LLW notes

Volume 18, Number 2 March/April 2003

Texas Compact/Texas

Texas House Passes Amended Bill re LLRW Disposal Facility

After a five-hour debate on April 22, the Texas House of Representatives passed an amended version of H.B. 1567—proposed legislation that seeks to amend the Health and Safety Code provisions dealing with the siting and operation of a commercial low-level radioactive waste disposal facility for the Texas Low-Level Radioactive Waste Disposal Compact. Twenty-seven floor amendments were laid out for the bill, of which nine were eventually adopted. The bill passed out of the House on the third reading on April 23.

The legislation, as reported out of the House, would allow the facility to dispose of federal facility waste, as defined under the Low-Level Radioactive Waste Policy Act of 1980 and its 1985 amendments, subject to certain specified conditions. The proposed legislation maintains, however, provisions in the Health and Safety Code limiting the disposal of waste at the commercial disposal facility to waste that is generated in the compact, subject to specified conditions. (See related story, this issue.)

During debate on the legislation, amendments were rejected that would have banned or reduced the amount of federal waste allowed to be disposed of at the facility, restricted the type of materials to be disposed, and denied access to states other than the current compact-member states of Texas Maine and Vermont. An amendment that would have allowed county commissioners to designate routes for radioactive materials being transported through their counties also was struck down, as were amendments that would have prohibited the transportation of radioactive materials within one mile of churches, schools and playgrounds and required transporters to carry enough insurance to cover the cost of any accidents.

One last-minute amendment that was accepted and incorporated into the bill as passed provides that Class B and C low-level radioactive waste must be disposed of "in above-grade vaults with internal access designed to isolate the waste from the environment, from which the waste is easily retrievable . . . [and] in a manner that includes: (A) individual monitoring of each waste structure

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In This Issue

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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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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

LLW Forum Elects New Executive Committee and Officers

At the Low-Level Radioactive Waste Forum's recent meeting in Austin, Texas, the organization took various actions affecting its leadership, including the passage of amendments to the Bylaws and the election of a new Executive Committee and officers.

The amendments to the Bylaws allow for four officer positions: Chair, Past-Chair, Chair-Elect and Treasurer. Each year, a new Chair Elect will be chosen. The Chair-Elect is elected to that office for a one-year term and automatically advances to the office of Chair of the Board and President and Chief Executive Officer for a subsequent one-year term. Upon expiration of a Chair's term of office, that person automatically becomes Past-Chair/Secretary for a one-year term. The Treasurer is elected to office for a three-year term. The idea is to add greater diversity and fresh ideas to the leadership while maintaining the institutional memory and strong leadership.

At the March meeting, the following individuals were elected to serve on the LLW Forum's Executive Committee for the upcoming year:

- Chair – Stan York, Midwest Compact Commission
- Past-Chair – Kathryn Haynes, Southeast Compact Commission
- Chair-Elect – Jack Spath, State of New York
- Treasurer – Terry Tehan, State of Rhode Island
- Member – Leonard Slosky, Rocky Mountain Board
- Member – Susan Jablonski, State of Texas
- Member – Bill Sinclair, State of Utah
- Member – Patricia Tangney, State of South Carolina

Max Batavia of the Atlantic Compact Commission and Thor Strong of the State of Michigan rotated off of the Executive Committee after years of dedicated service. The LLW Forum is appreciative of their hard work and efforts on its behalf.

For additional information, please contact Todd D. Lovinger at (202) 265-7990.

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or building; (B) monitoring of the ground beneath the disposal facility and the perimeter of the facility for leakage; and (C) active inspection and preventive maintenance." The listed provisions contain some similarities to those identified in the "assured isolation" concept—although they are not identified as such.

The House-passed version of the bill will now move to the Senate for consideration. The legislature, which is in session once every 2 years, is scheduled to end the current session on June 2.

A copy of the amended bill can be found on-line at *http://www.house.state.tx.us/welcome.php#mainContent*.

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claims, the same regulator pointed out that placing the money in a state account subject to raids by the legislature—such as was recently done by the South Carolina legislature in regard to the Barnwell closure fund and is being considered by the Washington legislature as well—is not necessarily a safer option. Envirocare and Wells Fargo also disagree with Senator Hickman's concerns and plan to provide the legislative committee and Senator Hickman with additional supporting information for their position.

Dianne Nielson, Executive Director of the Utah Department of Environmental Quality, told the committee that she would consult with the U.S. Nuclear Regulatory Commission about Hickman's proposal.

Central Compact/Nebraska

Nebraska Presents Evidence at Compact Hearing

In early April, the State of Nebraska presented evidence at a meeting of the Central Interstate Low-Level Radioactive Waste Compact Commission concerning its denial of US Ecology's license application for a regional low-level radioactive waste disposal facility in Boyd County and its subsequent withdrawal from the compact. The hearing regarding the withdrawal process was begun in 1999, but was subsequently put on hold pending a lawsuit over the state's alleged bad faith in reviewing the license application. On September 30, 2002, the U.S. District Court for the District of Nebraska issued a $151 million judgment 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 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 following arguments, among others, were presented by Nebraska to the Central Commission in support of the state's position:

- the state did not fail or refuse to fulfill its compact obligations, but rather performed those obligations in good faith, in a timely manner, and without improper political interference or influence;
- it is premature for the Central Commission to make a factual determination on Nebraska's fulfillment of its compact obligations because the state's administrative review process is not yet complete;
- the Central Commission's authority to revoke a party state's membership is limited by the terms of the compact—including limits on the available remedies—and Rule 23 penalties not expressly stated in the compact are invalid;
- the Central Commission may not sanction Nebraska for exercising its right to withdraw from the compact and, in any event, further recovery on claims of bad faith and delay is barred by the doctrine of res judicata;
- the state is entitled to a neutral and unbiased decisionmaker; and
- Nebraska has no continuing host state obligations under the compact.

The Central Commission will now study the evidence, including that presented by Nebraska at the April meeting, and will likely vote at its annual meeting in June on whether to allow the state to withdraw from the compact. If the commission finds that the state acted in bad faith in violation of the state's compact obligation and revokes its membership, it could levy sanctions against the state under the compact. The sanctions could, in theory, include the continued pursuit of development of a regional facility in the state. In that vein, the commission passed resolutions at its January meeting in Kansas City 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).

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and then, if such resolution does not dispose of the case, commit any future proceedings to a special master; or

- refer the cross-motions to a special master for a recommended decision.

In either case, the Solicitor General believes that "the provision of a mechanism for resolving the threshold legal questions is likely to focus the litigation on two controlling issues and facilitate the ultimate resolution of the controversy."

Central Midwest Compact/Illinois

Illinois Department of Nuclear Safety to Merge with Illinois Emergency Management Agency

In an effort to streamline state government and reduce the state deficit, Illinois Governor Rod Blagojevich recently announced a series of actions that the state will take to consolidate or transfer operations of 14 existing state agencies and five major functions that are expected to initially save approximately $40 million in the next fiscal year. Among the changes is the consolidation of the Illinois Department of Nuclear Safety (IDNS) with the Illinois Emergency Management Agency (IEMA). Consolidation of the agencies, according to a press release from the Governor's Office, will enable the state "to better coordinate emergency response to a terrorist threat or other potential disasters involving nuclear power facilities," as well as enable the state "to realize better communications and shared informational resources, and provide more efficient use of specialized expertise and facilities."

IDNS began operations on October 1, 1980, in an effort to consolidate the radiation responsibilities of several state agencies, commissions, and boards. The agency currently employs approximately 220 staff and is recognized as one of the foremost radiation protection programs in the nation. In fact, prior to the consolidation, Illinois and Arizona were the only two states in the country to have individual departments that are devoted exclusively to nuclear safety. Funds for IDNS programs mainly come from fees paid by the nuclear power utilities and the various licensees, registrants, accredited technologists and waste generators operating in the state.

Once IDNS and IEMA are consolidated, Gary Wright—the current IDNS Director —will become Assistant Director at IEMA in the Division of

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Northwest Compact/Utah

Utah House Votes Against Banning Class B & C Waste Disposal: Senate Committee Votes to Create Task Force to Study Waste Issues

On Friday, February 21, members of the Utah House voted 66 to 6 against the original version of H.B. 237—legislation seeking to ban the disposal of Class B and C waste in the state. Instead, the House voted to consider studies on the issue before such waste could be disposed in the state. Just a few short hours later, a state Senate committee passed legislation that would create a two-year task force to study the management and disposal of waste in Utah—including radioactive waste—and how to tax it.

The task force proposed in the Senate legislation would consist of seven senators and eight representatives and would investigate, amongst other things, whether Utah should accept more hazardous waste, how Utah facilities compare financially to out-of-state facilities, what obligations Utah has to accept waste based on interstate agreements, and how to long-term manage waste facilities. To conduct research, the task force would visit disposal facilities and solicit information from persons with relevant expertise. The task force would have until November 30, 2004, to submit a final report to three legislative committees, including a list of recommendations for waste treatment policies, fees and taxes, as well as proposed legislation.

Also, the proposed use of trust lands for the storage of high level waste—known as "Plan B"—failed to gain adequate support. In addition, a bill to impose fees and taxes on waste management and disposal failed to pass.

Background

Class B & C Waste Disposal 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.

Bills Filed in Utah This Legislative Session At least 10 bills addressing issues involving radioactive waste management and disposal were 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;
- create a task force to study the hazardous materials industry, including safety, oversight and regulation;
- 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; and
- 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.)

For additional information, see LLW Forum News Flash titled "Several Bills Addressing Radioactive Waste Issues Filed in Utah," February 12, 2003, or contact Bill Sinclair of the Division of Radiation Control, Utah Department of Environmental Quality, at (801) 536-4255.

Critics Argue Bias re Utah's Legislative Task Force

Utah's new legislative task force on radioactive issues is being criticized by a few individuals from Utah Legislative Watch, Families Against Incinerator Risk, and Healthy Environment Alliance of Utah who complain the task force is comprised of legislators who favor the hazardous and radioactive waste industry. In particular, these individuals have expressed dismay at the appointment of Representative Stephen Urquhart (R) and Senator Curtis Bramble (R), both of whom are said to support the importation of waste into the state, as co-chairs of the task force. The individuals expressing disappointment argue that Urquhart was an active leader in the House of Representatives debate on legislation in 2001 to block the proposed spent fuel storage facility on the Goshutes reservation and recently supported a state-sponsored version of the storage site if the nuclear consortium pushing the Goshutes facility is successful in attaining a license. (See *LLW Notes,* January/February 2003, pp. 7 – 9.) They charge that Bramble worked toward the defeat of Initiative 1—a state-wide ballot initiative that sought, among other things, to impose substantial additional taxes on the disposal of out-of-state

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low-level radioactive waste at Envirocare and to prohibit the disposal of Class B and C radioactive waste within the state. (See *LLW Notes,* November/December 2002, pp. 7 – 9.)

The co-chairs, however, deny that they are taking on the study with any forgone conclusions. Bramble was quoted in the local press as saying that he is "looking for credible information" and is uncertain "what the outcome is going to be." He said that the task force will gather information from a wide range of sources. Urquhart was quoted as saying that "[t]his is an area that is passionate and politically charged . . . [t]here's a lot of misinformation and a lot of money flowing from all sides."

In response to the allegations of bias, Ken Alkema—Envirocare of Utah's Senior Vice President for Compliance and Licensing—stated as follows:

> Envirocare appreciates the willingness of the legislature to spend the time and the resources to understand the important issue surrounding the use and disposal of hazardous and radioactive materials. The task force is balanced with 16 members representing various areas and interests of the State. Envirocare is confident that the task force can collect and evaluate the real risks and benefits of the use and disposal of these hazardous and radioactive materials and determine what is truth and what is fiction in determining sound State policy.

The task force has 19 months to conduct a study of a wide range of nuclear waste issues in the Utah.

For additional information about the task force members, future agendas and so forth, go to the Utah legislative website at http://www.le.state.ut.us/asp/interim/Commit.asp?Year=2003&Com=TSKHWR

Utah Legislators Reconsider Envirocare's Cleanup Guarantee

The Utah Legislature's Government Operations Committee recently heard testimony concerning the bank guarantee that Envirocare of Utah has established to secure the eventual closure and post-closure maintenance of its low-level radioactive waste disposal facility. Envirocare has collateralized an irrevocable letter of credit with Wells Fargo Bank that provides financial surety to Envirocare licenses and permits from the Utah Division of Radiation Control, the Utah Division of Solid and Hazardous Waste, and the Nuclear Regulatory Commission. The total of these three sureties is approximately $37.5 million. Wells Fargo Bank commits to provide these agencies the funds in the letter of credit upon their request.

Nonetheless, Senator Bill Hickman (R) has raised concerns about the security, arguing that the letter of credit could be seized by other creditors were Envirocare to file for bankruptcy. Hickman said that his concerns were not alleviated by the fact that the company also pays $400,000 a year into a new state account meant to maintain and monitor the site beginning 100 years after closure because the account does not address the immediate costs of shutting down the facility. Accordingly, Hickman suggested that it may be better to have Envirocare put up cash instead of a bank guarantee, at this time.

At the hearing, however, a state regulator expressed confidence that Envirocare's irrevocable letter of credit would be sufficient for any cleanup of the site and indicated that such financial assurance guarantee was allowed under current state and federal laws for other radioactive and hazardous waste facilities in the United States. Moreover, while recognizing the potential for vulnerability of the guarantee to bankruptcy

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Texas Compact/Texas (continued)

Bills Introduced in Texas That Would Allow for Siting of a Commercial/Federal Facility

On March 3, 2003, legislation was introduced in the Texas Senate to amend the Health and Safety Code provisions dealing with the siting and operation of a commercial low-level radioactive waste disposal facility for the Texas Low-Level Radioactive Waste Disposal Compact. Among the proposed changes is language that would allow the facility to dispose of federal facility waste, as defined under the Low-Level Radioactive Waste Policy Act of 1980 and its 1985 amendments, subject to certain specified conditions. The proposed legislation maintains, however, provisions in the Health and Safety Code limiting the disposal of waste at the commercial disposal facility to waste that is generated in the compact, subject to specified conditions.

The bill, S.B. 824, has been referred to the Senate Natural Resources Committee. Companion legislation, H.B. 1567, has been referred to the House Environmental Regulation Committee. The legislature, which is in session once every 2 years, is scheduled to end the current session on June 2.

Provisions Relating to the Disposal of Federal Waste

The proposed legislation states that the Texas Department of Health (the "department") may authorize a disposal facility license holder to dispose of federal waste "at a separate and distinct facility adjacent to the facility at which compact waste is disposed of." The legislation specifically prohibits the commingling of compact and federal facility waste and authorizes the department to restrict the amount and type of federal facility waste that may be accepted.

The proposed legislation further states that, in the event that federal facility waste is accepted, the license holder must

- "arrange for and pay the costs of management, control, stabilization, and disposal of federal facility waste and the decommissioning of the authorized federal facility waste disposal activity;"
- "on decommissioning of the authorized federal facility disposal activity, convey to the federal government or its designee . . . all necessary right, title, and interest in land and buildings acquired under department rules, together with the requisite rights of access to that property;" and
- "formally acknowledge before termination of the authorization the conveyance to the federal government or its designee of the right, title, and interest in radioactive waste located on the property conveyed."

Provisions Relating to Disposal of Commercial Waste

The proposed legislation changes several provisions of the code relating to the disposal of commercial low-level radioactive waste, as well as adding new provisions and deleting some old provisions. Among other things, the proposed bill removes all reference to the Texas Low-Level Radioactive Waste Disposal Authority and authorizes, in its place, the Department of Health to license a low-level radioactive waste disposal facility.

Licensee Restrictions and Conveyance of Title Language in the old code which provided that a disposal license could only be issued to a public entity has been deleted in the proposed legislation and language has been added which requires that the disposal facility license holder "convey to the state at no cost to the state title to the compact waste delivered to the disposal facility for disposal at the time the waste is accepted at the site." This provision does not apply to federal facility waste.

Liability The proposed legislation states that "[t]he acceptance, storage, or disposal of low-level radioactive waste by the disposal facility license holder does not create any liability under state law on the part of the state, or on the part of any officer

or agency of the state, for damages, removal, or remedial action with respect to the land, the facility, or the low-level radioactive waste accepted, stored, or disposed of." It also provides that the facility license holder must indemnify the state for any liability imposed under state or federal law.

Regional Disposal Facility The proposed legislation provides that the facility licensed under the Texas Health Code "is the regional disposal facility established and operated under the [Texas] Compact." It further provides that the facility "shall accept for disposal all compact waste that is presented to it and that is properly processed and packaged."

Site Location Under the proposed bill, a license may not be issued for a facility located (1) in a county that is contiguous to an international boundary, (2) in a county in which the average annual rainfall is greater than 20 inches, (3) in a county that adjoins the Devil's River or the Pecos River, (4) in a 100-year flood plain, or (5) less than 20 miles upstream of or up-drainage from the maximum elevation of the surface of a reservoir project that either has been constructed or is under construction by the U.S. Bureau of Reclamation or the U.S. Army Corps of Engineers or has been approved for construction by the Texas Water Development Board as part of the state water plan.

Class B and C Waste Disposal The proposed legislation specifically states that Class B and C wastes shall be disposed "(1) within a reinforced concrete barrier or within containment structures made of materials technologically equivalent or superior to reinforced concrete . . . and (2) in such a manner that the waste can be monitored and retrieved."

Provisions Relating to Facility Licensing

Facility Design, License Term and Management Techniques Under the proposed bill, a licensee must study alternative waste management techniques including waste processing and reduction at the site of generation and at the disposal facility, as well as the use of above-ground isolation facilities. The facility license, according to the legislation, will expire on the 35th anniversary of its date of issuance. The legislation also provides that the facility must, to the extent practicable, be designed to incorporate safeguards against local meteorogical conditions including hurricanes, tornados, earthquakes, earth tremors, violent storms, and flooding.

License Applications and Initial Evaluations The proposed bill provides a detailed process for accepting and evaluating disposal facility license applications. In particular, it provides that a notice that the department will begin accepting applications must be filed with the secretary of state for publication by October 1, 2003. Applications will then be accepted during a 30-day period, beginning 180 days after the date of publication. Applicants will be required to provide a nonrefundable $500,000 commitment fee. The Commissioner of Health will then review the applications that are deemed to be complete and select one for processing by the Department of Health. The bill specifically provides that, in order for an application to be deemed complete, it must include—among other things—a copy of a resolution of support of the proposed facility from the commissioner's court of the county in which the facility is proposed to be located. It also provides that the commissioner must conduct at least one public meeting in each county for which a facility is proposed to be located in those applications deemed administratively complete. In addition, the bill provides a four-tiered system of criteria to be used in the initial evaluation of applications by the commissioner. (For a detailed explanation of each criteria and its ranking, please refer to the proposed bill itself.)

License Technical Review The proposed legislation specifies that the Department of Health is to begin a technical review "[i]mmediately on the commissioner's selection of the application that has the highest comparative merit." The technical review shall be completed, and a draft license prepared, within 15 months. Upon

completion, a notice of the draft license will be published—with an explanation of the process for requesting a contested case hearing by affected persons.

Contested Case Hearing/Judicial Review The proposed bill provides for the opportunity for a contested case hearing, if certain conditions are met, before an administrative law judge. In such case, the legislation provides that only the applicant, the commissioner, and an affected person may be admitted as a party to the hearing. It also states that the number and scope of issues to be addressed at the hearing are to be limited and that a maximum expected duration of the hearing be specified. In any event, the administrative law judge must issue a proposal for decision by the first anniversary of publication of the notice of draft license and the department must take final action on that proposed decision within 90 days of its issuance. An opportunity for judicial review is provided under the proposed legislation only after the department takes final action on the license application and only if the petition is filed within 30 days after such final action.

Provisions Related to Financial Benefits for Host County

The proposed legislation provides that "[t]he disposal facility license holder each quarter shall transfer to the commissioners court of the host county 10 percent of the gross receipts from waste received at the disposal facility and any facility adjacent to the disposal facility that is authorized . . . to receive federal facility waste." The money may be spent by the commissioner's court of the host county for local public projects in the host county or may be disbursed to other local entities or to public nonprofit corporations to be spent for local projects. The money must be used for "public projects in the host county that are for the use and benefit of the public at large." The money does not constitute loans or grants-in-aid subject to review by a regional planning committee.

Provisions Relating to Disposal Fees

The proposed legislation provides that the license holder "shall submit to the department for review and approval in the application process a schedule of the proposed waste disposal fees it expects to collect." The fees must be sufficient to cover certain identified items, such as the funding of local projects, licensing and other fees, and future decommissioning. The legislation provides that the fees will be revised periodically according to a schedule based upon projected annual volume of waste received, the relative hazard of each type of waste generated, and certain identified costs.

A copy of the draft proposed legislation can be obtained online at http://www.capitol.state.tx.us/tlo/legislation/bill_status.htm.

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Nuclear Safety and will report to IEMA Director William Burke. The overall budget of the newly combined agency for fiscal year 2004 will be $234.9 million—a decrease of 12 percent in the agencies' overall fiscal year 2003 budgets. The reduction reflects both program and administrative cuts.

"By combining our resources, we can have a more efficient operation and also save some money," said Burke in regard to the consolidation. "The unique functions of both departments will be retained, and we will be able to realize efficiencies by sharing resources in areas like public information, legal counsel, legislative, personnel, information technology and fiscal operations."

The consolidation is expected to save $700,000 and becomes effective July 1.

For additional information, please contact Patti Thompson at (217) 785-0229 or go to www.state.il.us.

US Ecology v. State of California

CA Superior Court Rules Against US Ecology in Ward Valley Suit

On March 26, the Superior Court of California issued a Statement of Decision in a lawsuit filed by US Ecology against the State of California concerning the proposed Ward Valley low-level radioactive waste disposal facility. The court ruled in favor of the state, finding that US Ecology failed to establish the element of causation and that the company's claim is barred by the doctrine of unclean hands.

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. 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. 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, 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 5 decision. In particular, US Ecology challenged that part of the decision affirming the lower court's dismissal of the company's request for a writ of mandate directing the defendants to comply with the requirements of the California Radiation Control Law regarding the establishment of a low-level radioactive waste disposal facility in California. US Ecology also contested the appellate court's dismissal of its causes of action for breach of implied-in-fact and express contract. The State of California, on the other hand, challenged the appellate court's decision to allow US Ecology to proceed with its promissory estoppel claims against the state.

In late 2001, the California Supreme Court denied the parties' appeals of the appellate court's decision. (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.

The Court's Decision

In order to sustain a claim for promissory estoppel, the following elements must be present:
(1) a promise whose terms are clear and unambiguous;
(2) reliance by the party to whom the promise is made;
(3) that reliance must be reasonable and forseeable; and
(4) the party asserting the estoppel must be injured by the reliance.

In the case at hand, the court found the first three elements to be present, but ruled that US Ecology was not substantially injured by its reliance. Moreover, the court found that US Ecology's counsel acted with "unclean hands," thereby preventing the company from pursuing its equitable claims.

The Promissory Estoppel Claim The court held that the State of California made a clear and unambiguous promise when it signed a Memorandum of Understanding with US Ecology on August 19, 1988, which states in part that California agrees to "use its best efforts to assure the timely transfer of the relevant site from the federal government to the State . . . " The court further held that US Ecology reasonably and forseeably relied on the state's promise until 1997 when then-Governor Pete Wilson issued a press release calling the federal government's alleged concerns about Ward Valley a "sham." According to the court, "[a]t that time Ecology was no longer justified in spending money to go forward with the project based upon the State's promises to use its best efforts." Nonetheless, the court found that US Ecology was not entitled to damages, even though the state ended up breaching its promise to use its best efforts to acquire the Ward Valley site and even though the company reasonably spent money based on the state's promise, becaus the court found that the company did not suffer damages as a result thereof.

In particular, the court explained its decision as follows:

"It is undisputed the State used its best efforts to obtain Ward Valley during the Wilson administration. Since the reliance was not reasonable or forseeable after June 7, 1997, this would limit the damages to the time period from August 18, 1988 to June 7, 1997, if the State subsequently abandoned its promise to use its best efforts to obtain the site and the abandonment resulted in damage. The court finds that a breach occurred after the Davis administration took office, but concludes this breach was not a substantial factor in causing damage to Ecology since the federal government continued to resist the transfer."

Thus, while recognizing the state's breach of its promise, the court held that US Ecology failed to prove that its damages were caused by such breach. According to the court, "[t]he evidence does not support the conclusion the federal government would have transferred the property if requested to do so by the Davis administration."

US Ecology's "Unclean Hands" The court also found that US Ecology is barred from pursuing its equitable claims by the doctrine of unclean hands because of actions that the company took after the issuance of the National Academies of Sciences report on Ward Valley. Specifically, US Ecology raised objections to certain state efforts to work out an agreement allowing the Department of Interior to perform testing and to have some post-conveyance control of the project. Pointing this out, the court held that "Ecology cannot on 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."

(Continued on page 18)

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

Solicitor General Recommends that U.S. Supreme Court Exercise Original Jurisdiction in Southeast Compact Dispute

In response to an invitation from the U.S. Supreme Court, the U.S. Solicitor General recently submitted a brief urging the Court to exercise its original jurisdiction in a lawsuit filed against the State of North Carolina by the Southeast Compact Commission for Low-Level Radioactive Waste Management and four of its member states. The suit seeks 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.

In particular, the Solicitor General made the following recommendation to the Court in regard to the Southeast Compact Commission's suit:

> The United States . . . urges that the Court grant the moving States' motion for leave to file a complaint and direct North Carolina to answer. Following the filing of North Carolina's answer, the Court may wish to invite the parties to file cross-motions for partial summary judgment, supported by a stipulation of facts, limited to two questions: (1) Whether the Southeast Compact empowers the Southeast Commission to impose, as a sanction for a State's failure to construct a low-level radioactive waste facility, a requirement that the State return funds that the Commission provided in preparation for construction of that facility; and (2) Whether the Southeast Compact divests the Southeast Commission of authority to impose that sanction if the State withdraws from the Compact before the Commission completes the sanctions process.

Background

The Petitioners' Motion 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.

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 Filings The Southeast Compact Commission filed a similar motion for leave to file a bill of complaint in the U.S. Supreme Court against the State of North Carolina on July 10, 2000. (See *LLW Notes,* July/August 2000, pp. 1, 16-18.) North Carolina filed a brief in opposition to the Commission's motion on September 11, 2000. (See *LLW Notes,* September/October 2000, pp. 20-22.) The Solicitor General of the United States filed an amicus brief in the action on May

30, 2001 in response to an October 2000 invitation from the Court. (See *LLW Notes,* May/June 2001, pp.13–15.) In the brief, the Solicitor General asserted that the case does not fall within the Court's exclusive jurisdiction because

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

Significantly, however, the Solicitor General concluded that the Court "would have exclusive jurisdiction over a suit brought by one or more of the States that are parties to the Southeast . . . Compact against North Carolina based on that State's alleged violations of the Compact." On June 25, 2001, the U.S. Supreme Court issued an order denying the Southeast Compact Commission's motion without ruling or commenting on the merits of the complaint itself. (See *LLW Notes,* July/August 2001, pp. 18 - 19.) The Commission, in conjunction with four member states of the compact, filed a new motion in June 2002.

The Solicitor General's Finding that the Claims Presented Warrant the Exercise of Original Jurisdiction

In its brief, the Solicitor General begins by pointing out that the Supreme Court has previously held that its original jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." The Solicitor General acknowledges, however, that such exercise of original jurisdiction is "obligatory only in appropriate cases." Accordingly, the Solicitor General weighed the facts of the case against considerations taken into account by the Court when deciding whether or not to exercise its original jurisdiction.

The Nature of the Interest of the Complaining State In its brief, the Solicitor General stated that the petitioners' allegation that North Carolina has breached its obligations under the compact and has failed to submit to the compact's prescribed remedial mechanisms give rise to a "controvers[y] between two or more States" within the reach of the Court's "original and exclusive jurisdiction."

In so stating, the Solicitor General expressly rejected North Carolina's argument that original jurisdiction should not be exercised because the moving states are not the "real parties in interest," but rather "nominal" parties that represent the interests of a commission that can not invoke original jurisdiction by itself. In the first place, the Solicitor General disagreed with North Carolina's characterization of the parties. Moreover, the Solicitor General maintained that "[t]he moving states are, in short, asserting their own rights under the Southeast Compact, claiming that they themselves 'were harmed not only by the fact that they found themselves without a site within their region at which to dispose of low-level radioactive waste, but also because close to $80 million of the Commission's funds were converted by North Carolina without North Carolina fulfilling its obligations undertaken pursuant to the Compact.'" According to the Solicitor General, the moving states are not seeking recovery for the real parties in interest, but rather are seeking relief "that would redound to their own benefit under the Compact."

Finally, the Solicitor General stated in its brief that the presence of the Southeast Commission in the lawsuit as an additional plaintiff does not disqualify the moving states from invoking the Court's jurisdiction. "The Court's exclusive original jurisdiction provides a forum for interstate disputes, and the participation of non-state parties is normally unnecessary by virtue of a State's parens patriae role in representing the interests of its citizens," according to the Solicitor General. The brief continues, however, by pointing out that the Court has, nevertheless, on occasion, allowed non-state parties to participate in original actions.

"The presence of non-state parties accordingly does not deprive the Court of jurisdiction."

The Seriousness and Dignity of the Claim The Solicitor General maintained in its brief that the moving states' claim that North Carolina has violated the compact constitutes a "substantial sovereign claim" warranting the Court's exercise of its original jurisdiction. In so stating, the Solicitor General writes that "[i]nterstate compacts play an important role in the federal system" and that the case at hand "does not present an insubstantial dispute." Indeed, the Solicitor General expressly disregarded North Carolina's claim that this suit "constitutes little more than a contract dispute seeking compensatory damages" and maintained that such a claim "understates the seriousness of . . . [North Carolina's] compact obligations." In this regard, the brief states as follows:

> A State that enters into an interstate compact has made a sovereign commitment, on behalf of its citizens, to honor legally enforceable promises to its sister States and their citizens. Indeed, even if this suit merely involved 'purely monetary compensation,' the moving States' assertion that North Carolina has unlawfully retained nearly $80 million needed to prepare for a second disposal facility could, by itself, present a matter of sufficient gravity among the compacting States to justify this Court's exercise of its original jurisdiction.

The Availability of an Alternative Forum The Solicitor General maintained that—since the case involves a dispute among states over the meaning and application of an interstate compact and since the states have been unable to resolve their differences consensually—the Supreme "Court, through the exercise of its original jurisdiction, presents the only realistic forum for adjudication of that interstate dispute." Indeed, the Solicitor General went so far as to state that the Court "has a 'serious responsibility' to resolve an interstate dispute of this magnitude."

The Solicitor General's Assertion that the Court Should Consider Granting the Parties Leave to File Motions for Partial Summary Judgment

The Solicitor General, in its brief, noted that "[u]pon granting a motion for leave to file a complaint, the Court typically directs the defendant to file an answer and then, shortly thereafter, refers the matter to a special master to conduct appropriate proceedings." In certain cases, however, the Court has in the past considered or resolved preliminary or controlling legal issues before, or in lieu of, referring the case to a special master. It is the latter approach which the Solicitor General recommends for the case at hand.

> The moving States and North Carolina fundamentally disagree on two basic interpretive issues respecting the Southeast Compact: (1) whether the Compact empowers the Southeast Commission to impose, as a sanction for North Carolina's failure to construct a waste facility, a requirement that North Carolina return funds that the Commission provided in preparation for construction of that facility; and (2) whether the Compact divested the Commission of authority to impose that sanction when North Carolina withdrew from the Compact before the Commission completed the sanctions process . . . Because resolution of those threshold issues could dispose of the case and would in any event focus the dispute and determine the course of future proceedings, the Court may wish to consider addressing those matters before referring the case to a special master.

In particular, the Solicitor General recommends that the threshold questions be addressed through cross-motions for partial summary judgment. This could be dealt with in one of two ways. The Court could

- retain the power to resolve the motions itself

(Continued on page 5)

Yankee Rowe v. U.S. Department of Energy

Yankee Rowe Increases Damages Claim re Spent Fuel Storage

Managers of the defunct Yankee Rowe nuclear power station in Massachusetts have filed an amendment to the amount of their damage claim against the U.S. Department of Energy for the department's failure to timely dispose of the facility's spent fuel. Yankee Rowe, which shut down in 1992 after 31 years of operation and began decommissioning a year later, has had a $71 million claim pending against DOE since a federal judge ruled in 1999 that the department broke its promise to take the spent fuel by 1998. The $71 million represented the cost to keep the waste on-site through 2010 when the planned Yucca Mountain high-level radioactive waste repository is scheduled to open.

The company increased the projected cost to $191 million due to increased security since the September 11 terrorist attacks. If the spent fuel needs to remain on-site until 2020, Yankee officials estimate the storage cost will be about $231 million. Storage costs are currently passed on to the customers of the 10 New England power companies that own Yankee Rowe.

In 1992, work began to remove the plant's 266,000 pounds of radioactive waste from a pool of water to dry-cask storage containers that are supposed to be able to withstand earthquakes, tornadoes and small plane crashes. Although the dry-cask storage is assumed to be safer than keeping the waste in a pool, security has still been increased since the September 11 terrorist attacks.

State of Idaho v. U.S. Department of Energy

Court Rules '95 Cleanup Agreement Includes Plutonium-Contaminated Material

On March 31, a federal judge ruled that the unprecedented 1995 cleanup agreement between the State of Idaho and the U.S. Department of Energy requires removal of an estimated 62,000 cubic meters of plutonium-contaminated material buried at the Idaho National Engineering and Environmental Laboratory (INEEL). DOE had disputed that the agreement included such material, arguing instead that it only covered the 65,000 cubic meters of transuranic waste currently stored above-ground. DOE based its argument on (1) the department's definition of transuranic waste, (2) a distinction between stored and buried waste, and (3) a provision of the agreement that estimated the amount of waste to be removed at only 65,000 cubic meters.

The U.S. District Court for the District of Idaho, however, disagreed with DOE's interpretation of the agreement. Criticizing the department for seeking to "distort" key facts in the case and "split hairs" about the meaning of key sections of the agreement, the court ruled that the plain language of the agreement clearly required DOE to remove "all" transuranic waste at the site, including the 62,000 meters buried in a massive landfill. The court also said that DOE's effort to avoid responsibility under the agreement raises legitimate concerns for the state about potential contamination of the Snake River Plain Aquifer—a major regional water source that runs underneath INEEL.

Removal of the buried waste by DOE raises major technical challenges for the department. The department's initial efforts to address the buried waste have been fraught with delays. DOE officials expressed disappointment at the court's ruling, but have not indicated whether the department will appeal the ruling.

U.S. Department of Energy

MIMS to Get New Server

Please be advised that the web site for the Manifest Information Management System is being moved to a U.S. Department of Energy server. MACTEC, the current contractor for MIMS, has been hosting the site on its own server as a courtesy to the department. However, the department has found space on its server and the system will be transferred there in the near future.

During the time when the system is being moved to the new server, it may be off-line for a few days. Once it comes back on-line, it will have a new URL. The new URL will be

mims.apps.em.doe.gov

DOE to Continue Polygraph Testing of Employees

The U.S. Department of Energy recently issued a notice of proposed rulemaking announcing a tentative decision by the department to retain its current polygraph examination program, including the use of lie-detector tests to screen employees and job applicants with access to sensitive information. The department cited congressional directives to minimize leaks of classified data as a justification for the program, arguing that it is an appropriate way to identify employees that might be involved in espionage or leaks of nuclear weapons or other national security data. There have been several instances in recent years of suspected espionage by DOE employees and accusations of lax security at the department's nuclear weapons lab.

Several members of Congress have criticized the department's decision not to place more restrictions on the use of its polygraph program. The National Academy of Sciences had previously issued a study raising questions about the efficacy and fairness of polygraph testing, after which congressional legislation was drafted ordering DOE to develop a new polygraph program. The Academy recognized that polygraph testing has some value—particularly in investigating specific security incidents—but recommended that it not be used for screening employees and applicants.

In announcing its decision to retain the current polygraph program, DOE noted that it is also retaining current safeguards to protect against abusive use of the polygraph results. For instance, department regulations bar DOE or its contractors from taking action against an employee solely on the basis of test results.

(Continued from page 13)

US Ecology's Response

In response to the court's decision, American Ecology Corporation—US Ecology's parent company—issued a press release. In the release, Stephen Romano, President and Chief Executive Officer of American Ecology, stated that the company is "now analyzing the Statement of Decision with the assistance of legal counsel . . . and will be evaluating its legal options based on this analysis."

The release also contained statements about the financial impact of the ruling by Jim Baumgardner, Senior Vice President and Chief Financial Officer. Baumgardner states that, "The Company is no longer in a position to conclude from an accounting standpoint that it is more likely than not that it will recover its investment in the project. Consequently, the Company will write down the $21 million in Ward Valley assets in the first quarter of 2003." At December 31, 2002, American Ecology reported net total assets of approximately $87 million, so the decision to write down Ward Valley assets will have no cash impact to the company—although it will negatively impact earnings during the quarter and the year. According to Baumgardner, "the Company continues to possess sufficient financial wherewithal to meet its ongoing obligations and execute its current business plan."

U.S. Nuclear Regulatory Commission

NRC Licensing Board Blocks Issuance of PFS Spent Fuel Storage Facility License

On March 10, citing the risks that nearby military operations might pose, the Atomic Safety and Licensing Board—an independent judicial arm of the U.S. Nuclear Regulatory Commission—issued a decision blocking the issuance of a license to the Private Fuel Storage (PFS) consortium to construct and operate a spent fuel storage facility on the Skull Valley Band of Goshute Indians reservation in Utah. The decision comes as a disappointment to the consortium of nuclear utilities seeking to site a spent fuel storage facility until the permanent repository at Yucca Mountain, Nevada is opened. The State of Utah and its Governor Mike Leavitt, on the other hand, have been strong opponents of the proposed facility and have spent millions of dollars to block its licensing.

The licensing board's decision follows a formal hearing held in mid-2002 at which a number of issues challenging the PFS proposal were raised, including the likelihood of an F-16 (a single-engine military jet) crashing into the facility. In particular, the State of Utah complained that the site is unsuitable because it is located under an airway used by military pilots to fly thousands of F-16's a year from Hill Air Force Base to the military's Utah Test and Training Range. PFS disputed that the location of the site under the airway makes it unsuitable, arguing that the chances of an F-16 accidentally crashing into the facility are so minimal as to make precautions against the event unnecessary. In support of its argument, PFS relied on the "pilot avoidance" theory, which predicts that Air Force pilots would almost always take steps to guide crashing jets away from the facility.

The licensing board, however, found the state's evidence to be more convincing and rejected the PFS' argument, ruling that the facility can not be licensed until the safety concern over the F-16 crash scenario is addressed. In a 222 page opinion, the board stated that, "There is enough likelihood of an F-16 crash into the proposed facility that such an accident must be deemed credible."

The licensing board said that it might reconsider its decision if

(1) PFS can convince the Air Force to reduce the number, and/or to alter the pattern, of F-16 flights over Skull Valley, or

(2) PFS can demonstrate that the facility's storage structures are designed in such a manner that an F-16 crash would not have appreciable health and safety consequences.

In any event, PFS still has the opportunity to convince the five NRC Commissioners to overturn the licensing board's ruling on appeal.

A copy of the 220-page decision will be available from the NRC's web site at http://www.nrc.gov/what-we-do/regulatory/adjudicatory/pfs-decision.pdf.

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

Federal Regulators Hear Arguments re Revised PFS Spent Fuel Facility Proposal

On Monday, April 21, the Atomic Safety and Licensing Board (ASLB received briefs from the State of Utah and the U.S. Nuclear Regulatory Commission concerning a proposal by Private Fuel Storage (PFS) to downsize its proposed spent fuel storage facility on the Skull Valley Band of Goshute Indians reservation in Utah. The proposal was made in response to an unfavorable March 10 decision by the ASLB that expressed concern over the risks that nearby military operations might pose. (See related story, this issue.)

PFS' Response to the ASLB's Earlier Decision

On March 31, PFS responded to the unfavorable March 10 decision by

- ·filing an appeal of the licensing board's decision to the five-member Nuclear Regulatory Commission;
- filing a motion requesting that the licensing board consider new evidence that would prove that even if a fighter jet were to crash into the proposed storage facility, no casks would be penetrated and no radioactive release would occur; and
- filing a motion asking the licensing board to grant a license that would limit the size of the facility from 4,000 concrete spent fuel storage casks to 336 casks.

The latter option—limiting the size of the facility by more than 90 percent—would be a temporary solution that could allow PFS to proceed with planning and construction while working to address the licensing board's concerns about a larger facility.

NRC staff joined PFS in challenging the licensing board's decision. In particular, NRC staff argue that the board improperly discounted some of the evidence presented at hearings last year on the aircraft-crash risk. The evidence suggests that the probability of a crash at the site is less than 1 in 1 million.

Briefs by Utah and NRC

State officials have been quoted in local press as saying that the state will challenge any appeal by PFS and fight the proposal to downsize the facility. In the brief filed earlier this week, the state—which has been a leading opponent of the PFS proposal—argues that PFS' proposal to downsize the facility constitutes "an illegal end run" around federal regulators and makes the facility financially infeasible.

In their brief, NRC staff agreed that it would be illegal to issue a license for the facility based on PFS' existing application with fewer casks. However, staff suggested an alternative procedure that might allow PFS to go forward with its smaller-scale plans. Under the alternative procedure, PFS would have to amend their license application to address the smaller facility.

An ASLB decision on arguments raised in the briefs by PFS, NRC and Utah may be issued as early as late April or early May.

ASLB Rejects Utah's Concerns re PFS' Anti-Terrorism Protections

On March 21, the Atomic Safety and Licensing Board—an independent judicial arm of the U.S. Nuclear Regulatory Commission—issued a decision denying the State of Utah's request to review a confidential list of new safeguards and security requirements that federal regulators imposed last fall on nuclear waste storage. Utah had made the request in response to a license application submitted by Private Fuel Storage (PFS) consortium to construct and operate a spent fuel storage facility on the Skull Valley Band of Goshute Indians reservation in Utah. The licensing board issued an unfavorable ruling on PFS' application on March 10 citing, among other things, the risks that nearby military operations might pose. PFS is appealing the licensing board's decision and revising its proposal in an effort to win approval for its project. (See related story, this issue.)

In rejecting the state's request, the licensing board found that there is no need to review the updated security regulations since the proposed PFS facility has not been built. The regulations were issued on October 16, 2002. They include such things as tougher physical barriers and added security forces around stored fuel. They were circulated to storage site operators only and were never made public.

The state had requested the review to determine if the regulations are sufficient to protect Utahns and their environment. Although the state has been prohibited from seeing the updated security regulations, it was able to review the original security plan, written in 1997, for the facility. The state, however, argues that the limited review is not enough and wants to see the updated security regulations.

To date, the licensing board has rejected all but one small part of 11 different anti-terrorism issues that the State of Utah has raised in regard to the proposed PFS facility. PFS applauded the licensing board's recent decision and announced that it will comply with security requirements in effect when it begins operations at the proposed facility.

New NRC Chair Named by President Bush

President Bush recently announced that he will designate Nils J. Diaz as the new Chair of the U.S. Nuclear Regulatory Commission. Diaz, who has served as an NRC Commissioner since 1996, will replace Richard Meserve. In December 2002, Meserve announced that he would leave the Nuclear Regulatory Commission at the end of March—more than one year before his current term is set to expire—to become President of the Carnegie Institution, a research center in Washington, D.C. Monday was Meserve's last day at the Commission.

Diaz is a nuclear engineer. Prior to serving on the Commission, he worked as a professor of nuclear engineering science at the University of Florida and as the Director of a consortium involved in missle defense programs.

Normally, new NRC Commissioners must be confirmed by the Senate. However, a Chair can be designated by the President without Senate action.

Another NRC Commissioner, Greta Dicus, is expected to depart the agency this summer. That will leave President Bush with two slots to fill on the five-person commission. Under governing law, however, Bush would have to name one Democrat and one Republican in order to preserve partisan balance on the Commission.

NRC Seeks Public Comment re Control of Solid Materials

The U.S. Nuclear Regulatory Commission is seeking additional public comment on alternatives for controlling the disposition of solid materials that originate in certain areas of NRC-licensed facilities and that may contain no or very small amounts of radioactivity resulting from licensed operations. Current regulations allow solid materials to be released for unrestricted use if they are free of radioactivity or any detectable radioactivity is below a level considered to be protective of public health and safety and the environment. However, current regulations do not specify the precise level below which material can be released. Accordingly, NRC currently uses guidelines based primarily on the ability of survey meters to measure the radioactivity level on, or in, the solid material.

Prior Consideration/Alternatives Identified

Last year, the Commission directed staff to proceed with a rulemaking that considers a range of alternatives. The following five alternatives have been identified:

(1) continue NRC's current case-by-case approach of allowing release of solid materials for unrestricted use based on existing guidance on survey capabilities;

(2) amend NRC regulations to include a dose-based criterion for release for unrestricted use;

(3) allow release for "conditional use," restricted to certain authorized uses with limited public exposures, such as metals in bridges, sewer lines, or industrial components in a factory, or concrete in road fill;

(4) require disposal in an EPA-regulated landfill; or

(5) require disposal in a licensed low-level radioactive waste disposal facility.

Substantial information and comments were generated previously on alternatives (1), (2) and (5). However, additional information is needed on the feasibility of alternatives (3) and (4).

Materials Under Consideration

The solid materials under consideration include items such as furniture and ventilation ducts in buildings, metal equipment and pipes; wood, paper and glass; laboratory materials such as gloves and beakers; routine trash; site fences; concrete; soil; and other similar materials. According to NRC, "[m]uch of this solid materials has either no, or very small amounts of, radioactivity resulting from facility operations either because the material was exposed to radioactivity to only a limited extent or because it has been cleaned."

Upcoming Workshops

NRC will hold a public workshop on May 21-22 at its headquarters building in Rockville, Maryland to discuss the identified alternative approaches, with a focus on the feasibility of the conditional use and landfill disposal options. To assist interested parties, NRC staff have placed on the agency's website an Information Packet that discusses the various alternatives under consideration and how comments can be transmitted to the agency. The website is located at http://www.nrc.gov/materials.html. To get information, click on Key Topics on "Controlling the Disposition of Solid Materials."

Comments on the alternatives being considered are due by June 30 and should be submitted to Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 Attention: Rulemaking and Adjudications Staff.

For additional information, please contact Frank Cardile, Office of Nuclear Material Safety and Safeguards, at (301) 415-6185 or fpc@nrc.gov.

NRC Considering Wisconsin Agreement State Request

The U.S. Nuclear Regulatory Commission is considering a request by the State of Wisconsin to assume part of the agency's regulatory authority over certain nuclear materials in the state—i.e., to become an Agreement State. Currently, 32 states have signed such agreements with NRC. In addition, Pennsylvania and Minnesota are in various stages of entering into agreements with the agency.

The particular authority that Wisconsin is seeking includes responsibility for licensing, rulemaking, inspection and enforcement activities for

- radioactive materials produced as a result of processes related to the production or utilization of special nuclear material (SNM);
- uranium and thorium source materials; and
- SNM in quantities not sufficient to support a nuclear chain reaction.

Before making a decision on the request, NRC will review the state's radiation control program to ensure that it is adequate to protect public health and safety and is compatible with NRC's program for regulating the radioactive materials covered in the agreement.

If NRC approves the agreement, it will transfer approximately 260 NRC licenses—most of them for medical and other industrial uses—to Wisconsin's jurisdiction. NRC would retain jurisdiction, however, over about 10 nuclear materials licensees and over regulation of nuclear reactors in Wisconsin. NRC would also continue regulating federal agencies that use certain nuclear material in the state.

Copies of the agreement being proposed by Wisconsin, the Governor's request and supporting documents, and the NRC staff's assessment can be found on the NRC's Agency-wide Documents Access and Management System (ADAMS). Comments on the proposal should be sent to Michael T. Lesar, Chief, Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001.

NRC Renews Licenses for Virginia Power Stations

The U.S. Nuclear Regulatory Commission recently announced that it has renewed the operating licenses of the North Anna Power Station, Units 1 and 2, and the Surry Power Station, Units 1 and 2. North Anna is located about 40 miles northwest of Richmond, Virginia, whereas Surry is located about 17 miles northwest of Newport News, Virginia. Both plants are operated by Virginia Electric and Power Company. Both sets of licenses have been renewed for an additional 20 years.

North Anna and Surry Renewals

Applications for renewal were submitted to the NRC on May 29, 2001. The licenses for the North Anna Units 1 and 2 were set to expire on April 1, 2018 and August 21, 2020. The licenses for the Surry Units 1 and 2 were set to expire on May 25, 2012 and January 29, 2013.

As part of its review process, NRC conducted an environmental review—issued in November 2002—that found no impacts that would preclude renewal of the licenses for environmental reasons and a safety evaluation report—issued in December 2002—that found no safety concerns that would preclude license renewal because the licensee had demonstrated the capability to manage the effects of plant aging. (Copies of these documents can be found at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/northanna-surry.html.) In

addition, NRC conducted inspections of the plants.

On December 18, 2002, the Advisory Committee on Reactor Safeguards issued its recommendation that the operating licenses be renewed. The committee is an independent body of technical experts that advises the Commission. The committee's report can be found at http://www.nrc.gov/reading-rm/doc-collections/acrs/letters/2002/4982015.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, in addition to the Surry and North Anna renewals, NRC has approved license extension requests for ten other 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 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.)

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 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 Rules Geologic Factors Not Primary re Yucca

Rejecting a major argument put forth by the State of Nevada, the U.S. Nuclear Regulatory Commission recently issued a ruling finding that the Nuclear Waste Policy Act does not require the agency to give primary weight to geologic factors in judging whether the proposed Yucca Mountain high-level radioactive waste repository can safely contain radionuclides. Instead, the NRC found that the licensing guidelines that it set in 2001 properly give equal weight to man-made containment barriers, such as steel alloy canisters, as geologic barriers in judging the safety of the repository.

Before it can issue a license for the proposed facility, NRC must determine that DOE's repository design will contain waste effectively enough over thousands of years to meet leakage limits set by the Environmental Protection Agency. Nevada argues, however, that federal agencies illegally altered several repository site guidelines to cover up geologic flaws revealed over the course of several decades of study of the proposed site. The state argues that these flaws should have disqualified the site from further consideration. However, the state claims that instead the agencies improperly minimized the geologic flaws and focused on the value of steel

canisters in preventing radionuclide leakage. NRC's ruling rejected such claims.

To date, Nevada has filed six lawsuits against the NRC, DOE, EPA and others in regard to the Yucca Mountain project. The suits have been consolidated into four. They are scheduled for a September hearing in the U.S. Court of Appeals for the District of Columbia Circuit.

NRC Releases Draft Yucca Review Plan

The U.S. Nuclear Regulatory Commission recently released to the public a draft final version of the plan it would use to review an expected application from the U.S. Department of Energy for a high-level radioactive waste repository at Yucca Mountain, Nevada. The principle purpose of the plan, according to NRC, is "to ensure the quality and uniformity of NRC staff's reviews."

A previous draft of the plan was released for comment in March 2002 and three public meetings were held in Nevada. Approximately 1,000 comments were received on that version. The current version is being released for information purposes only—not for comment. It has not yet received Commission approval and is subject to change. If it is approved by the Commission, however, the agency will issue the final version and publish an associated *Federal Register* notice with a summary of comments received and changes made to the March 2002 draft.

Included in the plan are separate sections for potential reviews of repository safety before permanent closure, safety after permanent closure, the research and development program to resolve safety questions, the performance confirmation program and administrative and programmatic requirements. Each of these sections would define how the NRC would review DOE's compliance with NRC regulations.

Copies of the "Yucca Mountain Review Plan, Draft Final Revision 2," are available at http://www.nrc.gov/waste/hlw-disposal/regs-guides-comm.html.

NRC Issues Annual Assessments

The U.S. Nuclear Regulatory Commission recently issued annual assessment letters to 102 operating nuclear power plants and posted the letters on its website. One plant, the Davis-Besse nuclear facility in Ohio, was not issued an annual assessment letter because it is currently under the NRC's Inspection Manual 0350 Process.

According to NRC, "[e]very six months most plants receive either a mid-cycle review letter or an annual assessment letter along with an NRC inspection plan." The agency posts updated information on plant performance to its web site every quarter. The next mid-cycle assessment letters will be issued in September.

Copies of the assessment letters may be found at http;//www.nrc.gov/NRR/OVERSIGHT/ASSESS/index.html.

NRC Amends Licensing, Inspection and Annual Fees Rule

The U.S. Nuclear Regulatory Commission is amending its regulations for the licensing, inspection and annual fees it charges applicants and licensees for fiscal year 2003. Under federal regulations, the agency is required to collect nearly all of its annual appropriated budget through two types of fees:

- fees for NRC services, such as licensing and inspection activities, that apply to a specific license; and
- annual fees paid by all licensees to pay for generic regulatory expenses and other costs not recovered through fees for specific services.

The law requires that NRC recover $526.3 million—94 percent of its budget for FY 2003—less the $24.7 million appropriated from the Nuclear Waste Fund for high-level waste activities. Of the monies to be recovered, $29.3 million represents NRC activities related to homeland security.

The proposed annual fees have been determined under the "re-baselining" method. According to NRC, the agency decided to re-baseline fees this year "based on the changes in the magnitude of the budget to be recovered through fees."

Written comments on the proposed fee changes contained in 10 CFR Parts 170 and 171 should be received by the agency within 30 days after publication in the *Federal Register,* which is expected shortly. They should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-001, ATTN: Rulemakings and Adjudications Staff.

NRC Holds 15th Annual Regulatory Information Conference

The U.S. Nuclear Regulatory Commission held its 15th annual Regulatory Information Conference in Washington, D.C. from April 16 – 18. The conference focused on developing a better understanding of future trends for improved nuclear safety and on challenges shaping NRC policies and programs. Attendees at the conference included NRC management, representatives from regulated utilities, and other interested stakeholders. Topics discussed at the conference included, among other things, safety initiatives and regulatory trends, fire protection, and new and advanced reactor designs.

NRC Provides New Documents Search Interface

The U.S. Nuclear Regulatory Commission recently added a new search interface for its online Agencywide Documents Access and Management System (ADAMS) to make it easier to find and obtain public NRC documents. Using the new search and retrieval interface, users may now access documents directly from the NRC web site. Basic and advanced options are included for searching and retrieving publicly available documents. In addition, the new interface includes highlighting of search terms in document texts, an option to search for similar documents, and indicators for those documents in a search list that have already been viewed.

Additional details about the new search interface can be found at http://www.nrc.gov/reading-rm/adams.html or by calling (800) 397-4209.

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**

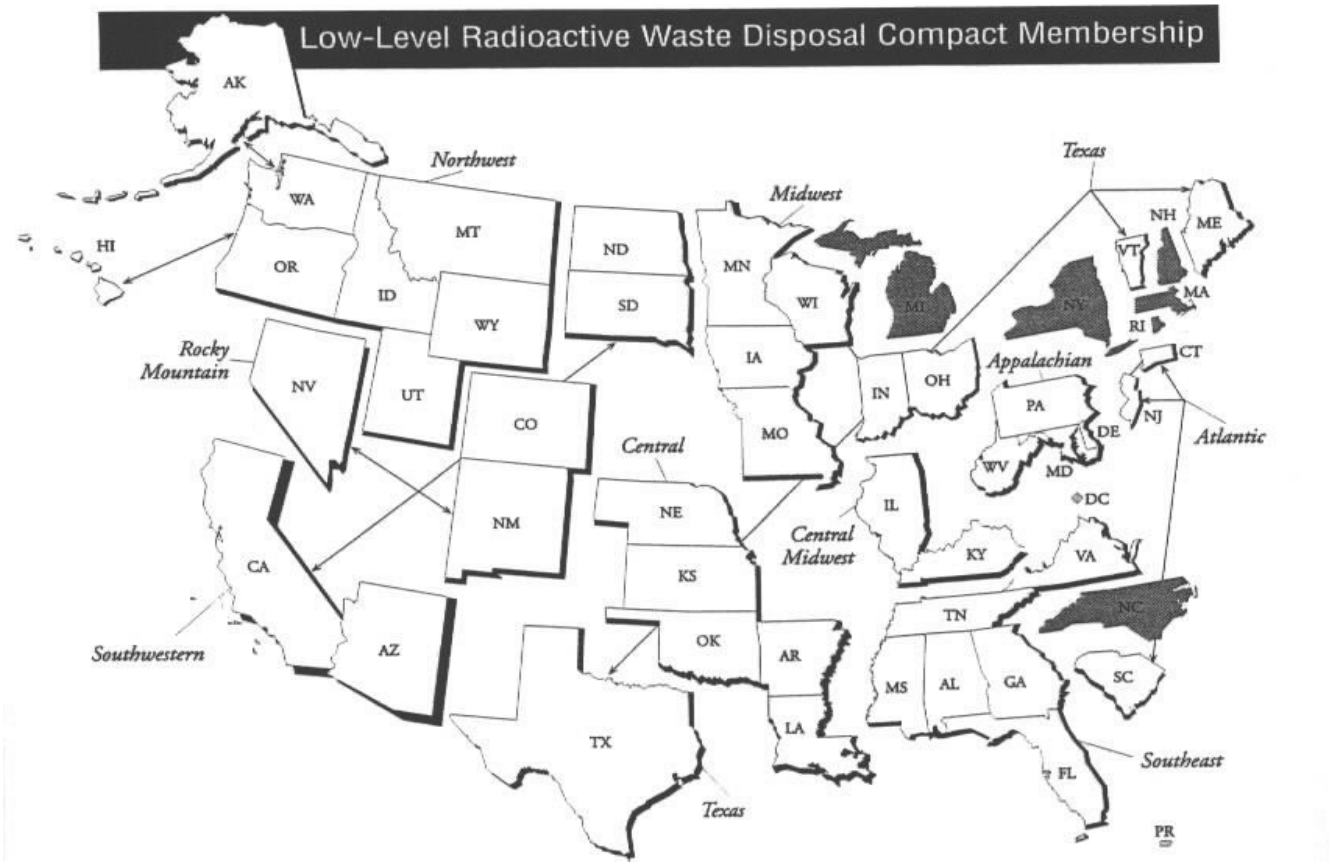
- GAO homepage (access to reports and testimony) ..... **www.gao.gov**

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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Oklahoma

Central Midwest Compact
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Hawaii
Idaho
Montana
Oregon
Utah
Washington *
Wyoming

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Indiana
Iowa
Minnesota
Missouri
Ohio
Wisconsin

Rocky Mountain Compact
Colorado
Nevada
New Mexico

Nothwest accepts Rocky Mountain waste as agreed between compacts

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Florida
Georgia
Mississippi
Tennessee
Virginia

Southwestern Compact
Arizona
California *
North Dakota
South Dakota

Texas Compact
Maine
Texas *
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