LLW notes

Volume 18, Number 1 January/February 2003

Entergy Arkansas v. State of Nebraska

Nebraska and Central Commission File Appellate Briefs in Legal Dispute

On December 30, 2002, the State of Nebraska filed a legal brief with the U.S. Court of Appeals for the Eighth Circuit relating to a district court decision in a case—which was initiated in December 1998—that challenges 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 district court ruled in favor of the Central Interstate Low-Level Radioactive Waste 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 state originally filed a notice of appeal on October 30, 2002.

In the brief, Nebraska argues that the appellate court should reverse the lower court's decision because the judge made a number of errors—one of the most significant of which is claimed to be his denial of the state's request for a jury trial. In addition, the brief also challenges the legal reasoning adopted by the judge to support the large damages award and argues that sufficient facts simply did not exist to find that the state acted improperly or in "bad faith" in denying US Ecology's low-level radioactive waste disposal facility license in 1998.

The Central Commission filed its answer brief on February 3, 2003. In the brief, the Commission argues that the appellate court should affirm the district court's decision. In support of its position, the Commission asserts that (1) the district court properly concluded that the Seventh Amendment does not guarantee a jury trial to a state in cases in which an interstate compact commission is required by the compact itself to sue one of the compact states for breach of its duties under the compact, (2) the district court's finding of "bad faith" on the part of Nebraska was not erroneous, (3) the district court did not err in declining to order as a remedy for Nebraska's bad faith performance under the compact of the completion of a state administrative process which the court found to be a mere continuation of bad faith,

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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

Results of LLW Forum's Work re Manifest Information Management System (MIMS)

At its September 2002 meeting, the Low-Level Radioactive Waste Forum determined to form a Manifest Information Management System (MIMS) task force to investigate a variety of issues. To gather information for the work of the task force, Stan York (the task force leader) and Todd Lovinger (the LLW Forum's Management Contractor) sent surveys to each LLW Forum member inquiring as to the usefulness and necessity of each data element currently contained in MIMS. The responses that were received indicated that LLW Forum members use the MIMS system and find it to be necessary. In addition, some members would like more or different information.

Conversations were then held with designated representatives of the disposal site operators. It was determined that there would be little or no additional cost to continue to provide the current information, but that there might be substantial additional costs to make changes (more or less data) in the present reporting software. The operators agreed that states and compacts could contact them individually to discuss the cost of providing additional or different information.

As a result of these conversations, it became clear that the next step is for DOE to decide whether it will continue to fund the program. It is clear from the responses of LLW Forum members that, in general, states and compacts place a high value on MIMS and support continued DOE funding. There is little that the LLW Forum (or the task force) can do until that decision is made by DOE. Therefore, the task force will not be convened until DOE makes its decision.

For information about receiving a different data set, the following individuals have been identified as contacts by the facility operators:

Barnwell, South Carolina facility (Chem-Nuclear): Sybil Horton at (803) 541-5018 or James Latham at (803) 259-1781

Envirocare, Utah facility (Envirocare of Utah): Brian Clayman at (801-532-1330)

Richland, Washington facility (US Ecology): Arvil Crase at (360) 753-3669

Status Update re MIMS

In late January, Dave Meredith of MACTEC, Inc.—DOE's current contractor for the Manifest Information Management System—provided the LLW Forum with the following statement in regards to updates to MIMS:

> This is to notify you that we have updated the MIMS database with all data submitted since the last update . . .
>
> Barnwell: We have added data for FY 2002 (October 01 through September 02) to the on-line database.
>
> Envirocare: We have added data for June 2001 through November 2002 to the on-line database.
>
> U.S. Ecology: On-line database contains data through September 2001. We have not received any data since.
>
> In the near future we will be adding a report to the MIMS that will show volumes and curies by disposal site, year, 10 CFR 61 Waste Classification (e.g., class A, B, C) and generator category (e.g., industry, academia, utilities, government).

Central Compact/Nebraska

Central Commission Passes Resolutions re Sanctions Against Nebraska and Revocation of the LLRW Portion of its Agreement State Status

At its January meeting in Kansas City, the Central Interstate Low-Level Radioactive Waste Compact Commission passed the following two resolutions relating to its ongoing dispute with the State of Nebraska over the siting of a low-level radioactive waste disposal facility in Boyd County:

- a resolution that essentially reactivates a proceeding that was previously initiated by the commission under its Amended Rule 23 to consider possible sanctions against the State of Nebraska for the state's alleged failure to comply with the terms of the compact and to fulfill its obligations thereunder; and
- a resolution authorizing the commission Chair to notify the U.S. Nuclear Regulatory Commission and the State of Nebraska that the commission will seek to have that portion of Nebraska's agreement state status that relates to the disposal of low-level radioactive waste revoked upon NRC's initiative pursuant to 42 U.S.C. s.2021(j)(1).

Resolution re Rule 23 Proceedings

Background On August 27, 1999, the State of Nebraska enacted legislation to withdraw from the Central Compact. Under Article VII(d) of the compact, such withdrawal becomes effective "five years after the Governor of the withdrawing state has given notice in writing of such withdrawal to each Governor of the party states" unless permitted earlier by unanimous approval of the commission. Accordingly, Nebraska's membership in the compact will end in August 2004, unless revoked earlier by the commission.

Following Nebraska's announcement of its intention to withdraw from the compact, the Central Commission initiated a proceeding under its Amended Rule 23 to consider possible sanctions against the state. Rule 23, amongst other things, lays out procedures for the commission to consider whether a withdrawing state has failed to comply with the terms of the compact and, in the case of such a finding, for revoking its membership and imposing penalties. The potential listed penalties include the payment of monetary damages, the continuation of host state obligations, and limitations on facility access for generators in the withdrawing state.

The Central Commission and the State of Nebraska subsequently entered into an agreement to hold the Rule 23 proceeding pending in status quo until the completion of a trial in litigation between the parties that challenges the state's actions in reviewing US Ecology's facility license application. On September 30, 2002, the U.S District Court for the District of Nebraska ruled in favor of the Central Commission and ordered the state to pay $151 million in damages. In so ruling the court found, 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 state filed a notice of appeal on October 30, 2002 and filed a legal brief with the U.S. Court of Appeals for the Eighth Circuit on December 30, 2002.

The Resolution The resolution contains the following complaints and charges against the State of Nebraska:

- "Nebraska failed and refused to perform its compact obligations in good faith, as it was expressly obligated to do under Article II(f) of the Compact;"
- "Nebraska failed to process the low-level

radioactive waste facility license application of US Ecology, Inc., within a reasonable period from the time that the completed application was submitted;" and

- "Nebraska has acted in bad faith by permitting political interference and influence to pervade its licensing process and decisions, its dealings with the Commission, and otherwise acted in bad faith toward its sister states and the members of the Compact, all as more specifically detailed in (a) the amended complaint of the Commission in the federal lawsuit above referred to . . . ; and (b) as detailed in findings of fact by the United States District Court for the District of Nebraska, Chief Judge Richard G Kopf presiding . . . "

The resolution further provides that "the Commission expects to receive and may consider as evidence in this proceeding (1) the testimony of the various witnesses in the federal trial; (2) sworn deposition testimony of some or all of those witnesses who testified; (3) the trial exhibits offered by the several plaintiffs and received in evidence at the trial, and particularly any exhibits referenced in the two memoranda and orders of the Court dated September 30, 2002; and (4) the two Court decisional memoranda themselves."

Next Steps Nebraska has 60 days in which to provide a written response to the commission including any written arguments, explanations or evidence. A special meeting of the commission will be held in March or April to provide Nebraska the opportunity for a hearing. Following the hearing, the commission will consider the evidence, deliberate in open session, and make its decision in open session in regard to the Rule 23 charges and possible revocation of Nebraska's membership in the compact under Article VII(e). If the commission determines that Nebraska did not comply with its terms and obligations under the compact, the commission may impose sanctions against the state.

Resolution re NRC Agreement State Status

Background The State of Nebraska has been an agreement state pursuant to 42 U.S. Code s.2021(b) for several decades. Nebraska's agreement state status includes the authority to license and regulate, among other things, the disposal of low-level radioactive waste within the state. Pursuant to this authority, Nebraska took on the responsibility of reviewing US Ecology's license application for the proposed Boyd County site, which application was denied on December 21, 1998.

In the course of its lawsuit against Nebraska, the Central Commission sought, among other things, what it terms "the equitable remedy of a fair opportunity to obtain its license for the Butte site." In particular, the commission recommended that the license review process be completed via the appointment of a Special Master selected by the Court—with an opportunity for comment by the parties. The commission further requested that the Court "retain jurisdiction through the thirty-year operational period, unless the Commission succeeds in its intended effort to have Nebraska's agreement state status voluntarily or mandatorily revoked as to low-level waste disposal, in which case the NRC would regulate and no continuing jurisdiction need be retained at that point." (See *LLW Notes,* July/August 2002, pp. 12 – 15.) The court did not award the commission the equitable relief it sought, but it did not foreclose the commission's making a request to the U.S. Nuclear Regulatory Commission to do so.

Pursuant to a resolution passed at the commission's October 23, 2002 meeting, the commission Chair wrote to Nebraska Governor Michael Johanns and requested that he consider voluntarily ceding Nebraska's agreement state status solely with reference to low-level radioactive waste licensing and regulation of disposal. Governor Johann's declined to do so in a subsequent letter of reply.

The Resolution The resolution passed by the commission at its January 2003 meeting resolves as follows:

- that the commission Chair is authorized to notify the U.S. Nuclear Regulatory Commission and the State of Nebraska that the commission intends to seek by petition to have that portion of Nebraska's agreement state status that relates to the disposal of low-level radioactive waste revoked upon NRC's initiative;
- that the commission will obtain the NRC's procedures, policies and similar information for such a proceeding;
- that the NRC be advised that "with regard to any such proceeding for revocation, the request is that such a procedure not be initiated formally until completion of the federal court litigation" currently on appeal; and
- that US Ecology, regional generators, license application consultants, and the public be invited to comment upon the proposed approach to the NRC at the commission's annual meeting in or about June 2003 - either orally or in writing.

The resolution specifically states that the commission "is inclined to pursue and advance the possibility of seeking a license and low-level radioactive waste disposal regulation " from the NRC for the Boyd County site and that the commission "desires that Nebraska continue to be bound to its 30-year responsibility to be the first host" of a compact disposal facility if the Boyd County site is licensable. The resolution acknowledges, however, that active pursuit of a license for the Boyd County site "needs to await finalization of the litigation appeals of the judgment entered against Nebraska, expected to take place over the next one and a half to three years."

Northwest Compact/Utah

Several Bills Addressing Radioactive Waste Issues Filed in Utah

At least 10 bills addressing issues involving radioactive waste management and disposal have been filed for consideration by the Utah legislature this session, including proposed legislation that would:

- ban the disposal of Class B & C low-level radioactive waste within the state;
- increase taxes on the disposal of hazardous and radioactive waste; and
- create a task force to study the hazardous materials industry in Utah, including safety, oversight and regulation.

In addition, several lawmakers have proposed either a bill or a resolution to conduct a feasibility study on putting a spent fuel storage facility on state school trust lands—widely seen as an attempt to derail the planned Private Fuel Storage, L.L.C. storage facility on the Goshute Indians reservation. Legislation has also been introduced to change the state's ballot initiative process in response to last year's decision by the state supreme court which found the process to be unconstitutional. (See *LLW Notes,* July/August 2002, pp. 1, 9 – 11.)

The proposed bills have been numbered and titled, but few contain the proposed text of the bill at this time.

Bills to Ban the Disposal of Class B & C Radioactive Waste

Following last November's defeat of a state-wide ballot initiative that sought, among other things, to impose substantial additional taxes on the disposal of out-of-state low-level radioactive waste

at Envirocare and to prohibit the disposal of Class B and C radioactive waste within the state (Citizen's State Initiative Number 1 - the Radioactive Waste Restrictions Act), various bills have been filed this session which once again seek to increase taxes and ban disposal of the so-called "hotter wastes." (See *LLW Notes,* November/December 2002, pp. 7 – 9.)

While Class B & C wastes are not presently disposed of in Utah, an application by Envirocare for a license to receive and dispose of containerized Class A, B, and C low-level radioactive waste was approved on July 9, 2001. (See *LLW Notes,* July/August 2001, pp. 6 – 9.) Appeals to that decision were subsequently filed by two environmental groups, but on November 19 the Utah Radiation Control Board voted 9 to 0 to affirm the Executive Secretary's earlier decision to approve the license application—subject to specified limitations and conditions. (See *LLW Notes,* July/August 2001, pp. 6 – 9.) The Utah Radiation Control Board approved a final order/board decision on February 10, 2003 which constitutes final agency action. Before the license is effective, however, Utah law requires that the legislature and Governor must both approve the facility. Envirocare has indicated that it does not plan to seek approval at this time due, among other things, to public confusion between the companies proposal and that of the Goshute Tribe and Private Fuel Storage (PFS) to accept high-level spent fuel rods from nuclear power plants.

Of the various bills that have been introduced this legislative session, some seek to simply "freeze" Envirocare's Class B & C license, while others seek to outright terminate it. One such bill that seeks to simply ban the disposal of Class B & C wastes in Utah, HB 237, was approved by the House Political Subdivisions Committee on February 6 by a vote of 7 to 2. During committee hearings, local citizens spoke both in favor and in opposition to the proposed bill. In particular, opponents argued that B & C wastes are no more dangerous than hazardous chemicals and fuels that currently are transported on state highways and that the bill is unnecessary because the legislature already reserves the right to reject an application for new types of wastes.

Bills to Increase Taxes on Waste Disposal

In addition to legislation to increase taxes on low-level radioactive waste disposed of at the Envirocare of Utah facility, legislation is expected to be introduced in Utah that will seek to increase taxes on the state's hazardous waste industry—composed primarily of Clean Harbors' landfill and incinerator in Tooele County. These facilities were previously operated by Safety-Kleen. Part of the reason for the anticipated tax is a dramatic decrease in the amount of hazardous waste disposed of in Utah in recent years.

In addition, legislation has been proposed that would seek to raise taxes on ECDC, a large waste disposal facility in Carbon County that accepts industrial waste from around the country and household trash from local counties. This bill only targets commercial waste facilities—not those owned by local governments.

International Uranium Corporation also appears to be the target of proposed legislation. The company operates a uranium mill near Blanding that accepts materials contaminated with uranium for recycling. IUC currently pays a tax, subject to the contract provisions, passed in the 2001 legislative session. However, lawmakers argue that contaminated materials from cleanup sites around the country are being disposed of at the facility and they are seeking to increase the current tax or to remove provisions making the tax only subject to new contracts. Officials from Envirocare of Utah, which has long seen the IUC facility as an "unfair competitor," have stated in response to the bill that they are supportive of a fair application of taxes.

A bill has also been introduced that seeks to tax the disposal of commercial and demolition wastes, which are currently exempt from state fees. The

wastes are primarily the byproducts of demolished buildings and residue from new construction.

Another bill, HB 143, seeks to put a fee on spent fuel transported to and through the State of Utah.

According to a Utah official, "[t]he legislature will most likely also look at the current fees structure which supports the oversight of commercial facilities." According to that official, "[c]urrent fees are not meeting the required oversight money needs of the Department of Environmental Quality." He continues that, "[t]he Legislature may examine all regulatory fees or individual fees assessed on various solid, hazardous, or radioactive waste streams."

Bills to Study Waste Issues

Legislation has also been filed that would create a task force to study the hazardous materials industry in Utah, including such issues as taxation, whether the Public Service Commission should regulate wastes, and how to eliminate conflicts of interest by those who work as regulators and then go to work for waste companies. Proper oversight and alleged conflicts of interest were issues that were raised by supporters of the Radioactive Waste Restrictions Act that failed to pass last November.

Legislation has also been introduced to create a legislative task force on whether to ban Class B & C waste disposal or to allow B & C waste but impose high taxes on it.

Resolution re Spent Fuel Facility on State Lands

Republican legislators are proposing a resolution that would urge the School and Institutional Trust Lands Administration (SITLA) to conduct a feasibility study on siting a spent fuel storage facility on state trust lands to earn money for Utah schools. By passing a resolution on the issue, instead of formal legislation, it would only require approval of the legislature—instead of also requiring signature by the Governor. Then, if lawmakers agreed the project was a good idea, they would put it on the general election ballot for a nonbonding vote.

The proposal has raised a tremendous amount of controversy as it is widely seen as an attempt to derail plans by a consortium of nuclear utilities—Private Fuel Storage, L.L.C.—to build a spent fuel storage facility on the Skull Valley Band of Goshute Indians reservation. (See *LLW Notes,* July/August 2000, p. 26.) PFS has submitted a license application to the U.S. Nuclear Regulatory Commission, which is expected to issue a ruling on the application shortly.

The most vocal opponent of the PFS proposal has been the State of Utah, led by Governor Mike Leavitt (R). In response to the new proposal to build a spent fuel storage facility on state lands, Leavitt has stated that he remains opposed to the disposal of such waste in the State of Utah, no matter where or by whom the facility is sited. Others have criticized the new proposal as an unfair attempt to take away the Goshutes plan for much-needed economic development.

For additional information, please contact Bill Sinclair of the Division of Radiation Control, Utah Department of Environmental Quality, at (801) 536-4255.

New LLRW Disposal Facility License Application Submitted in Utah

On January 30, 2003, Charles A. Judd -- former CEO of Envirocare of Utah, Inc. --submitted to the Utah Division of Radiation Control a siting application on behalf of Cedar Mountain Environmental for a new commercial low-level radioactive waste disposal facility. According to the application, Cedar Mountain Environmental

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Southwestern Compact/California

Legislation Introduced in California re Radioactive Waste Disposal

California State Senator Gloria Romero (D) recently introduced legislation that would place new restrictions and prohibitions on the disposal of low-level radioactive waste in the State of California. The legislation, SB 13, is similar to a bill which she introduced in the 2002 legislature, but subsequently withdrew.

Among other things, the proposed legislation does the following:

- prohibits the disposal of radioactive waste at a hazardous waste disposal facility and authorizes state agencies to adopt regulations and permit conditions relating to safety and monitoring conditions, as well as restrictions and limitations on maximum concentrations for, the disposal of TENORM;
- exempts the disposal of solid or hazardous waste containing TENORM at a solid or hazardous waste disposal facility from licensing requirements imposed under the Radiation Control Law;
- prohibits the disposal of radioactive waste or any materials containing byproduct, source, or special nuclear material except at a specified licensed facility (the bill also prohibits the transfer of radioactive material for recycling or for reuse by an unlicensed party, with certain specified exceptions); and
- prohibits the disposal of radioactive waste at a solid waste management facility.

State of New York

West Valley Impasse Declared

The U.S. Department of Energy and the New York State Energy Research and Development Authority (NYSERDA) have been negotiating for years to clearly delineate long-term site management responsibilities at the Western New York Nuclear Service Center (West Valley). In late January, NYSERDA declared that the agencies had reached an impasse in the negotiations.

At issue is DOE's long-term stewardship responsibilities. NYSERDA argues that the department can and must remain at West Valley to provide long-term stewardship for any radioactive waste that it leaves on site. DOE asserts that it does not have the authority to do this.

In declaring the impasse, NYSERDA announced that it will continue to explore all possibilities to assure that DOE meets what the agency believes to be the department's responsibilities at West Valley. In that regard, NYSERDA is in the process of hiring a law firm to review potential legal options.

(Continued from page 1)

(4) the district court did not err in awarding money damages to the Commission in light of Nebraska's waiver of sovereign immunity when it entered the compact, and (5) the district court did not err in awarding prejudgment interest.

Lawyers for the State of Nebraska have requested that they be given an opportunity for an expanded reply brief to be submitted by February 25. The lawyers for each side have agreed that a half-hour per side should be allowed by the Court of Appeals for oral argument.

The Appellant's Brief

In its brief, the State of Nebraska offers various issues about the lower court's decision that form the basis for its appeal and provides arguments in support of its position. The following is a brief summary of each issue and some of the state's associated arguments. Persons interested in a more detailed explanation are directed to the brief itself.

(1) The State Was Entitled to a Jury Trial on the Commission Claim of Compact Breach

The State of Nebraska argues that "[t]he district court's refusal to permit a jury trial was both an 'encroachment upon' and a 'curtailment of' an essential constitutional right, and [that] reversal is constitutionally compelled under the Seventh Amendment." In support of its argument, the state points out that the Seventh Amendment entitles a party to a jury trial if the cause of action is one "in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." Nebraska contends that the "required analysis is no different simply because the jury demand came from the State, not a private party" and that the Seventh Amendment applies equally to legal claims for money damages against a sovereign state.

In regard to the case at hand, Nebraska points out that the core claim being pursued is one of breach of a contract—namely, the congressionally approved interstate compact—and that the district court based its liability and damages analysis on the state's failure to perform its compact obligations. According to Nebraska, a breach of contract action seeking compensatory damages was historically regarded as a legal claim that was triable by jury. Moreover, Nebraska argues that the Central Commission "sought and was awarded quintessentially legal relief for the State's alleged breach" of contract—another factor that the state cites in support of its claimed right to a jury trial.

In regard to the equitable relief sought by the Central Commission, Nebraska states that "[i]t has long been recognized that a jury trial on legal issues cannot be denied because those issues are coupled with equitable issues and characterized as incidental or less significant by comparison." The presence of legal issues in the case means, according to Nebraska, that the litigants have a right to a jury trial on the legal issues—even if equitable claims are also involved.

(2) The District Court Erred in Finding that Nebraska Conducted the Licensing Process in "Bad Faith"

Nebraska also argues in its appellate brief that the district court erred by refusing to decide whether the licensing agencies' process or decision was "arbitrary and capricious" and that the court improperly substituted its own judgment as to how the agencies should have acted "reasonably." The state also complains that the district court presumed agency bias where none was proven and admitted evidence at trial that should have been excluded. The combination of these errors, argues the state, requires reversal of the district court's finding of bad faith.

In support of its position, Nebraska first argues that the district court erred in finding that Governor Nelson's conduct caused actual agency bias. Nebraska notes here that the directors of the Department of Environmental Quality and the Department of Health, not the Governor, were responsible for the licensing process and decision. Nebraska asserts that the evidence "did not show such personal, financial, or other illegal prejudice by Agency personnel that is required to overcome the presumption of honesty and integrity." Instead, Nebraska argues that the evidence merely showed insignificant interaction between the Governor and the agencies at the beginning of the licensing process. Staff from the Governors office, according to Nebraska, followed a "bright line" rule that did not allow them to discuss the license decision or technical review of the application with the agencies. Nebraska further

asserts that early evidence of Nelson and his staff's involvement in the licensing process should not have been admitted because it relates to a separate bad faith claim that is barred by the statute of limitations.

Finally, the state contends that its agencies did not act arbitrarily or capriciously in conducting the licensing process and that the licensing decision was not arbitrary and capricious. According to Nebraska, "[i]n every example of 'unreasonable' conduct cited by the trial court, the Agencies had a rational basis for their decision, and substantial evidence to support their views." The state also complains that the district court improperly judged the merits of US Ecology's license application by ignoring Nebraska's financial assurance and environmental regulations, substituting its own views for those of the agencies, and criticizing the license decision as evidence of bad faith. The license decision, according to Nebraska, was supported by overwhelming evidence on all grounds.

(3) The District Court Erred in Awarding Damages

Nebraska asserts that the district court erred in awarding damages for its finding that the state's administrative review of US Ecology's licensing application was flawed. Instead, Nebraska argues that the proper remedy is to remand the matter to the state administrative agencies with instructions to correct the flaw. In support of its argument, Nebraska points out that the Governor and all of the allegedly biased agency directors are no longer in the state's employ and that the state has assigned responsibility for deciding the application to new officials who had no previous involvement in the license review process. The only proper relief, according to the state, is to order the new and unbiased state officials to conduct a de novo contested case proceeding and otherwise finish the license review process in good faith.

Monetary damages, argues Nebraska, are not an appropriate remedy. In the first place, Nebraska contends that the Central Compact Commission suffered no monetary loss as a result of the license review process. All of the money used for the process, and upon which the district court's award is predicated, came from US Ecology and the generators. Furthermore, Nebraska asserts that the law "requires that a damage award must include appropriate adjustments to account for mitigation, and, where reliance damages are under consideration, the value of what the plaintiff received." (citations omitted) Nebraska argues that in a claim for "bad faith performance," damages are recoverable—if at all—only for "excess" costs due to the bad faith. The Central Compact Commission, however, did not particularize its "excess" damages at trial, according to Nebraska.

(4) The District Court Erred in Awarding Prejudgment or Postjudgment Interest

Nebraska asserts that the district court erred in awarding prejudgment and postjudgment interest. In regard to prejudgment interest, the state argues as follows:

"The U.S. Supreme Court has held that the Eleventh Amendment prohibits an award of prejudgment interest against a sovereign entity, such as the State of Nebraska, without its express consent, and that a sovereign's waiver to suit is not sufficient to allow an award of interest. The instant Compact, including the provision in Article IV(e) on which jurisdiction is premised, says nothing about a waiver of sovereign immunity to prejudgment interest. Accordingly, the award of prejudgment interest below is in direct conflict with the Eleventh Amendment and must be reversed." (citations omitted)

Nebraska argues that the district court's award of postjudgment interest is barred by the Eleventh Amendment for the same reasons. Nebraska points out that there is no explicit waiver of sovereign immunity against postjudgment interest in the Compact and that "the federal interstate statute cannot abrogate the State's Eleventh Amendment immunity since it does not unequivocally express an intention on the part of Congress to abrogate . . . "

Likewise, Nebraska asserts that the compact is silent on the award of prejudgment interest and that such an interest award cannot survive without a statutory basis for it—which the state claims does not exist. Moreover, the state contends that there is no basis for an award of prejudgment interest under federal common law or state law.

The Appellee's Brief

In its brief, the Central Commission responds to various issues raised by the State of Nebraska in support of its request for reversal of the lower court's decision and makes its own arguments in support of upholding that decision. The following is a brief summary of the commission's responses and some of the associated arguments. Persons interested in a more detailed explanation are directed to the brief itself.

(1) The Seventh Amendment Does Not Guarantee a Jury Trial in the Case at Hand

The Central Commission asserts in its brief that, "[g]iven that the Compact itself does not grant a right to jury trial and that neither states nor interstate compacts existed prior to the ratification of the Constitution, the district court, as required by the case law, looked for an appropriate historical analogy . . . [and] held that this suit most closely resembles a dispute among colonies regarding an agreement made by them." The Commission argues that the district court's analysis was correct and that "given that the King and his Privy Council ultimately resolved all disputes among colonies, it is clear that the common law did not provide a right to jury trial for disputes most analogous to the case at bar."

The Commission goes on to argue that, "Nebraska's analogy to a contract suit between private parties ignores the nature of the Commission and the purpose of the Compact." The simple fact that the Commission is not a state or itself a "sovereign" does not mean that it is just like any private litigant, according to the brief. In addition, the Commission points out that, in the case at hand, the Commission is acting to enforce on behalf of its member states both state and federal agreements made when the compact was enacted and ratified by Congress. Accordingly, asserts the Commission, there is no right to a jury trial.

(2) The District Court did not Err in Finding that Nebraska Acted in "Bad Faith"

In regard to Nebraska's argument that the district court erred in finding that the state acted in "bad faith," the Central Commission points out that under the appropriate standard for appellate review, the factual findings of the lower court can only be reversed if clearly erroneous. The Commission goes on to argue that the factual findings were indeed appropriate and correct.

In particular, the Commission challenges Nebraska's claim that the district court was obliged to measure the state's conduct under an "arbitrary and capricious" standard and argues that Nebraska is attempting to advance an incorrect standard for appellate review of the district court's factual findings.

As to the merits of the "bad faith" finding itself, the Commission asserts that the district court had ample basis to support its finding that former Governor Benjamin Nelson and his administration were biased against the project and that Nebraska state agencies were improperly influenced by the administration's actions. The Commission goes on to argue that the district court properly refused to exclude evidence on the basis of the statute of limitations and that Nebraska's licensing process was exposed as a "farce."

(3) The Award of Damages Combined with Limited Equitable Relief was Legally Correct

In terms of the damages award, the Commission begins by asserting that monetary damages are an appropriate remedy under the compact. While the Commission acknowledges that the district court fashioned a slightly different remedy than requested in order to find a solution that best rectified the damages, the Commission argues that "the district court acted within the governing law

and its discretion . . . [and that its] rejection of the State's proposal to resume a tainted administrative process was correct." In particular, the Commission notes that the court found that Nebraska's planned contested case hearing would be inadequate to vindicate the compact's "good faith" provision.

Furthermore, the Commission specifically disputes the state's claim that its waiver of sovereign immunity under the compact did not extend to monetary damages. In this regard, the Commission points out that, "Nebraska's refrain of sovereign immunity was litigated twice in the trial court and the waiver found below was affirmed twice by this Court . . . Nebraska's waiver of sovereign immunity, stemming from its membership in the Compact, makes damages an available remedy against the State."

The Commission also disputes Nebraska's claim that it did not suffer any monetary loss as a result of the state's bad faith, pointing out that it paid out $97,802,211.84 of its own money and credits and arguing that it is the real party in interest and is entitled to compensation reflecting the injury it suffered. The Commission goes on to dispute Nebraska's claims of mitigation.

(4) The District Court did not Err in Awarding and Calculating Prejudgment Interest

The Commission argues that the award of prejudgment interest was not an abuse of discretion and that the fact findings by the court of the principal amount, rate and necessary time period for the calculation were not clearly erroneous. The Commission goes on to dispute Nebraska's claim that an explicit prejudgment interest sovereign immunity waiver is required in the case at hand and argues that, "Nebraska's objection that prejudgment interest can be awarded only from 'the date the cause of action accrued' is illogical and without merit."

Accordingly, the Commission asserts that "there was neither an abuse of discretion in calculating nor any immunity defense to the award of prejudgment interest . . . [and the] principal amount, the applied rate and the triggering dates were legally and factually correct.

Background

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

Nebraska Senator Proposes Tax to Pay Verdict

Nebraska State Senator Chris Beutler of Lincoln has introduced legislation, LB 657, that would place a 3.5 percent tax on resident's electric bill in order to pay the $151 million judgment facing Nebraska in its legal dispute with the Central Compact Commission. Beutler acknowledges that the plan will likely be unpopular, but says that nobody else has come up with a viable alternative. "There's no good answer to this problem," said Beutler. "I don't want the general fund to absorb the shock."

Nebraska is currently facing a $673 million deficit. Nebraska Governor Mike Johanns has proposed transferring $35 million into the state's cash reserve fund to help pay the judgment if the state loses its appeal.

The Nebraska Public Power District opposes Beutler's bill, according to a spokesperson. They argue that it is premature because the issue remains pending on appeal.

Omaha Public Power District. One Nebraska utility opted not to join the action. In addition, US Ecology 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. Accordingly, the current defendants to the action, as identified in the Central Commission's outstanding amended complaint, include 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 have been disposed of by the 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 argues 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 seeks 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 requests 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."

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. For information about the district court's September 30 decision in favor of the Central Commission, see LLW Notes, September/October 2002, pp. 1, 15-17. For a copy of the court's September 30 decision, go to http://www.ned.uscourts.gov/entopinions/index.html.

US Ecology v. State of California

California Superior Court Refuses to Dismiss Ward Valley Lawsuit

On December 20, the California Superior Court for the County of San Diego denied a motion by the State of California for summary adjudication of US Ecology's promissory estoppel and declaratory relief claims in a lawsuit concerning development of the proposed low-level radioactive waste disposal facility at Ward Valley. In so doing, the court cleared the way for the case to go to trial—which is currently set to begin in San Diego on January 17, 2003. On January 3, arguments will be heard on a pending motion by the state for protection from the disclosure of documents which it contends are privileged, as well as on whether or not to allow the depositions of high-ranking state officials.

The case—which names as defendants 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 on the part of the defendants and seeks in excess of $162 million in damages from the state for, among other things, abandoning its efforts to purchase the Ward Valley site from the government. (See *LLW Notes,* May/June 2000, pp. 20-22.)

Denial of the Dismissal Motion

In denying the state's motion for summary judgment or, in the alternative, summary adjudication, the court held that the state "has not met its burden of showing that one or more elements of plaintiff's cause of action cannot be established or that there is a complete defense." The court also found that "there are triable issues of material fact precluding the court from determining that promissory estoppel is barred as a matter of law."

The State Has Failed to Show that US Ecology's Cause of Action Cannot be Established In support of its dismissal motion, the state contended that an earlier appellate court decision articulated that, in order to sustain its promissory estoppel claim, US Ecology must establish that the state's sole reason for abandoning the project was a political one. The state argued that US Ecology can not meet this burden because there were other considerations that led to the decision including environmental, health and safety, financial and social concerns. The Superior Court, however, held that the appellate court language quoted by the state "indicates only that if the sole reason were political as was pled, estoppel would not necessarily violate public policy, but that does not establish the only scenario that would not violate public policy." According to the court, the estoppel doctrine may bind the government "when in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel."

As to the specific issue of why the state abandoned the project, the court found as follows:

"While the State maintains there are several policy reasons in support of its decision, there is no evidence presented as to what was actually considered in making that decision. The evidence presented shows merely that the project was controversial, elicited public concern, and generated news articles, reports and studies. As such, the State has not met its initial burden."

There are Triable Issues of Material Fact The court also held that there remain triable issues of material fact as to whether the non-political reasons for abandoning the Ward Valley project were considered or whether they were resolved before the decision was made and whether political reasons were the real impetus for abandoning the project. In particular, the court noted that US Ecology has offered evidence suggesting that the state worked in concert with officials of the U.S. Department of Interior to develop a mutually acceptable "exit

strategy" to ensure that the Ward Valley land transfer would not occur. Furthermore, the court stated that at least some of the concerns raised by the state—such as groundwater contamination and potential impacts on the desert tortoise habitat—were rejected prior to the state's decision to abandon the project.

Background

The lawsuit, which was initially filed in the Superior Court of the State of California on May 2, 2000, alleges that the State of California broke promises that it had made to US Ecology to remain committed to completing the process necessary to develop a low-level radioactive waste disposal facility in Ward Valley, California. As a result of the promises, US Ecology claims that it incurred substantial costs in an effort to develop, construct and operate the proposed facility—which costs the company is seeking reimbursement for from the courts.

In response to a motion by the state, the California Superior Court sustained a demurrer to the entire complaint, without leave to amend. 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 in the action. The ruling affirmed the lower court's findings that US Ecology "cannot state a breach of an express or implied contract cause of action based on the . . . [Memorandum of Understanding], 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, holding as follows:

"We conclude the complaint stated a cause of action for promissory estoppel. We emphasize, however, that this conclusion means only that Ecology has plead sufficient facts to overcome a demurrer. Ecology will still be required to prove its claims, and we offer no opinion as to the likelihood that Ecology will be able to do so. We note further that although Ecology seeks all of its preparation costs and alleged lost profits, the full scope of contract-based damages are not necessarily recoverable under the equitable promissory estoppel doctrine."

Both US Ecology and the State of California petitioned the California Supreme Court to review the Court of Appeals' September 2001 decision. However, in December 2001 the California Supreme Court denied the petitions for review. (See *LLW Notes*, November/December 2001, pp. 1, 12-13.)

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

Cedar Mountain Environmental's entire application upon submittal was declared "business confidential" by the Utah Division of Radiation Control. Under Utah government record access law, items which are deemed "business confidential" cannot be disclosed to the public. On February 5, 2003, Bill Sinclair -- Executive Secretary of the Utah Radiation Control Board -- denied the request by Cedar Mountain Environmental to retain the siting application information as "business confidential." Cedar Mountain Environmental subsequently determined not to appeal the Executive Secretary's decision to the State Records Committee and withdrew their request to maintain the application as "business confidential."

For additional information, please contact Bill Sinclair of the Utah Division of Radiation Control at (801) 536-4255.

State of Utah v. Private Fuel Storage, L.L.C.

Utah Contests NRC Authority to License PFS Facility

The State of Utah recently filed a lawsuit in the United States Court of Appeals challenging the U.S. Nuclear Regulatory Commission's authority to license a proposed spent fuel storage facility on the Skull Band of Goshute Indians reservation in Tooele County. A consortium of nuclear utilities is proposing to build the facility due to the federal government's delay in opening the planned Yucca Mountain high-level radioactive waste repository. An NRC decision on the PFS license application is expected shortly.

Utah argues, however, that federal regulators have no authority to license privately owned, stand-alone storage for spent fuel. The state previously filed a complaint with the NRC on this issue, but the agency ruled a few months ago that it could do so. In issuing the ruling, NRC recognized that Congress did not grant the agency the explicit authority to license such a facility, but it noted that Congress also never barred NRC from licensing private, away-from-reactor storage.

A few weeks before Utah filed its challenge, Goshute tribal members who oppose the plan—including three tribal leaders who signed the original agreement with PFS in 1996—also filed a challenge in the federal appeals court. The U.S. District Court in Salt Lake City dismissed previous challenges by the state to the PFS proposal, but did not address the specific question of NRC authority to license such a facility. That case remains pending before the U.S. Court of Appeals for the Tenth Circuit.

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

NCRP Releases Report re Managing Potentially Radioactive Scrap Metal

The National Council on Radiation Protection and Measurements (NCRP) recently released a report titled, "Managing Potentially Radioactive Scrap Metal." The report, number 141, is the product of Scientific Committee 87-4 and offers NCRP's view and recommendations on several key issues regarding the disposition of scrap metal generated by radiological facilities, including those licensed by the U.S. Nuclear Regulatory Commission, as well as those regulated by the Department of Energy and individual states.

An NCRP press release describes the report and its findings as follows:

> The Report recommends that the disposition of scrap metal should follow the principles of pollution prevention in achieving waste minimization—discarding the contaminated portion and salvaging the clean portion. The Report identifies certain deficiencies in the current regulatory framework regarding a comprehensive disposition management approach. Viable alternatives are presented that form a set of guidelines, coupled with a suitable implementation strategy, to facilitate the disposition of these materials.
>
> The Report provides guidance on radiation protection relative to disposition of potentially radioactive scrap metal. Among other disposition alternatives, the Report establishes a radiation protection framework for "clearance"—a process for certifying the release of material for unrestricted use. NCRP strongly advocates the development of national as well as international dose- or risk-based clearance standards. In addition, the Report acknowledges that public acceptance is a key factor in establishing a regulatory procedure for clearance. The report also highlights the potential negative impact of "orphan sources' (i.e., uncontrolled licensed radioactive devices)

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U.S. Nuclear Regulatory Commission

NRC Rules that Terrorist Threats Can't Be Considered in Licensing Decisions

Finding the risk too speculative, the U.S. Nuclear Regulatory Commission recently ruled that the National Environmental Policy Act (NEPA) does not allow for the threat of terrorism to be considered when licensing reactors and other nuclear installations. In so ruling, the Commission held that allowing for the discussion of terrorist threats in licensing hearings could "unduly alarm the public" and may provide too much information to potential terrorists.

NRC's decision on the consideration of terrorist threats in licensing decisions was included in a ruling handed down in late December 2002 that covers several existing and proposed facilities—including the proposed spent fuel storage facility that Private Fuel Storage, L.L.C. (PFS) is seeking to locate on the Goshute Indian reservation in Tooele County, Utah.

In its ruling, NRC noted that risk is defined as a product of the probability of an event multiplied by its consequences. In the case of the proposed PFS storage facility, however, NRC said that "we have no way to calculate the probability portion of that equation, except in such general terms as to be nearly meaningless."

NRC's ruling did recognize the significance of the terrorist attacks that rocked the country on September 11, 2001. However, the commission found that the proper approach to dealing with the issue is to improve security at nuclear sites, on airplanes and around the country in general rather than to try to determine environmental effects of a hypothetical "third party attack" on a particular site. Such security preparations, as well as characteristics of plants that would bear on the success of a terrorist attack, will remain confidential according to the commission.

The commission's decision is in line with the agency's past response to speculation about terrorist threats against reactors. NRC has historically declined to consider the issue.

The decision is viewed as a major setback for nuclear opponents since NEPA—the law that requires the government to issue an environmental impact statement when it takes a major action significantly affecting the quality of the human environment—is often used by opponents to raise their concerns. Various industry experts have been quoted in the press as speaking out in opposition to NRC's decision, including Victor Gilinsky (a past NRC Commissioner who served in the 1970's and 1980's), Peter Bradford (a member of the commission from 1977 to 1982), and Dr. Edwin Lyman (president of the Nuclear Control Institute—a Washington, D.C. based antiproliferation group).

License Renewals Move Forward

The U.S. Nuclear Regulatory Commission recently announced that it has received a combined application for renewals of the operating licenses for Units 2 and 3 at the Dresden nuclear power plant, as well as for Units 1 and 2 at the Quad Cities nuclear power plant, for an additional 20 years. In addition, the agency issued final environmental impact statements on the proposed renewal of operating licenses for the Peach Bottom nuclear power plants, the Catawba nuclear facilty, and the McGuire nuclear facility.

Dresden/Quad Cities Application

The Dresden/Quad Cities license application was submitted by Exelon on January 3. The Dresden plant is located near Morris, Illinois. Operating licenses for Units 1 and 2 are currently set to expire on December 22, 2009 and January 12, 2011. The Quad Cities plant is located near Moline, Illinois. Operating licenses for both units

at that plant are set to expire on December 12, 2012.

NRC staff is currently reviewing the application to determine if it contains sufficient information for the required formal review. If it is deemed to be sufficient, staff will formally "docket" the application and announce an opportunity to request a hearing.

A copy of the application will be available at http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html.

Final Environmental Impact Statements

In its final environmental impact statements on the proposed renewals of operating licenses for the Peach Bottom, Catawba, and McGuire nuclear facilities, NRC finds no environmental impacts that would preclude license renewal for an additional 20 years of operation.

The Peach Bottom facility is located near Lancaster, Pennsylvania. Operating licenses for Units 2 and 3 expire on August 3, 2013 and July 2, 2014. Exelon Corporation submitted an application for renewal of the licenses on July 2, 2001.

The McGuire facility is located near Charlotte, North Carolina. Operating licenses for Units 1 and 2 expire on June 12, 2021 and March 3, 2023. The Catawba facility is also located near Charlotte, North Carolina. Operating licenses for Units 1 and 2 expire on December 6, 2024 and February 24, 2026. Duke Energy Corporation submitted an application for renewal of all four operting licenses on June 13, 2001.

Copies of the above-identified reports will be available at http://www.nrc.gov/reading-rm/adams.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 ten reactors on five sites—the Calvert Cliffs Nuclear Power Plant near Lusby, Maryland; the Oconee Nuclear Station near Seneca, South Carolina; the Arkansas Nuclear One plant; the Edwin I. Hatch plants near Baxley, Georgia; and the Turkey Point nuclear reactors near Homestead, Florida. (See *LLW Notes,* May/June 2002, p. 19.) NRC is currently processing license renewal requests for two other reactors. Several individuals, including the Senior Vice President and Chief Nuclear Officer of the Nuclear Energy Institute, have recently been quoted as predicting that most, if not all, nuclear reactors will apply for license extensions in the coming years. (See *LLW Notes,* March/April 2001, p. 14.)

NRC Guidance Document

NRC approved three guidance documents in July 2001 which describe acceptable methods for implementing the license renewal rule and the agency's evaluation process. (See *LLW Notes,* July/August 2001, p. 26.) The documents are intended to, among other things, speed up the renewal process.

In addition, an existing NRC document—"Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (NUREG 1437)—assesses the scope and impact of environmental effects that would be associated with license renewal at any nuclear power plant site.

NRC Issues Decommissioning GEIS Supplement

In late December, the U.S. Nuclear Regulatory Commission issued Supplement 1 to the 1988 Final Generic Environmental Impact Statement (GEIS) on Decommissioning of Nuclear Facilities. The supplement is intended to update the agency's evaluation of environmental impacts associated with the decommissioning of nuclear reactors as residual radioactivity at the site is reduced to levels allowing termination of the NRC

license. Items considered in the supplement include technological advances in decommissioning operations, experience gained by plant operators, and changes to NRC regulations since publication of the 1988 GEIS.

Only commercial nuclear power reactors licensed by the NRC are addressed by the supplement. It does not address research and test reactors or a power reactor that has been involved in a significant accident resulting in contamination of structures, systems, and components. Fuel cycle facilities are also not addressed by the supplement.

A copy of the supplement may be obtained through NRC's Agencywide Documents Access and Management System (ADAMS).

NRC Holds Meetings re Alternative Sites for Nuclear Power Plants

The U.S. Nuclear Regulatory Commission held a meeting in late January in Rockville, Maryland to obtain public comments on the possible development for criteria for the review of candidate and alternative sites for nuclear power plants. Under the National Environmental Policy Act (NEPA), NRC is required to review alternative sites when considering whether or not to grant an application for an early site permit, a construction permit, or a combined construction/operating license for a nuclear power plant. To date, NRC has used general non-binding guidance on alternative sites in reviewing applications. NRC's meeting was intended to collect comments on whether the agency should develop a regulation to specifically define the criteria for this review. In addition, the meeting also addressed whether and how NRC should consider emergency planning in reviewing alternative sites.

Staff guidance for reviewing an application for an early site permit, construction permit, or combined license is contained in NRC's "Environmental Standard Review Plan," NUREG-1555. This document can be obtained at the NRC Public Document Room or from the Agencywide Documents Access and Management System (ADAMS) at http://www.nrc.gov/reading-rm/adams.html under the accession number ML003702134.

NRC Plans to Resume Nuclear Security Tests

The U.S. Nuclear Regulatory Commission plans to resume mock terrorists attacks shortly in order to test security at nuclear power plants, despite an industry-backed plan to have operators perform the drills themselves. Known as Safeguards Performance Assessments, the tests were scheduled to begin in 2002, but were postponed after the attacks of September 11.

NRC is currently looking as several issues to improve plant security, including the possibility of increased training and fitness requirements for plant security workers, limits on the number of hours such workers may work consecutively, and mandatory minimum break periods. The mock attack drills have also been revised such that drills are now expected to be run at each plant every three years instead of eight and they may incorporate the use of more advanced technology—such as laser shooting. The increased security efforts are expected to add substantial costs to the agency's budget.

NRC held a public meeting on increased worker fatigue and security issues on January 23. At the meeting, the agency announced that it is nearly done finalizing a new set of assumptions related to the likely strength of a force attacking a nuclear power plant—known as a "design basis threat." These new assumptions will be used in the mock terrorist attacks that are expected to begin shortly.

NRC Orders Enhanced Facility Access Authorization

The U.S. Nuclear Regulatory Commission has issued orders to all 103 operating commercial nuclear power plants to enhance authorization programs for individuals to gain facility access. The orders (1) formalize a series of security measures taken by NRC licensees in response to advisories after the September 11 attacks and (2) include additional security enhancements which have emerged from the comprehensive security review.

The measures generally include restricting temporary unescorted access to a facility and re-verifying background investigation criteria for individuals with unescorted access. The measures also require that licensees share critical background investigations with other licensees.

The orders became effective immediately and will remain in effect indefinitely. They require that licensees provide NRC with a schedule for achieving full compliance within 20 days or provide written justification as to why they can not or should not do so.

NRC to Review Witt Report

On January 10, a draft report by James Lee Witt Associates was released which finds, among other things, that the U.S. Nuclear Regulatory Commission's comprehensive emergency plans for protecting the public in the event of a severe accident involving significant releases needs modification. The draft report, titled "Review of Emergency Preparedness at Indian Point and Millstone-Draft," was prepared for the State of New York.

NRC is currently reviewing the draft report. In the meantime, the agency released the following statement:

> NRC regulations require that comprehensive emergency plans be prepared and periodically exercised to assure that actions can and will be taken to protect citizens in the vicinity of a nuclear power plant. The current emergency plans are designed to cope with very severe accidents involving significant releases, regardless of the cause. We are reviewing the draft report's findings that these emergency plans require modification. In the meantime, the NRC will continue to work with its licensees, the Federal Emergency Management Agency, and State and local officials in support of ongoing efforts to improve emergency preparedness programs.
>
> The conclusions in the draft report appear to be based in part on concern over the effects a terrorist attack could have on the plant. Although we are reviewing the draft report's recommendations concerning the implications of terrorism for emergency planning, we want to reassure the public that significantly enhanced security measures have been put in place since the terrorist attacks of September 11, 2001. In general, these requirements, issued under NRC orders, include increased patrols, augmented security forces and capabilities, additional security posts, installation of additional physical barriers, vehicle checks at greater standoff distances, enhanced coordination with law enforcement and military authorities, and more restrictive site access controls for all personnel. The NRC has conducted numerous inspections at the Indian Point Energy Center to confirm that security measures have been and are being implemented.

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on clearance procedures and offers recommendations for a solution.

The Report culminates with five major findings and eight major recommendations that summarize the NCRP's position on the issues involved in disposing of potentially radioactive scrap metal. The conclusions of this Report are also applicable to managing the disposition of other similar materials.

The Report costs $45 and can be purchased from NCRP directly.

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**

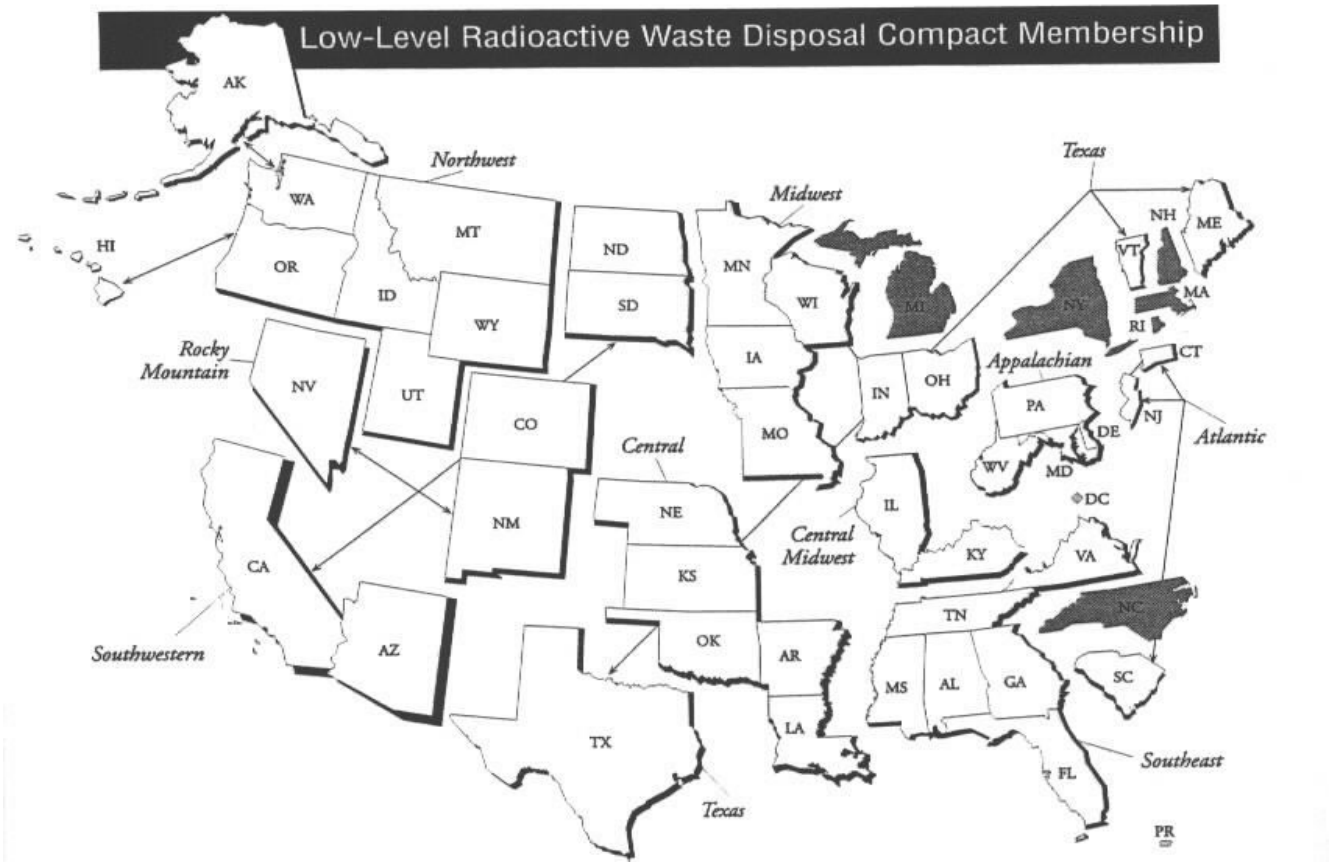
- GAO homepage (access to reports and testimony) ..... **www.gao.gov**

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.



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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
Maine
Texas *
Vermont

Unaffiliated States
District of Co.umbia
Massachusetts
Michigan
New Hampshire
New York
North Carolina
Puerto Rico
Rhode Island