, Nebraska asserts that such a waiver would be "limited, as the Compact's explicit language provides, to suits 'requiring . . . [a] party state[] .. . to perform [its] duties and obligations arising under this compact . . ." (citations omitted)

Moreover, Nebraska asserts that "[o]n a finding of a failure of good faith performance of those 'duties and obligations' by the responsible state officials, the remedy of first resort, as a matter of federal jurisprudence, has not been money damages, but, instead, remedial orders directing that the officials whose performance had been found wanting take corrective action in compliance with the law." In this regard, Nebraska states that there is an abundance of precedence holding that federal courts have the authority to order state officials to comply with the law.

Nebraska further argues that the award of money damages is improper because it serves no compact purpose whatsoever. In so stating, Nebraska

disputes the court's finding that the equitable remedial alternative is unworkable—pointing out that the state officials proposed by Nebraska to administer a de novo contested case proceeding are not the same ones involved in the license review process and that the state administration that would be charged with taking corrective action is not the same one that the district court found to have acted in bad faith. The state even goes so far as to offer that, "to the extent there is any discomfort with the persons proposed by Nebraska, the district court can certainly direct that other State officials be named who are acceptable to both the district court and the Commission."

The Denial of a Jury Trial was in Error

As its final argument, the state asserts that "[t]he Seventh Amendment compels a jury trial on the legal claims asserted against the State [in the action at hand]." In support of this claim, the state notes that under common law a sovereign state would likely have a right to a jury trial in a contract action with a private party. The commission's suit, charges the state, is analogous to such a situation. Since the commission sought both equitable and legal relief, Nebraska argues that the "law is clear that a jury trial on the issues relating to the legal relief is constitutionally required."

Nebraska concludes its argument as follows:

> The Commission, by the terms of the Compact is a separate entity from the party states . . . It is not a sovereign state or a quasi-sovereign entity. Thus, Nebraska was entitled to a jury trial in this matter.

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

Central Commission Responds to Petition for Rehearing En Banc

On March 15, the Central Interstate Low-Level Radioactive Waste Commission filed a reply brief with the U.S. Court of Appeals for the Eighth Circuit in response to the State of Nebraska's March 2 petition requesting a rehearing en banc in a lawsuit between the parties. The case involves a challenge of the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes*, September/October 2002, pp. 1, 15-17.) The court awarded the compact commission over $151 million in damages. The state filed a notice of appeal on October 30, 2002. The Eighth Circuit heard oral arguments on the appeal on June 12, 2003. (See *LLW Notes*, May/June 2003, p. 12.) On February 18, 2004, the appellate court issued an order affirming the lower court's ruling. (See LLW Forum News Flash titled, "Eighth Circuit Affirms District Court Decision in Favor of Central Compact: Summary Analysis," February 24, 2004.)

For additional information about the lawsuit and procedural history, see related story on pages 12-15.

Overview of Central Commission's Argument

In its reply brief, the Central Commission argues that Nebraska's petition for a rehearing en banc should be denied for the following reasons:

- Nebraska previously submitted its contention that the court erred in finding that the state waived its sovereign immunity against a suit by the commission and the court's prior decisions upholding a finding of waiver are consistent with previous decisions of the Eighth Circuit and the Supreme Court;

- Nebraska's claim that the appellate court erred by not reversing the district court's damage award and ordering instead the restarting of the licensing process as a remedy for the state's bad faith behavior is meritless; and

- the appellate court's anlaysis of the Seventh Amendment issue regarding the state's right to a jury trial was correct and is consistent with previous decisions of the Eighth Circuit and the Supreme Court.

Nebraska has Waived its Sovereign Immunity to this Suit

In regard to Nebraska's complaint that the appellate court "disposed of the sovereign immunity from money damages issue summarily in a footnote," the Central Commission first argues that the state "cannot fairly complain about summary disposition of an 'issue' in a footnote when it did not advise the Court in its Statement of Issues that it was raising the contention, and then only mentioned it in passing in a footnote itself."

The commission goes on to argue that the state's "attack on a previous panel's reference to the 'law of the case' doctrine in an earlier appeal is similarly unsound" because earlier rulings in the case correctly found that Article IV(m)(8) and Article IV(e) of the Compact "specifically waived Nebraska's sovereign immunity as to actions brought to enforce obligations arising under the Compact."

In conclusion, the Central Commission asserts that "Nebraska's sovereign immunity claims, including the objection to the reference to 'law of the case,' have been raised, considered, and decided on multiple occasions by the district court and . . ." the appellate court, and were also the subject of the Supreme Court's denial of certiorari in an earlier case. Accordingly, the commission argues that Nebraska's complaint that its immunity claims have not been adequately considered "rings hollow."

Recommencement of the Bad Faith Licensing Process is not an Appropriate Remedy

In response to Nebraska's contention that the appellate court erred by awarding money damages instead of continuation of the licensing process, the Central Commission quoted a passage from the appellate court's decision finding, among other things, that "the state agencies had demonstrated an inability to review the license application fairly and that Nebraska's withdrawal from the Compact made it unlikely an injunction could be effectively enforced." Indeed, the appellate court had ruled that "the deference generally due a state's administrative proceeding does not apply" due to evidence of Nebraska's use of the administrative process to wrongfully delay and deny the license.

Nebraska was not Constitutionally Entitled to a Jury Trial

The Central Commission also challenges Nebraska's claim that it was entitled to a jury trial, which claim the commission summarizes as an argument that the compact is just like a contract between private individuals. The commission rejects this argument, however, asserting that it fails to recognize "the governmental character of the commission and the multi-state and federal interests at play in the context of an interstate compact." Accordingly, while the commission agrees that a compact is a contract, it argues that it is not at all similar to a commercial contract between private parties.

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Central Interstate Low-Level Radioactive Waste Commission v. Nebraska

Background on the Case Between the Central Commission and 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.)

The Parties

The utilities which filed the original action included Entergy Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Wolf Creek Nuclear Operating Corporation; and Omaha Public Power District. (Omaha Public Power District voluntarily dismissed its complaint in advance of the trial, however, and is not part of the judgment.) One Nebraska utility opted not to join the action. In addition, US Ecology—the company chosen to site and operate the proposed Central Compact disposal facility—joined the action as a plaintiff in March 1999. The Central Interstate Low-Level Radioactive Waste Commission was originally named as a defendant in the suit, but subsequently realigned itself as a plaintiff.

Various Nebraska agencies, officials, employees and individuals were named as defendants to the original action. However, during the course of the litigation, several amended complaints were filed and certain claims—such as the due process claims put forth by the generators and US Ecology—were dismissed. In the end, the defendants to the action, as identified in the Central Commission's amended complaint, included the State of Nebraska, its Governor, and the Directors of the Department of Environmental Quality (NDEQ) and Department of Health and Human Services Regulation and Licensure (NDHHS).

The Issues

In the original action, the generators and US Ecology claimed that the 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 cited various instances of bad faith by the state, all of which were disposed of by the lower court in regard to US Ecology's and the generators' suit, including but not limited to 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 challenged the constitutionality of the procedures employed in making a licensing decision, and they alleged various related statutory and constitutional violations. (For a more detailed explanation of the issues raised by US Ecology and the generators, see *LLW Notes*, January/February 1999, pp. 16-17.)

In its amended complaint, the Central Commission argued that "the defendant State of Nebraska has violated its contractual, fiduciary, and statutorily established obligations of good faith toward sibling

Compact states and the administrative entity comprised of the representatives of the five states, that is, this Commission." (Persons interested in a listing of the specific alleged violations are directed to the amended complaint themselves.)

Requested Relief

In its amended complaint, the Central Commission sought declaratory and monetary relief including, among other things

- an accounting of all funds received by the State of Nebraska in furtherance of the project and the exact uses of said funds;
- compensatory damages for costs incurred due to Nebraska's alleged misconduct; and
- the creation of "a just and equitable remedy . . . including the removal from the State of Nebraska's independent control, supervision, and management any further aspect of the regional facility's license application process."

In particular, the Commission requested that the court "substitute an appropriate manner of completing the licensing, such as through an appointed Master, or through a scientifically qualified, appointed entity or group representing either all of the five Compact states equally, or in the alternative, none of them, or through another impartial appropriate governmental agency."

District Court's Decision

On September 30, 2002, the U.S. District Court for the District of Nebraska ruled in favor of the Central Commission finding, among other things, that the state's license review process was "politically tainted" by former Governor Benjamin Nelson's administration. (See *LLW Notes*, September/October 2002, pp. 1, 15-17.) In its decision, the court did the following:

- entered judgment in favor of the State of Nebraska and all defendants against the utilities and US Ecology,
- entered judgment in favor of the Central Interstate Low-Level Radioactive Waste Commission against the utilities and US Ecology,
- entered judgment in favor of the Central Commission against the State of Nebraska, the Nebraska Department of Environmental Quality, and the Nebraska Department of Health and Human Services Regulation and Licensure, and
- entered judgment in favor of Nebraska and all other defendants against the Central Commission regarding the commission's fiduciary duty claim and misuse of rebate claim.

In regard to the Central Commission's "good faith" claim, the court ruled that the commission shall recover from Nebraska the sum of $151,408,240.37 plus post-judgment interest. In addition, the court issued a declaratory order that "the State of Nebraska breached its 'good faith' obligation under

Art.III(f) of the Central Interstate Low-Level Radioactive Waste Compact when processing the license application." The court also taxed costs against the State of Nebraska.

The court rejected a proposal by the commission and some of the utilities to order an independent review of the license application via the appointment of a special master. In addition, the decision made clear that the court would not order the state to issue a license.

The court's entire opion, which is approximately 200 pages in length, can be found on-line at http://www.ned.uscourts.gov/entopinions/index.html.

US Ecology's Pursuit of Damages

Following the district court's decision, US Ecology announced its intention to seek over $12 million in damages from the judgment awarded to the compact commission. That figure represents the $6,247,920 that the court determined US Ecology made in contributions in the form of work intended to achieve a license, plus interest from the time of the contributions up to the date of the ruling. According to the court, "the Commission lost the entire value of these contributions as a direct result of Nebraska's bad faith conduct."

Nebraska's Appeal

The state filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit on October 30, 2002. (See *LLW Notes*, November/December 2002, pp. 13 - 14.) In subsequent court filings, the state identified the following six issues to be raised in its appeal of the district court's decision.

- Whether a commission, not a party to an interstate compact, may recover money damages from a compact member state when neither the commission nor any compact member state suffered monetary loss from a breach of that compact?

- Whether a state that is a member of an interstate compact has a right to a jury trial in breach of compact action brought in federal court by a private party seeking money damages?

- Whether a district court can properly find that a state violated its compact duty to conduct a license application review process in good faith based on its findings that the state's governor publicly stated and acted as though he opposed the license, even though the evidence does not support a finding that (i) the governor ever directed the state's regulatory agencies to deny the license, (ii) the regulatory agencies ever agreed to or reviewed the license application on any basis other than its merits, and (iii) the agencies acted arbitrarily and capriciously by denying the license?

- Whether a district court may award prejudgment and post-judgment interest against a compact member state when the purported sovereign immunity waiver in or under the interstate compact does not provide for any award of interest, and may calculate prejudgment interest from the date of each payment by the plaintiff, rather than the date of the compact breach or other date?

- Whether a district court, which has enjoined a state licensing process because the state had conducted it in bad faith, can order the state to pay all of the money that third parties have spent

on that process, rather than order it to correct any bad faith conduct and finish the process.

- Whether a district court's finding of liability and damages must be reversed because the evidence relied upon to reach a finding of bad faith should have been barred, in whole or in part, by the applicable statute of limitations, the res judicata doctrine, and/or the Noerr-Pennington doctrine?

Oral arguments on the appeal were heard on June 12, 2003. (See *LLW Notes*, May/June 2003, p. 12.)

Appellate Court's Decision

On February 18, the U.S. Court of Appeals for the Eighth Circuit filed a decision affirming the district court's ruling in the case. (See LLW Forum News Flash titled, "Eighth Circuit Affirms District Court Decision in Favor of Central Compact: Summary Analysis," February 24, 2004.) In affirming the lower court's decision in favor of the Central Commission, the appellate court concluded as follows:

> After lengthy proceedings in the district court and multiple appeals before different panels of this court, the issues have been fully presented. We have carefully examined the extensive record and the arguments of the parties, and for the reasons cited we conclude that the district court did not err in striking Nebraska's demand for a jury trial, in finding that Nebraska breached its good faith obligation under the Compact, in exercising its discretion in fashioning monetary relief instead of an injunction, in its award of damages and interest, or in any other respect relevant to this appeal.

A copy of the appellate court's opinion itself can be viewed on-line at http://www.ca8.uscourts.gov/opndir/04/02/023747P.pdf.

For additional background information, see LLW Notes, May/June 2001, pp. 1, 11-12. For information about a novel "equitable remedy" requested by the Central Commission in its final brief, including the appointment of a Special Master to head a license review completion process and the possible termination of Nebraska's regulatory authority over low-level radioactive waste, see LLW Notes, August/September 2002, pp. 14-15.)

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

Both Parties File Motions in Dispute Between Southeast Compact Commission and North Carolina

On March 30, the Southeast Interstate Low-Level Radioactive Waste Management Commission and plaintiff states filed a motion for summary judgment in regard to their lawsuit seeking the enforcement of sanctions against North Carolina, the compact's designated host state, for its failure to develop a regional low-level radioactive waste disposal facility. (See *LLW Notes*, May/June 2002, pp. 1, 11.) On the same date, the State of North Carolina filed a motion to dismiss the plaintiffs' Bill of Complaint on the grounds that it fails to state a claim upon which relief can be granted. Both motions, as well as a prior motion by North Carolina to dismiss the Southeast Commission as a plaintiff for lack of jurisdiction, remain pending before the Supreme Court of the United States.

Background

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

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

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

Prior Motion to Dismiss the Complaint North Carolina filed a motion to dismiss the Southeast Commission as a plaintiff on August 15, 2003. (See *LLW Notes*, July/August 2003, pp. 13 - 15.) In its motion, the state put forward three arguments in support of dismissal of the action: (1) the state is immune from suit by the commission, absent abrogation or consent, because the commission is not the federal government or a state, (2) the state has not waived its immunity from suit by the commission, and (3) the commission cannot ride "piggyback" on the claims of the states.

Solicitor General's Brief in Opposition to Dismissal In late February 2004, the U.S. Solicitor General filed a brief arguing that North Carolina's motion to dismiss the Southeast Commission as a party to the action should be denied because (1) the plaintiff states' claims fall within the Supreme Court's original jurisdiction, (2) the Eleventh Amendment does not prevent the Southeast Commission from joining in the plaintiff states' complaint and asserting identical

claims in this original action, and (3) North Carolina's invitation to treat the Supreme Court's directly applicable precedent as "effectively disavowed" should be declined. The motion was submitted in response to the Special Master's invitation to the Solicitor General to express the views of the United States on North Carolina's motion.

For a detailed summary of North Carolina's arguments in support of dismissal of the action, as well as identification of affirmative defenses raised by the state, see LLW Notes, July/August 2003, pp. 13 - 15.

Plaintiffs' Motion for Summary Judgment

In their motion, the Southeast Commission and plaintiff states seek summary judgment with respect to Count 1 of their Bill of Complaint. In Count 1, the plaintiffs are seeking declaratory relief to enforce a sanctions order previously imposed by the Southeast Commission against North Carolina in the nature of a restitutionary remedy. The order was approved by the commission in December 1999 after a sanctions hearing in which North Carolina expressly declined to participate. (See *LLW Notes,* November/December 1999, pp. 8-9.) The plaintiffs argue that the sanctions order was a valid exercise of the commission's authority under the compact and that North Carolina is obligated to comply with the resolution, despite the state's withdrawal from the compact prior to its passage. (See *LLW Notes,* June/July 1999, pp. 1, 6.)

The Compact Authorizes the Commission to Impose the Sanctions at Issue The plaintiffs argue that Article VII(f) of the Southeast Compact authorizes the commission to impose sanctions for breach of the compact. Article VII(f) states, in part, that "Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state."

The plaintiffs further assert that because North Carolina rejected two written invitations and an oral request to participate in the proceeding and present evidence, the state has expressly waived its right to challenge the sanctions order unanimously passed by the commission. According to the plaintiffs, "North Carolina's choice [not to participate in the sanctions hearing or otherwise to contest the sanctions complaint on its merits] leaves it with only a jurisdictional challenge to the Commission's ruling."

The plaintiffs note that North Carolina appears to be arguing that as a matter of law, the sole or most severe sanction that the compact authorizes is expulsion and that the sanction imposed was beyond the commission's power. In response, the plaintiffs contend that such an argument, like all non-jurisdictional defenses raised by the state, is waived. Moreover, they claim that "the argument is clearly wrong." Article VII(f) states that a compact member in breach may be subject to sanctions "including suspension of its rights under this compact and revocation of its status as a party state." The word "including" is not a term of exclusion or limitation, according to the plaintiffs, but rather is used to provide examples of the commission's sanctions power.

The plaintiffs go on to point out that the next sentence of the compact states that "[a]ny sanction shall be imposed only upon the affirmative vote of at least two-thirds of the Commission members." The use of the word "[a]ny," according to the plaintiffs, "strongly suggests that suspension and expulsion are not the sole sanctions that the Commission may impose." And, the plaintiffs point out that "there are circumstances, such as those present here, in which expulsion is not a sanction, but is instead precisely what the breaching member state wants—a way to escape its obligations under the Compact." The compact cannot logically be interpreted, according to the plaintiffs, to restrict the available sanctions to one that may not in fact be a punishment, but rather a reward.

As a final argument, the plaintiffs contend that "if North Carolina had not waived its argument and if there were any doubt about whether the restitutionary remedy ordered lies within the scope of the Commission's sanctions power, the Commission's interpretation of Article VII(f) should receive deference."

The Compact Authorized the Commission to Impose Sanctions Despite North Carolina's Withdrawal In their motion, the plaintiffs address North Carolina's argument that the Southeast Commission lost its authority to sanction the state at the moment it withdrew its membership in the compact. According to the plaintiffs, "although membership may be resigned in certain circumstances, the commitments and obligations undertaken while a member must be fulfilled."

In support of their position, the plaintiffs first point to the following language in the compact which they argue "explicitly addresses a member State's continuing obligations despite withdrawal or any other attempt to evade sanctions:"

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred *by becoming a party state to this compact may be* subject to sanctions by the Commission . . . (emphasis added)

The plaintiffs also refer the Court to the following compact language which they contend "makes crystal clear that a State cannot escape from obligations incurred by virtue of Compact membership by the simple expedient of withdrawing from the Compact:"

> Rights and obligations incurred by being declared a party state to this compact *shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.* (emphasis added)

The above language, according to the plaintiffs' motion, "requires a member State to fulfill its obligations under the Compact—including obligations incurred as a result of a sanctions process—until the effective date of the sanction" and "deprives the member State of any ability to withdraw from the Compact and avoid its obligations under the Compact until the terms of any Sanctions Resolution are effective or as provided in the Sanctions Resolution."

In further support of their argument that the sanctions resolution is effective despite North Carolina's withdrawal from the compact, the plaintiffs assert that "the plain language of the Compact comports with the common law, which the Supreme Court has used as a tool in interpreting compacts." As the plaintiffs explain their argument, "under common law, a member's right to resign from or terminate membership in a voluntary membership organization is generally unfettered, but is subject to that member's satisfaction of any financial or other obligations incurred while a member." Under this principle, "a party that unilaterally withdraws from a contractual relationship is subject to the contractually-specified processes for resolving disputes about that party's extant obligations under the compact."

In concluding their arguments, the plaintiffs write the following about the possible negative impacts of a finding that North Carolina is not subject to the commission's sanctions order:

> If it is successful, North Carolina's attempt to evade the responsibilities it voluntarily assumed while it was a member of the Compact will have two detrimental effects. First, it will have a chilling effect on the willingness of states to enter into compacts because compacting states will know that their partners can easily avoid their compact obligations. Second, it will encourage states that become unhappy with their extant compact obligations simply to walk away.

North Carolina's Motion to Dismiss the Plaintiffs' Bill of Complaint

In its motion to dismiss, North Carolina argues that the plaintiffs' complaint should be dismissed for three distinct reasons: (1) the sanctions order at issue is unenforceable because North Carolina was not a party to the compact when it was imposed; (2) the sanctions order is unenforceable because the compact does not authorize the Southeast Commission to impose monetary sanctions, but instead limits its authority to suspension and termination of party states' rights under the compact; and (3) to the extent that the plaintiffs seek a judicial remedy beyond those prescribed in the compact, such a remedy is unavailable because plaintiffs' rights against North Carolina arise solely out of the compact, which expressly establishes the remedies available for its breach.

The Sanctions Order is Unenforceable Because North Carolina Was Not a Party to the Compact at the Time of its Passage North Carolina begins its argument for dismissal by pointing out that the express terms of the compact "unambiguously limit the Commission's sanctions authority to States—unlike North Carolina—that are parties to the Compact at the time the sanctions are imposed."

> Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state.

In this regard, North Carolina asserts that "[b]y its plain terms this provision authorizes the imposition of sanctions only against 'party states'" and that "the express specification of permissible sanctions identifies only actions that *could* be applied to party States, *e.g.*, suspension of rights under the Compact and revocation of status as a party State." North Carolina's withdrawal from the compact was, according to the state, effective on July 26, 1999. The sanctions inquiry was not approved by the commission until August 1999 and the sanctions order was not imposed until December 1999. According to the state's argument, since North Carolina was not a party state when the sanctions inquiry was conducted and the sanctions were imposed, the commission had no authority under Article VII(f) to impose sanctions of any kind on North Carolina.

In support of its argument, North Carolina points out that the Southeast Compact "differs materially—and tellingly—from other interstate compacts approved in the same congressional Act that approved the [Southeast] Compact." Other compacts, according to North Carolina, were written in such a manner as to authorize the imposition of sanctions on a state that has withdrawn. Moreover, some compacts specifically state that withdrawal is not effective until a prescribed period of time after notice of the intent to withdraw is provided. North Carolina explains the significance of the lack of similar language in the Southeast Compact as follows:

> The presence of provisions in the compacts negotiated by other States and approved by Congress in tandem with the Southeast Compact only confirms what the Southeast Compact's language already makes clear, even standing alone: the Commission's sanctions authority does not extend to former party States that have lawfully withdrawn from the Compact.

Finally, North Carolina addresses the plaintiffs' assertion that language in the compact should be interpreted to mean that the "rights and obligations" of a party state continue even after withdrawal. In particular, the plaintiffs point to the following text in support of this argument: "Rights and obligations incurred by being declared

a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction." The plaintiffs' broad interpretation of this language is, according to North Carolina, implausible. The text makes more sense, argues the state, if read to limit the commission's authority to sanction only party states.

The Southeast Commission Lacks Authority to Impose Monetary Sanctions In the event that the Court finds that the Commission's sanctions authority extends to former party states, North Carolina argues that the sanctions order is nonetheless unenforceable because the Southeast Commission lacks the authority to impose monetary sanctions. According to the state's argument, the express terms of the compact limit the commission's sanctions authority to the power to revoke the membership status of a party state. Such a limitation is confirmed in two ways, according to North Carolina, by the compact's terms and structure. First, Article VI(b) of the compact prohibits member states from "pass[ing] any law or adopt[ing] any regulation which is inconsistent with this compact." This provision, notes North Carolina, refers to possible sanctions for breach "and once again the *only* type of sanction expressed relates to membership rights." Second, interpretive rules hold that the "meaning of a general term in a contract is limited by accompanying specific limitations." In this regard, the state points out that the only types of sanctions mentioned in the compact relate to the exercise of rights under the compact, not to money damages.

In further support of its position, North Carolina notes that "[t]he Compact's omission of any reference to monetary penalties stands in marked and telling contrast to the language of the other compacts approved by the same Act of Congress." Other compacts, according to the state, expressly provide for the imposition of monetary sanctions. The Southeast Compact, however, is "utterly devoid" of any such provisions and includes sanctions text that speaks "exclusively" to the revocation and suspension of rights. The significance, according to North Carolina, is as follows:

> Especially given the repeatedly and contemporaneously demonstrated ability of Congress and the States to negotiate compact provisions expressly allowing for monetary sanctions against breaching States, it would be wholly unreasonable for the Court to renegotiate the bargain reflected in the terms of *this* Compact by writing into it a remedy the negotiating parties plainly elected not to include.

Finally, North Carolina argues that "[i]t is of no significance that Article VII(f) describes the available sanctions as 'including' the suspension and revocation of rights." In the first place, North Carolina contends that the sanctions power is not established by Article VII(f), but rather by Article IV(e)(11)—which it argues indicates that the powers conferred are limited to those enumerated. In addition, North Carolina contends that "in the context of the entire Compact, and in light of the very clear provisions of other compacts, the 'including' phrase cannot be reasonably read as merely listing examples of potential sanctions, which are otherwise unlimited in scope." Such an interpretation would, according to the state, render the phrase "including" to be meaningless surplusage.

Plaintiffs Cannot Obtain Judicial Remedies Beyond Those Prescribed in the Compact At the end of its motion, North Carolina addresses a secondary theory of recovery advanced by the plaintiffs—that even if the sanctions order was invalid and North Carolina's non-compliance with that order was therefore not a breach of the compact, monetary recovery can still be sought from the Court as an independent award of damages or restitution for a different breach (i.e., North Carolina's failure to construct and operate a low-level radioactive waste disposal facility). North Carolina rejects this theory, however,

arguing that the Court has "no more authority to award these monetary remedies … than did the Commission in the first instance because such a remedy would still be at odds with the Compact's express provisions."

In support of this position, North Carolina points to the principle that "no court may order relief inconsistent with [a compact's] express terms, no matter what the equities of the circumstances might otherwise invite. North Carolina also notes what it terms a "fundamental policy" of contracts law—"that contracts should be made by the parties, not by the courts, and hence that remedies for breach of contract must have a basis in the agreement of the parties." In the instant case, the remedy called for by the compact—according to North Carolina—is unambiguous: suspension or revocation of rights under the compact. There is no basis in the compact, argues the state, for the imposition of any greater or different remedy. As the state writes in its motion, "it is black-letter law that a plaintiff cannot pursue non-contract remedies, on non-contract common-law theories, for conduct that the plaintiff itself claims to be a breach of contract."

The state also points out in its motion that the money being sought by the plaintiff states was not originally provided by them, but rather by generators of waste, and that North Carolina spent over $50 million of its own money that it cannot recoup.

US Ecology v. State of California

US Ecology Files Opening Brief re Ward Valley Appeal

On March 15, US Ecology—a subsidiary of American Ecology Corporation—filed an opening brief in its appeal of an earlier decision in a lawsuit that the company filed against the State of California concerning the proposed Ward Valley low-level radioactive waste disposal facility. Specifically, US Ecology is appealing a March 26 decision by the Superior Court of California for the County of San Diego in favor of the State of California. In that ruling, the Superior Court held that US Ecology could not recover damages against the state because the company had failed to establish the element of causation and because the lawsuit is barred by the doctrine of unclean hands. (See *LLW Notes*, March/April 2003, pp. 12-13.)

Background

The action—which was filed in May 2000 against the State of California, the Governor, and the Department of Health Services and its Director—alleges breach of contract and promissory estoppel causes of action stemming from the state's alleged abandonment of its promise to use its "best efforts" to pursue transfer of the Ward Valley site from the federal government for a proposed low-level radioactive waste disposal facility. As originally filed, it sought a writ of mandate directing the state to take the necessary steps to acquire the Ward Valley site, as well as damages in excess of $162 million. (See *LLW Notes*, May/June 2000, pp. 20-22.)

In October 2000, the California Superior Court sustained a demurrer without leave to amend as to all causes of action contained in the suit. (See *LLW Notes*, November/December 2000, pp. 1, 14.) US Ecology appealed and, in September 2001, a three-judge panel of the State of California

Court of Appeal for the Fourth Appellate District reversed in part and affirmed in part the lower court's decision. (See *LLW Notes*, September/October 2001, p. 14.) In particular, the appellate court affirmed the lower court's findings that US Ecology "cannot state a breach of an express or implied contract cause of action based on . . . [its Memorandum of Understanding with the State of California], and that Ecology has failed to state a contract cause of action based on any other alleged oral or written agreement." The appellate court also affirmed the lower court's holding that US Ecology could not sustain a claim to force the State of California to take action necessary to cause establishment of the Ward Valley site. However, the appellate court reversed the lower court's findings in regard to US Ecology's claim for promissory estoppel.

Both US Ecology and the State of California petitioned the California Supreme Court to review the Court of Appeals' September 5 decision. In late 2001, the California Supreme Court denied the parties' appeals. (See *LLW Notes*, November/December 2001, pp. 1, 12-13.) A trial on the promissory estoppel claim was held before the Superior Court in early 2003.

On March 26, 2003, the Superior Court issued a decision in favor of the State of California. In so doing, the court held that US Ecology could not sustain its claim for promissory estoppel because the company was not substantially injured by its reliance on California's promise. Moreover, the court found that US Ecology's counsel acted with "unclean hands," thereby preventing the company from pursuing its equitable claims. (See *LLW Notes*, March/April 2003, pp. 12-13.)

Following the decision, US Ecology filed a motion to vacate the March 26 ruling and enter a new judgment. On May 30, the court denied that motion. US Ecology filed an appeal in the Court of Appeal of the State of California, Fourth Appellate District, Division One, on June 27, 2003.

Outline of Arguments in US Ecology's Opening Brief

In its opening brief, US Ecology argues that the Superior Court denied recovery on erroneous grounds.

With regard to the company's promissory estoppel claim, US Ecology contends that the court first erred by requiring that US Ecology first prove that the federal government would have transferred the Ward Valley site had the state not breached its promise. According to US Ecology, promissory estoppel does not require proof of what third parties would have done had the promise been kept, but rather only that the plaintiff reasonably relied on the promise to its detriment.
US Ecology also complains that the court misconstrued the company's burden with respect to its reliance damages, requiring US Ecology to show what its position would have been had the promise been performed rather than the amount required to put US Ecology in the position it would have been had the promise not been made. And, to the extent that proof of causation (other than reliance on the promise) is legally required to establish a promissory estoppel claim, US Ecology argues that the court erred in imposing a but-for causation test rather than a substantial-factor test.

US Ecology also asserts that the court erred in holding that the unclean-hands defense barred US Ecology's recovery. According to US Ecology, to bar recovery based on a plaintiff's unclean hands, the defendant must establish that (1) the misconduct prejudiced or harmed the defendant, and (2) the plaintiff's actions constituted misconduct. In the case at hand, US Ecology argues that the defendant did not meet either burden. In regard to the first element—that the misconduct prejudiced or harmed the defendant—US Ecology notes that the positions articulated in the documents cited by the court as evidence of unclean hands were fully consistent with the state's own positions and that no state representative involved in the Ward Valley project during that time ever testified that

the company's positions harmed the state's efforts to secure the site or were inconsistent with the state's positions at the time. As for the second element—that the plaintiff's actions constituted misconduct—US Ecology asserts that the positions reflected in the cited documents constituted nothing more than the reasonable positions of company counsel.

The Court Erred in Engrafting a Causation Element onto Promissory Estoppel

In its brief, US Ecology first argues that the Superior Court erred as a matter of law by requiring the company to prove that the federal government would have transferred the Ward Valley site to the state but for California's breach of its promise to US Ecology.

> The superior court's decision reflects two distinct legal errors: First, the court mistakenly engrafted a non-existent causation requirement onto its promissory estoppel analysis. Promissory estoppel does not require proof of what third parties would have done had the promise been performed, but only that the plaintiff relied on the promise to its detriment. Second, even if a causation showing was required, substantial-factor (rather than but-for) causation is the governing standard. Ecology satisfied that standard by proving that the State's breach of its promises was a substantial factor in causing its damages.

The Court Erred in Requiring US Ecology to Prove that the Government Would Have Transferred the Site US Ecology asserts that the court also erred when it required the company to prove that the federal government would have transferred the Ward Valley site had the State of California not breached its promises." According to US Ecology, "to prevail on its substantive promissory estoppel claim . . . Ecology simply had to show that it was injured by its reasonable and detrimental reliance on the State's promises—not what would have happened had the State performed."

> To satisfy the "causation" element of a promissory estoppel claim, the plaintiff is required to show only that the expenses it incurred were made in reliance on the defendant's promise. In this case, the superior court found that Ecology's expenditure of funds to pursue the project was foreseeable and reasonable through June 7, 1997, and that those expenditures were made in reliance on the MOU "best efforts" promise. (citations omitted)

Having established its entitlement to recovery, US Ecology argues that its burden with respect to its reliance damages was to show the amount required to put the company in the position it would have been had the promise not been made—including funds spent in preparation for performance. US Ecology acknowledges that the defendant may argue that the plaintiff would not have recovered its costs had the contract been performed, but in such case the defendant has the burden of proof. In the instant action, US Ecology contends that it made the required showing by proving that it incurred roughly $30 million in costs related to the project, not including interest, but that the court erred by placing the burden on US Ecology to show that the federal government would have transferred the land absent the state's breach of its promises.

The Superior Court Erred in its Application of the Substantial-Factor Test US Ecology argues in its brief that "[b]y proving its reasonable and detrimental reliance on the State's promise, Ecology satisfied the only 'causation' test required by this Court (and California law generally) for a successful promissory estoppel claim." However, to the extent that additional proof of causation is required, the company contends that the Superior Court misapplied the "substantial factor" causation test by requiring the company to prove that the federal government would have

transferred the Ward Valley site "but for" the state's breach. Instead, US Ecology argues, the defendant need not have been the sole cause of the plaintiff's injury under the substantial-factor test and the fact that other causes contributed to the plaintiff's injury does not absolve the defendant.

> Had the district court properly applied the substantial-factor test instead of requiring proof of but-for causation, it would have ruled in favor of Ecology. The State's abnegation of its promises was at a minimum a substantial factor in causing harm to US Ecology. By the time the State ultimately abandoned its efforts to acquire Ward Valley in late 1999, Interior and BLM had given the State multiple opportunities to request the transfer of the land . . . Yet, each time the State either ignored or refused outright the federal government's invitations. The State cannot argue that it played no role in the failure to acquire the Ward Valley site when it declined repeated opportunities to pursue that very acquisition—and in fact, went so far as to propose that Interior issue an opening order to foreclose the acquisition, which Interior properly rejected.

The Superior Court Erroneously Applied the Doctrine of Unclean Hands

In the latter part of its brief, US Ecology argues that the Superior Court erred in concluding that US Ecology's promissory estoppel claim was barred by the doctrine of "unclean hands." As US Ecology explains it, the affirmative defense of unclean hands is available under California law if a plaintiff seeking equitable relief engaged in misconduct that affected the transaction and if the plaintiff's actions prejudiced or harmed the defendant. In holding that US Ecology had "unclean hands" in the instant action, the court relied on five documents to reach the conclusion that "[US] Ecology cannot on the one hand argue the State failed to use its best efforts to obtain the property from the federal government while on the other it continued to make demands rejecting or limiting the scope of any agreement and created obstacles to an agreement conveying the property." US Ecology contends that this reasoning is flawed, however, because (1) the state failed to meet its burden to prove that US Ecology's conduct caused it any prejudice; and (2) the cited documents do not rise to the level of "misconduct" required to bar US Ecology's recovery.

The State Failed to Introduce Evidence that it was Prejudiced by the Documents According to US Ecology, "a bedrock legal principle of the unclean-hands defense under California law is that the defendant must prove it was harmed or prejudiced by the plaintiff's actions." US Ecology goes on to state that "[i]n keeping with this principle, it is the defendant's burden at trial to demonstrate how the plaintiff's actions resulted in prejudice specifically to the defendant and how that prejudice 'renders inequitable the assertion of [relief] against the defendant.'" It is exactly this burden that US Ecology asserts the state failed to fulfill—i.e., the state did not explain how it was injured by any of the acts of misconduct which they charged against US Ecology.

> For each of the actions on which the trial court premised its unclean-hands ruling, the State's and US Ecology's interests and publicly stated positions were then fully aligned. In each instance, the State either approved or failed to object to Ecology's actions, or engaged in similar acts itself. Yet years later, at trial, the State found it advantageous to repudiate those acts, and impugn Ecology for taking actions to advance positions identical to the State's own positions at the time. The superior court, by failing to demand that the State satisfy its burden to show prejudice, erred as a matter of law in finding that Ecology's promissory estoppel claim was barred by the unclean-hands doctrine.

US Ecology did not Commit Any Misconduct that would Support an Unclean-Hands Finding US Ecology asserts that the plaintiff's actions must rise to the level of "misconduct" for the defense of unclean hands to apply. In other words, "[t]he party asserting the unclean-hands doctrine as a defense 'must show that [the plaintiff] was guilty of misconduct so severe as to preclude its recovery for any resulting harm.'" In the instant case, however, US Ecology argues that—as a matter of law—none of the company's actions constitute misconduct that justifies applying the doctrine.

> The communications by Ecology and its counsel on which the superior court based its unclean-hands ruling were in no way unconscionable, illegal, fraudulent, or inequitable; nor did they constitute any other kind of "misconduct." Instead, these communications reflected statements of Ecology's positions and lawful attempts to protect its legal interests. There is no evidence that the positions reflected in those communications were illegal, spurious, or even incorrect, or that they were advanced in bad faith.

Rather than being actions that constitute misconduct that would justify the application of the unclean-hands doctrine, US Ecology contends that the communications cited by the Superior Court "reflect (at most) aggressive positions taken to protect Ecology's legal interests." The company goes on to argue that "[b]ecause the communications on which the court premised its unclean-hands finding do not constitute misconduct as a matter of law, the finding cannot stand."

Natural Resources Defense Council v. U.S. Department of Energy

States Weigh in re DOE Right to Reclassify Waste

In late March, the attorneys general from six states filed a "friend of the court" brief with the U.S. Court of Appeals for the Ninth Circuit in support of a lower court ruling that effectively blocks the U.S. Department of Energy's efforts to reclassify some high-level radioactive waste at three nuclear sites. The states participating in the brief include Washington, Oregon, Idaho, South Carolina, New Mexico and New York. In their brief, the states ask the appellate court to uphold a lower court decision that overturned a regulation that DOE claims allows it to reclassify high-level radioactive waste so that it would not have to be permanently removed.

The Issues

At issue is a 1999 DOE rule, known as Order 435.1, that serves as the department's principal interim regulatory tool for managing its radioactive waste. The rule provides, in part, that the department may reclassify high-level nuclear waste as "incidental" waste suitable for disposition in underground storage tanks, thereby effectively exempting the waste from storage and handling requirements contained in the Nuclear Waste Policy Act of 1982. Had the lower court upheld the rule, it would have allowed DOE to dispose of high-level radioactive waste at the Idaho National Engineering and Environmental Laboratory, the Hanford facility in Washington, and the Savannah River Site in South Carolina.

Specifically, the rulemaking allows DOE to reclassify waste as incidental if steps are taken to reduce its radioactivity levels to the extent practicable and if those levels are no higher than the most radioactive waste classified as low-level radioactive waste. DOE stands by its rulemaking,

contending that it has "unfettered discretion" in deciding how to dispose of radioactive waste. The department argues that residual amounts of waste can be safely disposed in underground storage tanks using grouting—a procedure which involves filling mostly empty tanks with concrete.

The plaintiffs, however, argue that the rulemaking violates federal nuclear waste disposal laws and is merely an effort by DOE to save cleanup money. They contend that the rulemaking violates the Nuclear Waste Policy Act, which requires that DOE dispose of all high-level nuclear waste in a federal underground repository. The law defines all waste generated by past nuclear reprocessing operations as high-level, so the plaintiffs argue that all tank wastes must be disposed in an underground repository.

Procedural Background

The lawsuit was filed in 2002 by the Natural Resources Defense Council, the Snake River Alliance, and the Yakama Nation. Subsequently, the states of Washington, Oregon, Idaho, and South Carolina filed "friend of the court" briefs in support of the plaintiffs. (See *LLW Notes,* November/December 2002, p. 15.) DOE originally responded by requesting that the case be dismissed, but the court denied the department's motion to do so in early August 2002. (See *LLW Notes,* July/August 2002, pp. 18-19.)

In July 2003, the U.S. District Court for the District of Idaho struck down the rule as "invalid." (See *LLW Notes,* July/August 2003, p. 15.) In striking down DOE Order 435.1, the court ruled that the rulemaking directly conflicts with provisions of the Nuclear Waste Policy Act. According to the court, the department "does not have the discretion to dispose of [high-level radioactive waste] somewhere other than a repository established under [the Nuclear Waste Policy Act]."

(Continued from page 11)

The commission also rejects the state's argument that the analogy of this case to a dispute among colonies over a prior agreement is not appropriate because the commission itself is not a sovereign. In this regard, the commission argues that the appellate court "correctly concluded that there was no such thing as a suit like this at common law" and that the appellate court's "employment of an analogy to colonial disputes fits the Supreme Court's tests much better than does Nebraska's simplistic private party contract analogy."

U.S. Environmental Protection Agency

EPA Extends Comment Period on its ANPR re Low-Activity Waste

The U.S. Environmental Protection Agency has just issued a press advisory announcing a 60-day extension of the public comment period for its previously published Advanced Notice of Proposed Rulemaking that seeks comment on a wide variety of issues related to the disposal of waste containing low concentrations of radioactive material—a concept that the EPA defines as "low-activity" radioactive waste. Comments on the ANPR are now due by May 17, 2004.

The ANPR, as originally published, does not include proposed regulatory language or a specific regulatory approach, but rather seeks public input on scientific and policy issues to assist the agency in determining whether or not to go forward with the development of a regulation. EPA states, however, that in general the agency "believe[s] that radioactive waste disposal could be improved by a consistent approach that is based on the risk to public health and the environment presented by the material in question, rather than its origin or statutory definition." The U.S. Nuclear Regulatory Commission, Agreement States, and Department of Energy facilities were all consulted in the development of the ANPR.

In announcing the extension of the public comment period, the agency issued the following statement:

> On November 18, 2003, EPA published the ANPR in the Federal Register to seek public comment on a range of possible approaches for the safe disposal of "low-activity" radioactive waste. The "low activity" radioactive waste ANPR is an effort to begin public dialogue on the wide range of issues surrounding the effective management of radioactive waste. The ANPR introduces the concept of "low-activity" radioactive waste and explores equivalent or superior management and disposal approaches. The 60-day extension of the comment period will allow further public input on the important questions framed by the "low activity" waste ANPR. For more information, visit http://www.epa.gov/radiation/larw.

An announcement about extension of the ANPR will be published in the Federal Register on March 12.

Background

Upon initial publication of the ANPR, EPA provided the following in the way of background:

> Present regulation of "low-activity" radioactive waste is inconsistent, often based on the origin of the waste. Besides inconsistent regulation, cost and availability of disposal affect the way low-activity wastes are managed. We believe that certain types of disposal facilities, particularly hazardous waste landfills permitted under Subtitle C of the Resource Conservation and Recovery Act (RCRA), may be able to offer appropriate protection for disposal of low-activity radioactive wastes. Among the wastes that could be addressed as "low-activity" are mixed (chemically hazardous and radioactive) wastes, wastes containing natural radioactivity, cleanup wastes, and other low-level radioactive waste.

By identifying additional options for the safe disposal of such wastes with, of course, appropriate regulatory controls, EPA believes that a number of benefits will be realized including (1) a more consistent consideration of the risks associated with "low-activity" wastes, (2) quicker

site cleanups, and (3) improved overall management of radioactive wastes.

The ANPR states that "'low-activity' is a conceptual term that does not have a statutory or regulatory meaning." Indeed, the ANPR outlines and requests public comment on methods that could be used to define "low-activity" waste. Nonetheless, the document does differentiate between low-activity mixed waste (LAMW) and other low-activity radioactive wastes (LARW).

The ANPR focuses on concepts to ensure protective disposal of low-activity radioactive wastes, while offering alternative options. Some of the issues addressed and on which comments are sought are as follows:

- what types of disposal facilities might be appropriate for the disposal of low-activity wastes;
- what types of additional measures might be needed to provide confidence that such facilities can be protective;
- how to define low-activity (i.e., modeling of potential exposures to landfill workers or evaluating the behavior of the landfill over a long time period);
- what level of risk or dose should be the benchmark to model potential exposures;
- how might NRC address waste from its (or its Agreement State) licensees;
- how should state agencies and the general public be involved in allowing alternative disposal options to be developed; and
- whether or not non-regulatory actions (i.e., guidance) could help improve current practices.

A copy of the Advanced Notice of Proposed Rulemaking is available for downloading on the EPA's web site at www.epa.gov/radiation/larw. Comments may be submitted by mail to: Air and Radiation Docket, Environmental Protection Agency, EPA West Room B108, Mail Code: 6102T, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460, Attention Docket ID No. OAR-2003-0095. Comments may also be submitted electronically or through hand delivery/courier.

For additional information, contact Adam Klinger of the U.S. Environmental Protection Agency at (202) 343-9378 or Dan Schultheisz, also of EPA, at (301) 343-9300.

U.S. Nuclear Regulatory Commission

NRC Considering Utah Request to Amend its Agreement with the Agency

The U.S. Nuclear Regulatory Commission is considering a request by the State of Utah to amend its agreement under Section 274 of the Atomic Energy Act to assume regulatory authority over 11e.(2) byproduct material within the state. If the request is accepted, Utah will be the sixth state to assume this authority. The other states are Colorado, Illinois, Ohio, Texas and Washington.

Under the proposed amendment to the Utah agreement, NRC would transfer to the state the responsibility for licensing, inspection, enforcement and rulemaking activities for uranium mill tailings and uranium milling operations. This would result in the transfer of four NRC licensees to Utah's jurisdiction. Prior to entering into the amended agreement, NRC would ensure that the state's program is adequate to protect the public health and safety and that it is compatible with NRC's program for regulating the materials covered in the amendment to the agreement.

An announcement of the proposed amendment to the Utah agreement, along with a summary of the NRC draft assessment of the Utah 11e.(2) byproduct material program, will be published in the *Federal Register* for four consecutive weeks for public comment. Interested persons are invited to provide comments to Michael T. Lesar, Chief, Rules Review and Directives Branch, Division of Freedom of Information and Publication Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001.

Copies of the proposed amendment to the Utah agreement, the Governor of Utah's request and supporting documents, as well as the NRC staff assessment are available on the NRC's Agency-wide Documents Access and Management System (ADAMS).

NRC Issues Final EIS' re Virgil C. Summer and R.E. Ginna Plants, Moves Forward re Other Renewal Applications

The U.S. Nuclear Regulatory Commission recently issued final environmental impact statements on the proposed renewal of the operating licenses for the R.E. Ginna and Virgil C. Summer nuclear power plants. In both instances, NRC found that there are no environmental impacts that would preclude license renewal for an additional 20 years of operation.

In addition, NRC recently held public meetings on the proposed renewal of the operating licenses for the Donald C. Cook Nuclear Plant, Units 1 and 2, and the Arkansas Nuclear One, Unit 2, nuclear power plant. NRC also announced that it will be holding public meetings shortly on the proposed renewal of the operating licenses for the Point Beach Nuclear Power Station, Units 1 and 2, and the Browns Ferry Nuclear Plant, Units 1, 2 and 3. And, NRC has announced the opportunity to request a hearing on the proposed renewal of the operating licenses for Units 2 and 3 of the Millstone nuclear power plant.

Issuance of Final EIS' re Virgil C. Summer and R.E. Ginna Plants

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

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

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

As part of its environmental review of both applications, the NRC held public meetings and accepted comments from members of the public, local officials and representatives of state and federal agencies.

Copies of the Summer final EIS are available electronically at http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement15/index.html. Copies of the Ginna final EIS are also available electronically at http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement14/sr1437s14.pdf.

Public Meetings re D.C. Cook and Arkansas Nuclear One

The D.C. Cook Plant—which is located near Benton Harbor, Michigan—is operated by Indian Michigan Power Company. The operating license for Unit 1 is set to expire on October 25, 2014, and for Unit 2 on December 23, 2017. A license renewal application for the plant was submitted to the NRC on November 3, 2003. NRC staff held public meetings on March 8th in Bridgman, Michigan, on the environmental review of the license renewal application.

The Arkansas Nuclear One Plant is located near Russellville, Arkansas. The current operating license for Unit 2 at the plant, which is operated by Entergy Operations, is due to expire on July 17, 2018. The Commission unanimously approved a license extension for Unit 1 on June 20, 2001 following a review of staff recommendations. NRC staff held public meetings on February 3 in Russellville to gather comments on environmental issues the public believes NRC should consider in its review of the license application.

Copies of the D.C. Cook license renewal application are available electronically on the NRC's Agency-wide Documents Access and Management System (ADAMS) at http://www.nrc.gov/reading-rm/adams/web-based.html by entering accession number ML033070179. Copies of the Arkansas One renewal application are available on the NRC web page at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/ano-2.html.

Public Meetings re Point Beach and Browns Ferry Plants

The Point Beach Nuclear Power Station is located near Two Rivers, Wisconsin. The current operating licenses for Units 1 and 2 expire on Octobe 5, 2010, and March 8, 2013, respectively. Nuclear Management Company submitted a license renewal application for the units on February 26, 2004. NRC plans to hold a public meeting in Two Rivers on March 31 to discuss how the agency will review the application.

The Browns Ferry Nuclear Power Plant is located near Decatur, Alabama. The current operating license for Units 1, 2 and 3 are set to expire on December 20, 2013, June 28, 2014, and July 2, 2016, respectively. The Tennessee Valley Authority submitted a license renewal application for the units on January 6, 2004. NRC staff will hold two public meetings on April 1 in Athens, Alabama on the environmental review related to the license renewal application. (Unit 1 of the plant has been shut down for an extended period. NRC is currently reviewing TVA's extensive work on that unit to determine if it may be restarted.)

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

Hearing Request Opportunity re Millstone Plant

NRC has announced an opportunity to request a hearing on the applications to renew the operating licenses for Units 2 and 3 of the Millstone nuclear power plant. The plant is located in Waterford, Connecticut. The current operating licenses for Units 2 and 3 expire on July 31, 2015 and November 25, 2015, respectively. Dominion Nuclear Connecticut, Inc. submitted a license renewal application on January 22, 2004. NRC staff have determined that Dominion has submitted sufficient information for the agency to formally "docket," or file, the applications.

A copy of the Millstone relicensing application can be found at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/millstone.html.

NRC Regulations/Status of Renewals

Under NRC regulations, a nuclear power plant's original operating license may last up to 40 years. License renewal may then be granted for up to an additional 20 years, if NRC requirements are met. To date, NRC has approved license extension requests for 23 reactor units. In addition, NRC is currently processing license renewal requests for several other reactors.

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

NRC Rejects Most Protests Against PFS Project, but Agrees to Consider Two Issues

In February, the U.S. Nuclear Regulatory Commission rejected requests by Utah officials to consider a dozen issues relating to a proposal to store up to 44,000 tons of spent fuel in a storage facility on the reservation of the Skull Valley Band of Goshute Indians. In refusing to consider issues about the facility—which is being proposed by a consortium of eight nuclear utilities named Private Fuel Storage—NRC upheld a previous administrative ruling by the Atomic Safety and Licensing Board. NRC did, however, agree to consider two issues that the ASLB previously refused to consider: (1) whether PFS' plans include adequate measures for inspecting and repairing spent fuel canisters at the site, and (2) whether the environmental impact statement included, as alleged by Utah officials, a one-sided cost-benefit analysis which represents the benefits to be greater than is accurate. With regard to the latter issue, Utah officials have complained that NRC staff were inconsistent in choosing as inputs into the analysis two different time frames: 20 years, which represents the duration of the initial license for which PFS has applied, and 40 years, which represents the projected length of time that waste would be stored at the site. NRC did, however, back the ASLB on several issues relating to the adequacy of the environmental impact statement.

NRC's February decisions about the proposed PFS project were followed by an agency decision in late March not to scrutinize the finances of the project or the financial plan drafted by the consortium, despite a federal embezzlement

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NRC Issues Annual Assessments

The U.S. Nuclear Regulatory Commission recently issued annual assessment letters to 102 of the nation's 103 operating commercial nuclear power plants. An annual assessment letter was not issued to the Davis-Besse nuclear facility in Ohio because it is currently under a special NRC oversight program.

Every six months most plants receive either a mid-cycle review letter or an annual assessment letter, along with an NRC inspection plan. Updated information on plant performance is posted to the NRC web site every quarter. In addition, public meetings at each of the plant sites are planned and will be announced in advance. The next mid-cycle assessment letters will be issued in September.

Copies of the assessment letters sent to each licensee can be found on the NRC web site at http://www.nrc.gov/NPR/OVERSIGHT/ASSESS/index.html and through the Agencywide Documents Access and Management System (ADAMS).

NRC Adds Focus re High-Level Waste Programs

The U.S. Nuclear Regulatory Commission has established a separate division of High-Level Waste Repository Safety in its Office of Nuclear Material Safety and Safeguards. The purpose of the change is to enhance NRC's focus on major high-level radioactive waste programs and issues and to conduct a comprehensive licensing program for the proposed high-level waste repository at Yucca Mountain, Nevada. An application to construct and operate the repository is expected to be submitted by the U.S. Department of Energy in December.

William Reamer will serve as Director of the new Division. Reamer previously served as Deputy Director of the Division of Waste Management which, prior to the reorganization, handled all waste management activities for the Office of Nuclear Material Safety and Safeguards.

John Greeves will lead a new Division of Waste Management and Environmental Protection which will plan, manage and implement programs related to the decommissioning of sites, management of low-level radioactive waste activities, and conduct of environmental reviews. Greeves formerly served as the Director of the Division of Waste Management.

NRC anticipates that the changes will improve organizational effectiveness and efficiency and focus attention and resources on the major program areas of high-level waste, decommissioning, environmental protection and low-level waste. The reorganization became effective on March 22.

NRC Issues License to U.S. Enrichment Corporation

The U.S. Nuclear Regulatory Commission recently issued a license to the U.S. Enrichment Corporation (USEC) to construct and operate a uranium enrichment test and demonstration facility at the Portsmouth Gaseous Diffusion Plant site in Piketon, Ohio. The American Centrifuge Lead Cascade Facility will be based on the U.S. Department of Energy's centrifuge technology for enriching uranium for use in producing fuel for nuclear reactors. The Lead Cascade will consist of up to 240 full-scale centrifuges, which will recycle the enriched and depleted uranium.

USEC applied for a license to build and operate the facility on February 12, 2003. In January, NRC issued an environmental assessment finding that there would be no significant environmental impact from the facility and a safety evaluation report concluding that USEC's proposed programs would provide adequate safeguards and protection for the health and safety of workers, the public and the environment. The NRC held off on issuing a license at that time until USEC had finalized lease arrangements for the facility with DOE, which owns the Portsmouth plant.

USEC intends to follow construction of the Lead Cascade with a full scale uranium enrichment plant using centrifuge technology. On January 12, USEC announced plans to build this centrifuge plant at the Piketon site. USEC is expected to submit a license application to NRC for this facility in August.

NRC Sets Schedule to Review LES Application

The U.S. Nuclear Regulatory Commission has established a 30-month milestone schedule for reviewing an application from Louisiana Energy Service to build a gas centrifuge uranium enrichment plant—to be known as the National Enrichment Facility—in Eunice, New Mexico. The agency will hold a hearing on the application as part of its review and invites persons whose interests may be affected by the proceeding to file a written petition for permission to participate in the hearing.

LES is an international consortium of companies in the nuclear industry consisting of two general partners—Urenco Investments, Inc. and Westinghouse Enrichment Company—and six limited partners. LES originally submitted its application on December 15. NRC has determined that the application contains sufficient information to begin a detailed review and has formally "docketed," or filed, the application. A copy of the application is available on the NRC's Agency-wide Document Access and Management System (ADAMS) at http://www.nrc.gov/reading-rm/adams/web-based.html using accession number ML040020261.

The NRC staff will conduct a comprehensive review of the LES application and prepare a safety evaluation report and an environmental impact statement before the hearing is completed. Persons wishing to participate in the hearing must file a petition to intervene within 60 days of publication of the Commission's notice and order in the *Federal Register*.

NRC Offers Hearing Opportunity on Proposed Humboldt Bay Spent Nuclear Fuel Storage Facility

The U.S. Nuclear Regulatory Commission has accepted for detailed technical review an application from Pacific Gas and Electric Company (PG&E) for a license to possess spent nuclear fuel in an independent spent fuel storage installation (ISFSI). The ISFSI would be located on the site of the former Humboldt Bay nuclear power plant in Humboldt County, California. NRC is offering an opportunity for interested persons to request a hearing.

PG&E submitted an application on December 15, 2003. If granted, the license would authorize the company to store spent fuel in the ISFSI for 20 years. The Humboldt Bay nuclear plant has been shut down since 1976. Spent fuel has been stored in a water pool inside the reactor refueling building since that time. Under PG&E's proposal, the used fuel would be moved into a dry storage cask system that the company would construct and operate at the site.

The NRC will conduct a comprehensive review of the application and conduct safety and environmental evaluations to determine if it would meet requirements of the agency's regulations, would not be inimical to the common defense and security, and would not constitute an unreasonable risk to public health and safety. Any person whose interest may be affected by the ISFSI may file a petition for a hearing.

PG&E's application is available for review on the NRC's Agency-wide Document Access and Management System (ADAMS) at http://www.nrc.gov/reading-rm/adams/web-based.html.

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indictment against the Goshutes' tribal leader—who is one of the project's biggest advocates. (See *LLW Notes*, January/February 2004, p. 6.) NRC also announced that it will not delve into corruption allegations by Goshutes who oppose the facility. According to NRC, the agency's license process is not the proper arena in which to consider such issues.

To Obtain Federal Government Information

by telephone

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

by internet

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

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

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

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

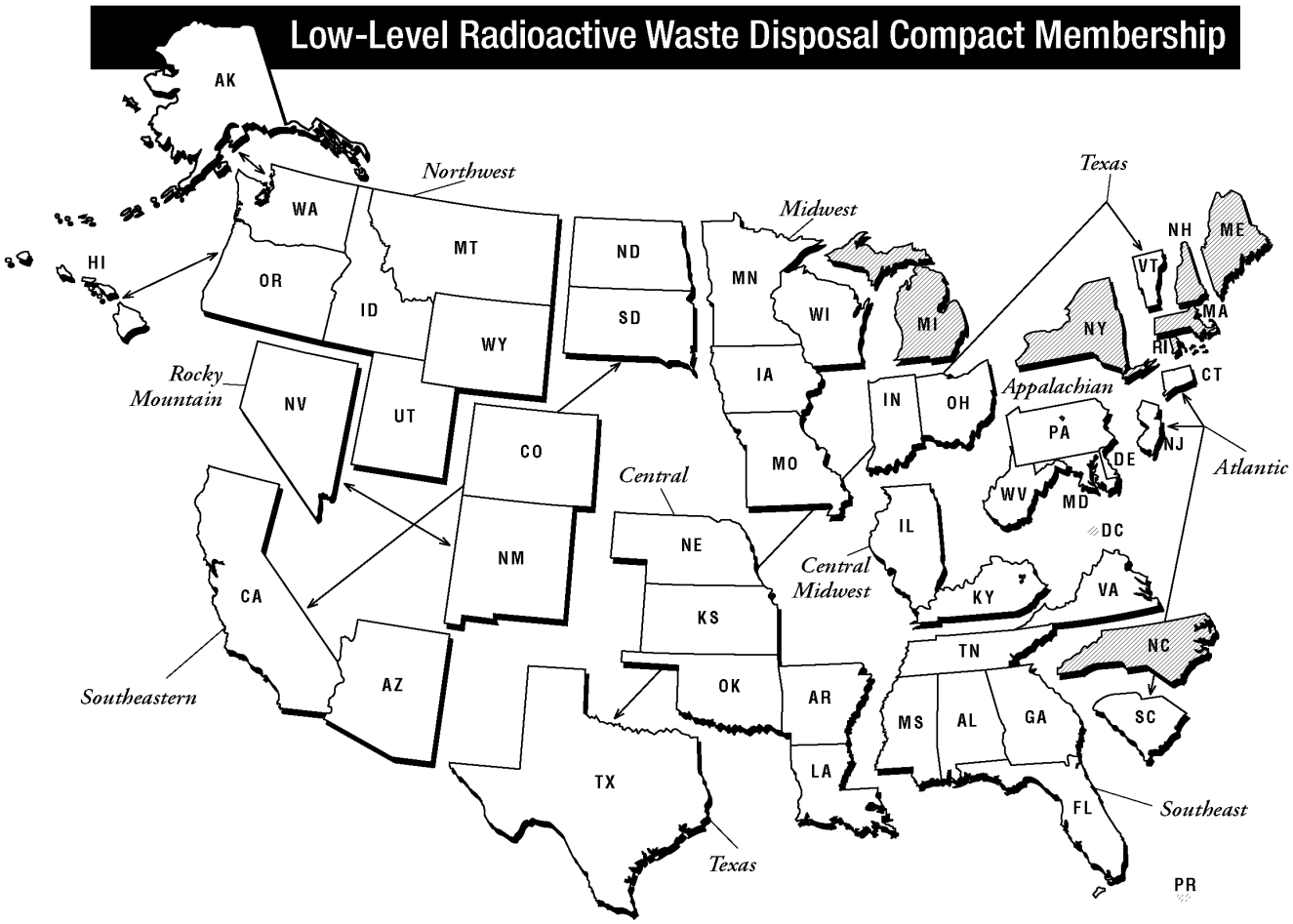
- GAO homepage (access to reports and testimony) .....**www.gao.gov**

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

Accessing LLW Forum, Inc. Documents on the Web

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

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



Appalachian Compact
Delaware
Maryland
Pennsylvania
West Virginia

Atlantic Compact
Connecticut
New Jersey
South Carolina

Central Compact
Arkansas
Kansas
Louisiana
Nebraska
Oklahoma

Central Midwest Compact
Illinois
Kentucky

Northwest Compact
Alaska
Hawaii
Idaho
Montana
Oregon
Utah
Washington
Wyoming

Midwest Compact
Indiana
Iowa
Minnesota
Missouri
Ohio
Wisconsin

Rocky Mountain Compact
Colorado
Nevada
New Mexico

Nothwest accepts Rocky Mountain waste as agreed between compacts

Southeast Compact
Alabama
Florida
Georgia
Mississippi
Tennessee
Virginia

Southwestern Compact
Arizona
California
North Dakota
South Dakota

Texas Compact
Texas
Vermont

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