

# LLW *notes*

Volume 16, Number 5 September/October 2001

*Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*

## **U.S. Supreme Court Denies Request for Certiorari in Central Commission / Nebraska Suit**

On October 1, the U.S. Supreme Court denied without comment the State of Nebraska's July 16 petition for a writ of certiorari in a lawsuit initiated by the Central Interstate Low-Level Radioactive Waste Commission. (See *LLW Notes*, July/August 2001, pp. 1, 12-16.) The lawsuit, which was originally filed in December 1998, challenges the state's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. In its petition, Nebraska had asked the Court to review a decision of the U.S. Court of Appeals for the Eighth Circuit rejecting the State's claim of Eleventh Amendment sovereign immunity. (See *LLW Notes*, March/April 2001, pp. 16-19.) Specifically, Nebraska presented the following question to the Court:

"Whether a State waives its Eleventh Amendment sovereign immunity from a suit seeking damages and other retrospective relief in federal court by entering into a multistate compact that authorizes only prospective relief against the State and only in 'any court that has jurisdiction?'"

Twelve states had filed an amici curiae brief with the Court in mid-August in support of the State of Nebraska's petition. (See *LLW Forum News*

Flash titled, "Twelve States File Amici Curiae Brief in Central Commission/Nebraska Suit Arguing Appellate Decision Erodes Sovereign Immunity," August 22, 2001.) The brief argued that "[t]he Eighth Circuit's decision substantially erodes States' Eleventh Amendment immunity with regard to their obligations under interstate compacts." The following states signed on to the amici curiae brief: Alaska, California, Florida, Hawaii, Mississippi, Missouri, Montana, North Carolina, Ohio, South Carolina, Utah, and West Virginia.

Also in mid-August, the Central Commission filed a brief in opposition to Nebraska's petition for a

*(Continued on page 11)*

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# Low-Level Radioactive Waste Forum, Inc.

## LLW Notes

Volume 16, Number 5 September/October 2001

Editor and Writer: Todd D. Lovinger

Layout and Design: Rita Houskie, Central Interstate Low-Level Radioactive Waste Compact

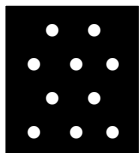
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LLW  
FORUM, INC

Low Level Radioactive Waste Forum, Inc.  
2227 20<sup>th</sup> Street N.W., Unit 301  
Washington, DC 20009  
(202) 265-7990  
FAX (202) 265-7995  
E-MAIL [llwforuminc@aol.com](mailto:llwforuminc@aol.com)  
INTERNET [www.llwforum.org](http://www.llwforum.org)

## 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 Holds Fall Meeting in Denver, Colorado

The Low-Level Radioactive Waste Forum, Inc. ("LLW Forum") held its fall meeting in Denver, Colorado on September 20, 2001. The LLW Forum Executive Committee met on September 19. Fifteen LLW Forum Directors, Alternate Directors, and meeting designees representing thirteen compacts, host states, and unaffiliated states participated. In addition, one Non-Government Associate Member participated in the meeting. Other persons representing four federal agencies, a facility operator, an industry organization, various states and compacts, a law firm, and a private contractor also observed and participated in the meeting.

The following is a brief summary of some of the issues discussed and decisions made at the meeting. Persons interested in a more detailed summary are directed to the meeting report itself.

### Department of Defense Waste Issues

Chairman Haynes reported that LLW Forum representatives met in July with senior officials of DOD to discuss concerns regarding DOD compliance with state and compact regulations. Haynes reported that DOD officials were receptive and pledged to work with the LLW Forum to resolve the issues.

Dale Murad, US Air Force, and Barbara Green, counsel to the Rocky Mountain Board, expressed their positions with regard to the previous administrative action in the Rocky Mountain compact. Mr. Murad stated that litigation was the appropriate method for resolving the question of sovereign immunity with regard to the compacts.

Following discussion, the LLW Forum adopted a resolution requesting that the DOD hold in

abeyance all legal proceedings until the issues are resolved, and committing the LLW Forum to working with DOD to resolve the issues. (*See resolution on page 5.*)

### MIMS Continues

In accordance with LLW Forum recommendations made to U.S. Department of Energy representatives at the March 2001 meeting in Point Clear, Alabama, DOE has determined to continue operating the Manifest Information Management System (MIMS). Steve Loftus of Mactec, a contractor to the Department of Energy, reported that MIMS has been moved from Idaho to DOE headquarters under the Environmental Management division. He distributed a user survey and asked LLW Forum members to submit their suggestions for improving the system.

### NAS Study

Lynda Brothers of Sonnenchein, Nath and Rosenthal, reported on her personal observations as a member of a National Academy of Sciences committee charged by the U.S. Nuclear Regulatory Commission to determine whether there is a basis to establish criteria for controlling the release of slightly contaminated solid materials. Brothers reported that she expects a report to be issued in early 2002.

### Barnwell Allocation System

Patricia Tangney of South Carolina and George Antonucci of Chem-Nuclear Systems explained the allocation system for the Barnwell, SC facility. All generators have been offered an allocation for 2001-2002 based upon disposal history. Very small generators were all offered an allocation of at least 5 cubic feet. Antonucci stated that he knows of no generators having waste that cannot be accommodated in 2001-2002. Tangney said it has not been decided whether there will be an

## Low-Level Radioactive Waste Forum, Inc. *continued*

allocation system in 2002-2003.

Generators must obtain a transportation permit from the South Carolina Department of Health and Environmental Control by October 31, 2001 in order to dispose of their waste at Barnwell.

### **Envirocare Access Permits**

Kenneth Alkema reported that Utah requires that site access permits for the Envirocare of Utah low-level radioactive waste disposal facility be obtained by January 1, 2002. The permit can be held by the generator or the broker.

### **FUSRAP Scoping Session**

Rick Collins (Appalachian Compact), Susan Jablonski (Texas), and Ken Alkema (Envirocare) discussed their experiences in dealing with FUSRAP waste and raised a number of concerns. It was agreed that the LLW Forum would study the issues in more depth at a future meeting. Two representatives from the U.S. Army Corps of Engineers participated in the discussions and agreed to provide further information at the next LLW Forum meeting in March 2002.

### **LLW Forum Executive and Business Sessions**

The Board of Directors of the LLW Forum made the following decisions during the Executive and Business sessions of the meeting:

- They adopted the "Statement of Principles of the Low-Level Radioactive Waste Forum, Inc."
- A budget was adopted for 2002 and the current management contractor was retained for an additional year.

- Membership dues were set at \$7,500 for compacts and \$4,000 for states. (*See resolution on page 4.*)
- The Executive Committee was authorized to set membership fees and benefits for Associate Members, Subscribers and Donors. (*See resolution on page 5.*)
- Officers were authorized to adjust the 2002 budget to reflect actual revenues and expenses. (*See resolution on page 5.*)
- Officers were authorized to adjust meeting registration fees for speakers. (*See resolution on page 5.*)

*If you have questions or need additional information, please contact Todd D. Lovinger—the LLW Forum's management contractor—at (202) 265-7990.*

### **Resolution re Membership Dues for States and Compacts**

*Resolved that the Board of Directors sets memberships dues for compacts for 2002 at \$7,500 each;*

*Resolved that the Board of Directors sets membership dues for states for 2002 at \$4,000 each, of which up to \$1,000 may be in ordinary in-kind services;*

*Resolved that the Executive Committee is authorized to recognize extraordinary in-kind services in further lieu of a portion of the cash payment.*

## **Resolution re Associate Membership Dues, Subscriptions, and Donations**

*Whereas, members of the Board of Directors should set their own dues based on the needs of the organization; and*

*Whereas, subscription rates, associate member fees, and other fees fluctuate based on supply and demand requiring frequent review and adjustment; now, therefore*

*Be it resolved that the Board of Directors of the Low-Level Radioactive Waste Forum, Inc. does determine that the Board shall set dues for all classifications of state and compact members; and*

*Be it further resolved that the Board authorizes the Executive Committee to establish such fees as may be appropriate for associate memberships and for subscriptions and other services as may be offered by the Forum; and*

*Be it further resolved that the Board hereby authorizes the Executive Committee to waive fees and negotiate pricing arrangements for specified services on an individual basis at their discretion.*

## **Resolution re Adjustments to 2002 Budget**

*Resolved that the Board authorizes the Officers of the LLW Forum, Inc. to adjust the budget during this fiscal year to reflect actual revenues and expenses.*

## **Resolution re Speaker Fees**

*Resolved that the Board authorizes the Officers of the LLW Forum, Inc. to adjust registration fees for speakers, as needed, on a case-by-case basis. Officers shall report adjustments to the Board during the executive session at each meeting of the LLW Forum, Inc.*

## **Resolution re DoD Waste Management and Disposal Practices**

*Whereas, a controversy has developed between the nation's low-level radioactive waste (LLRW) compacts and certain entities of the United States Department of Defense (DoD), which controversy has the potential to deny most DoD generators of LLW access to the current disposal sites; and*

*Whereas, the Low-Level Radioactive Waste Forum (Forum) wrote to the DoD on April 30, 2001 expressing serious concerns about the management of LLW; and*

*Whereas, Forum representatives met with senior personnel of the DoD on July 25, 2001; and*

*Whereas, the Forum conveyed an issue paper to the DoD on August 15, 2001; and*

*Whereas, the Forum received a letter from DoD dated September 14, 2001 that continues to raise serious concerns regarding DoD LLW management; and*

*Whereas, the nation's LLW compacts are united in desiring LLW disposal sites to continue to be available to all federal and non-federal generators; and*

*Whereas, the nation's LLW compacts provide essential services to the DoD in carrying out authorized federal functions; and*

*Whereas, it is the position of the Forum that the DoD and all of its components are subject to the requirements of the LLW compacts.*

*Now therefore be it resolved that:*

- 1. The Forum requests that the DoD and all of its components hold in abeyance all existing legal proceedings and abstain from initiating any new legal proceedings regarding DoD LLW management until the outstanding issues are resolved in a manner that satisfies both the interests of the compacts and the DoD; and*
- 2. The Forum is committed to continue working with the DoD to resolve these issues.*

### *Appalachian Compact/Pennsylvania*

## **Pennsylvania LLRW Advisory Committee Meets**

The Pennsylvania Low-Level Radioactive Waste Advisory Committee held a meeting on September 21. During the course of the meeting, attendees discussed and heard presentations on the following topics of interest:

- an overview of EPA's final rule on the storage, treatment, transportation and disposal of mixed waste;
- the status of commercial low-level radioactive waste disposal facilities and recent developments in other states and compacts;
- an update on the proposed transportation tax in the State of Iowa;
- an update on the Pennsylvania Department of Environmental Protection's solid waste radioactivity monitoring program; and
- an update on low-level radioactive waste generation trends in Pennsylvania and the Appalachian Compact.

During the latter report, it was noted that Pennsylvania's waste volume in 2000 was 421,983.1 cubic feet (nearly 98% of the compact's total volume). Ninety-seven percent of that waste was disposed of at Envirocare and the other 3 percent was disposed of at the Barnwell facility. However, the waste going to Envirocare represented only 0.01 percent of the activity.

It was also reported that the Pennsylvania

Department of Environmental Protection is continuing development of its solid waste radioactive waste monitoring program—the first of its kind in the country. When fully activated, over 300 facilities in Pennsylvania will have to do such monitoring.

It was further noted that Pennsylvania recently contracted with US Ecology Hanford to begin a one-time shipment of discrete sources of radium—such as clocks, radios, smoke detectors, and other similar items.

As to Pennsylvania's Agreement State status, it was explained that the process—which began in the mid 1990's—continues. Final regulations were published on September 14, 2001, but outstanding issues remain to be resolved with the U.S. Nuclear Regulatory Commission in regard to SDMP sites. No projected date of implementation was given at the meeting.

Finally, it was noted that the contract with GTS Duratek/Chem-Nuclear Systems regarding development of a regional low-level radioactive waste disposal facility for the Appalachian Compact region expires in January 2002. It was reported that Pennsylvania and the compact have no plans to continue a siting process, at this time.

### *Northwest Compact/Utah*

# Utah Approves Envirocare Request to Dispose of Containerized Class A Waste in Existing Cell

On October 19, the Executive Secretary of the Utah Radiation Control Board issued license amendment #12 to Envirocare of Utah, Inc. The action amends Envirocare's existing license to allow the company to receive and dispose of containerized Class A low-level radioactive waste in the existing cell at Envirocare's facility in Tooele County, Utah. Envirocare's previous amendment request for the existing cell did not contemplate disposal of unopened containerized waste such as resins in the cell up to Class A limits. Typically, soil or debris-type waste would be disposed of in such a cell. The new amendment request clarifies, amends, and develops procedures for handling containerized Class A waste in the existing cell. (For additional information, see *LLW Notes*, January/February 2001, p. 8.)

The decision to grant the requested amendment followed a 30-day public comment period and two public hearings. The comment period expired on June 14, 2001. A public participation document was prepared which responds to the 250 comments received on the amendment request. The document can be obtained on the agency's web site at

[www.deq.state.ut.us/eqrad/drc\\_hmpg.htm](http://www.deq.state.ut.us/eqrad/drc_hmpg.htm).

### **Opportunity for Appeal**

Parties have 30 days to appeal the decision of the Utah Radiation Control Board to grant the amendment request. Appeals must be filed by November 17, 2001.

### **How to Obtain Background Information**

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

[www.deq.state.ut.us/eqrad/drc\\_hmpg.htm](http://www.deq.state.ut.us/eqrad/drc_hmpg.htm).

### **Unrelated Pending Application**

The amendment request is being made separate from the company's license application to dispose of Class B and C low-level radioactive waste in a new landfill cell. That application has received approval from the Executive Secretary of the Utah Radiation Control Board. (See *LLW Notes*, July/August 2001, pp. 6-9.) Nonetheless, Envirocare recently announced that it would not pursue legislative approval for its B and C application this session due to timing factors. (See January 11 News Flash titled, "Envirocare Decides Not to Seek Legislative Approval for B and C Waste This Session: Local Poll Indicates Opposition to Application.") Under Envirocare's proposal, the existing cell will open in the interim while final decisions are being made concerning the new containerized Class A, B, and C cell.

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

## Controversies Continue re Utah Spent Fuel Proposals

Controversy continues to surround the proposed storage of spent nuclear fuel by Private Fuel Storage Limited Liability Company (PFS)—a coalition of nuclear utilities seeking to site a spent fuel storage facility on the Skull Valley Band of Goshute Indians reservation in Utah. For one thing, the state—which has opposed the proposal since its inception—recently responded to a lawsuit brought by facility proponents by claiming that it is unlawful to store high-level radioactive waste at an off-site facility that is not owned and operated by the federal government. For another, a dispute has arisen over the leadership of the tribe, resulting in multiple elections yielding different results.

### The Lawsuit

On September 20, the State of Utah filed a motion to dismiss an April 2001 lawsuit by the Goshutes and PFS. The suit, which was filed in the U.S. District Court for Salt Lake City, complains that six recently enacted state laws erect unfair and unconstitutional barriers to the plaintiffs' facility siting plans. In particular, the suit alleges that the laws unlawfully interfere with interstate commerce and infringe upon exclusive federal authority over the regulation of Indian affairs and nuclear power. (See *LLW Notes*, May/June 2001, p. 18.)

In the motion to dismiss, the state argues that the Nuclear Waste Policy Act of 1982 prohibits high-level radioactive waste from being stored off-site at a facility that is not owned and operated by the federal government. Accordingly, the state claims that the proposed storage facility is unlawful and that there is no basis for the plaintiffs' lawsuit. The motion to dismiss follows a July 2001 counterclaim filed by the state questioning the legitimacy of the siting proposal. (See *LLW Notes*,

July/August 2001, pp. 20-21.)

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

### The Tribal Leadership

Following the presentation in August 2001 of a resolution at a tribal meeting to remove the Chair and Vice-Chair of the Goshutes, controversy has arisen over who are the appropriate leaders of the tribe. At least two separate elections were recently held in September and October, allegedly yielding differing results. Moreover, the Chair at the time of the presentation of the resolution, Leon Bear, reportedly has refused to step down and maintains that his ouster was illegitimate. Since tribal elections are closed to the non-Goshute public and news media and are not overseen by any outside organization, independent verification of election results is not possible.

Having a recognized leader in place who supports the PFS proposal will be important to the success of the PFS project. Whereas Bear supports the proposal, some of the others who were allegedly elected subsequently are opposed to it.

### Russia Moves Forward with Spent Fuel Plan

To the dismay of several nuclear watchdog groups, Russia is moving forward with controversial plans to build cutting-edge nuclear reactors and spent fuel management facilities in an attempt to make the country a major service center to the world's nuclear industry. Public-private partnerships have developed to build new uranium-fueled conventional reactors to meet short-term energy needs and legislation has been passed to change the country's environmental laws to allow the importation of large quantities of spent nuclear fuel from foreign countries for reprocessing and storage. Passage of the spent fuel legislation will al-

*(Continued on page 10)*



## Green Party of Utah Holds First Convention in Salt Lake City

In mid-October, the first Green Party of Utah convention was held in Salt Lake City, Utah. During the course of the meeting, the participants adopted bylaws, elected state officers, and established an affiliation with the national party. Many issues were discussed during the convention, from electoral reform to promoting a “living wage” for all employees.

The keynote address at the convention was delivered by environmental activist Chip Ward. During his speech, Ward urged Utah residents to organize a grassroots campaign to keep nuclear waste out of the state. Ward specifically criticized Private Fuel Storage Limited Liability Company’s efforts to store spent nuclear fuel on the reservation of the Goshute Indian Tribe, as well as efforts by Envirocare of Utah to accept greater quantities of low-level radioactive waste at its disposal facility in Tooele County. (See related stories, this issue.)

Ward told his audience that they have a unique opportunity now to fight against nuclear waste because of strong opposition to the PFS plan by state and local leaders including Utah Governor Mike Leavitt, Representative Jim Hansen, and some Tooele County commissioners.

Ward argued that nuclear waste should not be brought into the state due to concerns about the alleged risk to human health and the environment.

### *State of Maine*

## Maine Yankee Plant Closure Deal Agreement Reached

In early September, state officials and environmentalists reached an agreement with Maine Yankee on a revised closure plan for the company’s Wicasset, Maine nuclear power plant. Notably, the terms of the plan require Maine Yankee to comply with state cleanup standards that are more stringent than federal residual radiation limits, as well as additional groundwater, soil, shoreline and near-shore monitoring beyond NRC requirements. The agreement also requires Maine Yankee officials to interview former plant workers and to review other historical data for information about potential contamination leaks. It was worked out under an NRC settlement process begun a year ago. NRC approval of the revised plant closure plan is expected to take between nine and 24 months.

Under the terms of the agreement, residual radiation at the site must not expose any individual to a dose exceeding the state limit of 10 millirems, with a maximum of 4 millirems exposure coming from groundwater. The federal standard, on the other hand, is 25 millirems from all sources of potential contamination. Plant officials have been quoted as saying that the tougher cleanup standards will not increase cleanup costs for the company and will have “minimal impact” on the decommissioning schedule—especially given the potential alternative of having to defend the plant closure plan in NRC proceedings.

The agreement, however, is not completely comprehensive of all issues related to closure of the plant. Some potentially contentious issues remain outstanding, including Maine Yankee’s

plan to store approximately 700 tons of spent nuclear fuel at the site in dry storage casks for an indefinite period of time. Environmentalists are opposed to the plan. In addition, state officials have expressed some concerns about certain sampling issues related to dose modeling, calibration of sampling equipment and field measurements. Nonetheless, state and plant officials—as well as environmentalists—have been quoted as hailing the agreement as a success and all have expressed general satisfaction with the outcome.

At present, decommissioning of the Maine Yankee plant is more than 50 percent complete. Decommissioning is expected to be completed by late 2004 or early 2005.

**(Russia.....Continued from page 8)**

low the Russian Ministry of Atomic Energy to pursue billions of dollars worth of contracts for the reprocessing of spent fuel from a variety of countries including, among others, Japan, Taiwan, Switzerland, Germany, Spain, Korea and China. (See *LLW Notes*, July/August 2001, p. 16.) Many countries oppose the reprocessing out of concern that increased commercial-use of weapons-grade plutonium could lead to increased production of nuclear weapons.

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

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

## Supercritical Fluid Extraction Used to Clean Radioactive Soil

Two Idaho National Engineering and Environmental Laboratory (INEEL) chemists recently reported that they had successfully used a process called supercritical fluid extraction to clean soil contaminated with two long-lived radioactive elements produced by past nuclear weapons development and nuclear energy research. Under the process, the researchers used pressurized, heated carbon dioxide and an added metal binding compound to reportedly remove more than 69 percent of plutonium and americium from soil. Follow-up experiments were said to remove almost 100 percent of the radioactive elements.

Supercritical fluid extraction is currently used to decaffeinate coffee, purify spices and dry clean clothes. It is said to be safe and environmentally friendly. The process is being scrutinized by scientists around the world and projects using the method are underway in both India and Czechoslovakia.

For the INEEL experiments, carbon dioxide and soil were mixed, heated and pressurized. A chemical agent was added which grabbed the plutonium and americium, whisking them back into the fluidized carbon dioxide. The carbon dioxide was then shunted out of the soil and depressurized.

*Entergy Arkansas v. State of Nebraska*

## Federal District Court Dismisses Claims Against Nebraska by Utilities and US Ecology

On August 29, the U.S. District Court for the District of Nebraska issued an order dismissing, with prejudice, the procedural and substantive due process claims of US Ecology and five generators in their lawsuit against the State of Nebraska. The court declined, however, to dismiss the Central Interstate Low-Level Radioactive Waste Commission's amended complaint. The court further determined that its dismissal of the generator's and US Ecology's due process claims against the State of Nebraska does not result in their complete removal from the lawsuit because of their pending cross-claims and equitable subrogation claims against the Central Commission.

The lawsuit, which was originally filed in December 1998, challenges the State of Nebraska's actions in reviewing US Ecology's license application for a low-level radioactive waste disposal facility in Boyd County. On July

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writ of certiorari. (See LLW Forum News Flash titled, "Twelve States File Amici Curiae Brief in Central Commission/Nebraska Suit Arguing Appellate Decision Erodes Sovereign Immunity," August 22, 2001.)

*For background information on the lawsuit, see LLW Notes, May/June 2001, pp. 1, 11-12 and January/February 1999, pp. 16-17.*

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16, the State of Nebraska filed a petition for a writ of certiorari requesting that the U.S. Supreme Court review a decision of the U.S. Court of Appeals for the Eighth Circuit rejecting the state's motion to dismiss the Central Commission's complaint. The state argued that the Central Commission could not sue Nebraska because such a lawsuit would violate the state's Eleventh Amendment sovereign immunity. (See LLW Forum News Flash titled, "Nebraska Petitions Supreme Court re Sovereign Immunity," July 20, 2001.) Subsequently, in mid-August, twelve states filed an amici curiae brief supporting review by the high court of the appellate decision. In the amici curiae brief, the states argue that "[t]he Eighth Circuit's decision substantially erodes States' Eleventh Amendment immunity with regard to their obligations under interstate compacts." (See LLW Forum News Flash, "Twelve States File Amici Curiae Brief in Central Commission/Nebraska Suit Arguing Appellate Decision Erodes Sovereign Immunity," August 22, 2001.) The Supreme Court has not yet decided whether it will hear the appeal.

### **The District Court's Order**

The district court's August 29 order was issued in response to a prior decision by the U.S. Court of Appeals for the Eighth Circuit. In that decision, the appellate court decided that the generators and US Ecology could not sue the State of Nebraska under the compact. The appellate court then remanded to the district court the issue of whether or not the generators and US Ecology possessed "property interests" sufficient to pursue additional claims of denial of procedural and substantive due process under the Fourteenth Amendment to the U.S. Constitution. The Fourteenth Amendment, among other things, prohibits the government from taking private property without due process of law.

### **Due Process Claims Raised by US Ecology and the Generators**

US Ecology and the generators claimed that they have a property interest in the issuance of a low-level radioactive

waste disposal license and in the money spent in an attempt to obtain that license. Specifically, they argued that their “property interest” was created by Nebraska’s “substantive standards or criteria that guide an officials discretion” as to whether or not to issue a license.

The pivotal question, according to the district court, “is whether Nebraska’s discretion to issue the license to . . . [US Ecology] was substantially limited.” If it was, a property interest existed that would be sufficient to allow the generators and US Ecology to maintain the civil rights lawsuit against the State of Nebraska. If it was not, then no property interest could be found and the generator’s and US Ecology’s claims would fail as a matter of law.

To answer the question, the district court reviewed Nebraska regulations concerning the issuance of a license for a low-level radioactive waste disposal facility. (N.A.C. tit. 194, Ch. 3, s. 009.) The court determined that the regulations, which establish twelve criteria for license issuance, do not create a property interest. In so ruling, the court held as follows:

“This regulation does not create a property interest. In particular, Nebraska reserves the right to decide whether the license disposal site will ‘constitute an unreasonable risk to the public health and safety and the environment.’ The decision about whether the public health and safety will be furthered by granting or denying a license is the quintessential example of a discretionary decision. In other words, there can be no legitimate claim of entitlement to a nuclear waste disposal license when issuance of it turns almost entirely upon such open-ended factors as the ‘public health and safety.’” (citations omitted)

The court emphasized that the concern for “public health and safety” is not an isolated part of the regulation, but rather is emphasized in virtually every criterion set forth therein. Accordingly, the court determined that “Nebraska retained such great discretion that the regulation,

although nominally mandatory in nature, cannot be said to provide . . . [US Ecology] and the Generators with a ‘legitimate claim of entitlement’ to a license.” As a result, the court held that these parties had no property interest which is protected by the Fourteenth Amendment.

### **Claims Raised by the Central Commission**

The court, in line with its previous ruling now on appeal to the Supreme Court, refused to grant the defendants’ motions to dismiss the Central Interstate Low-Level Radioactive Waste Commission’s complaint. The court held that “[t]he arguments advanced by the defendants have been disposed of earlier either by this court or the Court of Appeals.” To the extent that the defendants assert a variation of those earlier arguments, the district court held that they are without merit.

The court also refused to stay consideration of Nebraska’s most recent motion to dismiss the Central Commission’s amended complaint while the petition for a writ of certiorari remains pending before the Supreme Court, as the state had requested.

### **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 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, which remains pending before the district court, 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 the original action, the utilities and US Ecology were seeking declaratory relief including, among other things, a finding that the state license review process is “unrectifiably tainted” and that the State of Nebraska should be removed from supervising and managing any further aspect of the license review process. They also sought an award of money damages against individual defendants and the State of Nebraska. The court, by dismissing US Ecology’s and the generators’ claims, has effectively denied them of this relief.

In its pending amended complaint, the Central Commission is also seeking 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.*

*US Ecology v. State of California*

## California State Court Finds US Ecology Can Sustain Promissory Estoppel Action re Ward Valley

On September 5, a three-judge panel of the State of California Court of Appeal for the Fourth Appellate District reversed in part and affirmed in part a lower court's decision in a lawsuit filed by US Ecology concerning the development of the proposed low-level radioactive waste disposal facility in Ward Valley, California. The action—which was filed 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 and seeks a writ of mandate directing the state to take the necessary steps to acquire the Ward Valley site. The suit, as originally filed, seeks in excess of \$162 million in damages. (See *LLW Notes*, May/June 2000, pp. 20-22.)

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 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."

The appellate court also remanded to the trial court for reconsideration the issue of whether Committee to Bridge the Gap, the Los Angeles Chapter of Physicians for Social Responsibility, and the Southern California Federation of Scientists have a direct interest in the narrowed litigation sufficient to allow them to intervene.

In response to the court's ruling, Jack Lemley—Chair, President and Chief Executive Officer of American Ecology Corporation—stated, "[t]his ruling is a clear victory for US Ecology. We are confident of our ability to prove these allegations and establish damages at trial." Lemley further promised that US Ecology "intends to vigorously pursue successful conclusion of this litigation to protect the interests of our shareholders."

### Appeals Filed in California Supreme Court

On October 15, both US Ecology and the State of California filed petitions for review in the Supreme Court of the State of California in regard to the Court of Appeals' September 5 decision. In particular, US Ecology is appealing that part of the decision affirming a 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 is also petitioning for review of its causes of action for breach of implied-in-fact and express contract. The State of California, on the other hand, is challenging the appellate court's decision to allow US Ecology to proceed with its promissory estoppel claims against the state.

### *U.S. Nuclear Regulatory Commission*

# **NRC Clarifies Director's Decision re Pre-UMTRCA Mill Tailings Containing 0.05% Uranium or Thorium**

## **Responds to Envirocare Inquiries re Wayne and Maywood NJ FUSRAP Sites**

At the recent Low-Level Radioactive Waste Forum, Inc. meeting in Denver, Colorado, we held a scoping session on the disposal of Formerly Utilized Site Remedial Action Program (FUSRAP) waste. Various individuals participated in that session, including representatives of states and compacts, the U.S. Army Corps of Engineers, and disposal facility operators. During that session, Ken Alkema of Envirocare of Utah questioned the licensing requirements for pre-Uranium Mill Tailings Radiation Control Act (UMTRCA) mill tailings containing 0.05 percent by weight or greater uranium or thorium. Alkema reported that Envirocare was currently awaiting NRC guidance on the issue.

On September 20, Martin Virgilio—Director of NRC's Office of Nuclear Material Safety and Safeguards—sent Envirocare a letter responding to a variety of issues raised by the company, including the pre-UMTRCA mill tailings issue. In regard to the latter, Virgilio stated as follows:

“Your February 22, 2001, letter also sought clarification of the licensing requirements applicable to pre-UMTRCA mill tailings containing 0.05 percent by weight or greater uranium or thorium. We agree with your conclusion that such material is subject to NRC requirements applicable to source material and are taking this opportunity to clarify the December 2000, 2.206 Director Decision. That decision noted throughout the document that

pre-UMTRCA mill tailings were not regulated by the NRC. That statement was made in the context of mill tailings which normally contain only a very small concentration of uranium or thorium (usually assumed to be somewhat less than 0.05%). However, to the extent that mill tailings contain greater than 0.05% uranium or thorium, the tailings are clearly licensable under 10 CFR Part 40. In regard to determining concentration, it is important to note that the sampling process for the determination of the concentration, absent other applicable requirements, should generally be based on the license conditions of the licensed site for which the material is to be sent. In the absence of license requirements, standard sampling practices should be followed. It is recognized that the process of preparing contaminated material for shipment may result in some mixing with cleaner material as it is ‘dug up’ and loaded for shipment before sampling. This natural dilution of the concentration of uranium and thorium in contaminated material is in contrast to the intentional dilution of contaminated material for the purpose of reducing its concentration below 0.05% which is not acceptable in the absence of prior authorization. Finally, we note that pre-UMTRCA mill tailings from FUSRAP sites which are source material may be placed in a 11e.(2) cell if the conditions of the November 2000 guidance are met.”

Virgilio's letter also addressed a variety of other issues raised in previous correspondence by

## Federal Agencies and Committees *continued*

Envirocare including, among other things,

- whether the pre-UMTRCA mill tailings at the Wayne and Maywood, New Jersey FUSRAP sites are radiologically, physically, and chemically similar to and compatible with the material in Envirocare's 11e.(2) cell, such that disposal of the material in such a cell will provide adequate protection to the public health, safety and environment;
- whether the pre-UMTRCA mill tailings located at the Maywood site are source material or 11e.(2) byproduct material;
- whether NRC will continue to exercise its enforcement discretion to allow Envirocare to continue disposing of pre-UMTRCA mill tailings in its 11e.(2) disposal cell; and
- whether NRC will require Envirocare to take any action or to seek a license amendment to address the non-11e.(2) byproduct material already in its 11e.(2) cell.

According to the letter, after consideration of the issues raised by Envirocare, NRC remains of the view that Envirocare's "license for disposal of 11e.(2) byproduct material (NRC Materials License SMC-1559) does not authorize Envirocare to dispose of radioactive material from the Wayne, New Jersey FUSRAP site." However, due to NRC's reconsideration of the classification of the material at the Maywood site, a question arose as to treatment of material at the site that is considered source material because of its greater than 0.05 weight percent thorium and uranium content and also considered 11e.(2) byproduct material because of the process by which it was created. NRC resolved the issue as follows:

"Given that the material fits into two different

legal classifications with different regulatory requirements both of which are protective of the public health and safety, we conclude that the NRC has the discretion to appropriately classify the material. Rather than impose two different regulatory approaches to essentially the same material, we conclude that classifying all the tailings at the Maywood site as 11e.(2) byproduct material, even if some of the tailings contain licensable source material, is sensible regulatory policy."

*For additional information, please contact Michael Weber, Director of NRC's Division of Fuel Cycle Safety and Safeguards, at (301) 415-7212 or Ken Alkema, Senior Vice President of Envirocare of Utah, at (801) 532-1330.*

Persons interested in a more detailed explanation of the issues discussed in Virgilio's letter are directed to the letter themselves. Copies of the letter can be obtained on-line at

<http://www.nrc.gov/NRC/ADAMS/index.html>.

## **NRC Web Site Reopened with Limited Information**

The U.S. Nuclear Regulatory Commission has reopened its web site, albeit with a limited amount of information. The web site was closed following the September 11 terrorist attacks in Washington and New York out of concern that information on the site may be used by terrorists. In addition, all nuclear facilities were immediately placed on high security alert following the attacks.

NRC officials recently confirmed that the temporary site shut down was done at the request of U.S. military officials at the Department of Defense concerned that information on the site

*(Continued on page 17)*



## NRC Seeks Early Public Comment re Entombment

The U.S. Nuclear Regulatory Commission, after studying associated technical issues, has determined that entombment may be a viable option for decommissioning a nuclear power plant. Prior to developing a rule, however, NRC is seeking early public comment on the development of proposed options to change its regulations to allow entombment as a decommissioning option.

Under the entombment method, radioactively contaminated materials are left in a specifically engineered structure following decommissioning after all of the nuclear fuel has been removed from the reactor. The structure must be designed to isolate the radioactive materials from the environment for more than 60 years and must be appropriately maintained by the licensee until the radioactivity has decayed to a level acceptable for release of the site for unrestricted use. Under current NRC regulations, all decommissioning activities must be completed within 60 years of the time when a nuclear power plant permanently stops operating, unless exemptions are granted on a case-by-case basis.

The entombment option would reduce the risk of worker exposure to radioactivity because less handling is needed for contaminated materials that are left in place rather than being transported off-site. Entombment also reduces potential transportation risks.

Three different entombment options are presently being considered. Under the first, NRC would not undertake a rulemaking, but would rather allow entombment through exemption to existing regulations on a case-by-case basis. The second option would involve a rulemaking to amend the 60-year time frame for completion of decommissioning activities and to clarify the use of engineered barriers for reactor entombments. The third option would involve a full rulemaking to establish criteria and licensing requirements for an

entombed facility.

The proposed rule was published in the Federal Register on October 16, 2001 (66 Federal Register 52,551). Comments are due within 75 days of publication.

*For additional information on entombment, please see LLW Notes, September/October 2000, pp. 28-29.*

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### **(NRC Web Site....Continued from page 16)**

might aid terrorists targeting U.S. nuclear facilities. Some nuclear watchdog groups objected to the site's closure and demanded that NRC delay certain planned actions as a result thereof.

In a statement issued upon the reopening of the site, NRC said that "[t]aking down the agency website was a precaution to make sure it did not contain information that could be helpful to terrorists." NRC also noted that "other information and documents deemed non-sensitive will be added to the site" as the agency continues its review.

Currently, the site contains the NRC's mission statement; news releases; information about employment, public meetings, and rulemakings; and details on how to report safety concerns—including threats of terrorist activities. Information about the exact locations of nuclear power plants, design and construction, and contingency plans for nuclear accidents have been removed from the site. In addition, background information on power plants and other NRC-regulated facilities has also been removed from the site.

In regard to the pared down site, NRC states as follows:

"In support of our mission to protect public health and safety, the NRC is performing a review of all material on our site. In the interim, only select content will be made available. We appreciate your patience and understanding during these difficult times."

## **NRC Issues Final Rule re Storage of Certain Greater Than Class C Waste**

The U.S. Nuclear Regulatory Commission is publishing amendments to its regulations to allow the storage of power-reactor-related greater than Class C waste in an independent spent fuel storage installation or a monitored retrievable storage installation. The amendments are a response to a 1995 petition by the Portland General Electric Company on the storage of greater than Class C waste from its Trojan nuclear power plant in Oregon.

According to an NRC press release, the “amendments allow licensing for interim storage of greater than Class C waste in a manner consistent with licensing interim storage of spent fuel (high-level radioactive waste) and would maintain federal jurisdiction for storage of such waste.” NRC believes that the amendments will provide public health and environmental protection comparable to that required for the storage of spent fuel at an independent spent fuel storage installation—whether on- or off-site. The idea is to provide flexibility to reactor licensees in selecting a regulatory approach to storing reactor-related greater than class C waste after termination of their Part 50 license.

NRC’s press release on the amendments states as follows:

“The NRC believes the rule change is necessary because (1) previous requirements did not adequately address storage of reactor-related greater than Class C waste; (2) there were jurisdictional issues regarding NRC and Agreement State authority over reactor-related greater than Class C waste storage activities; and (3) it will reduce regulatory burden on licensees, NRC and Agreement States.”

A proposed rule on this subject was published by the NRC in June 2000 and minor changes were made as a result of 18 comment letters received thereon.

The amendments will be published in the *Federal Register* shortly and will become effective 30 days thereafter.

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## **NRC Commissioner Nils Diaz Sworn in For Second Term**

On October 4, Nils Diaz was sworn in for a second term as a Commissioner of the U.S. Nuclear Regulatory Commission. Diaz was confirmed by voice vote of the U.S. Senate on September 26. His term runs through June 30, 2006.

Diaz was first sworn in as an NRC Commissioner in 1996. Prior to that, he served as an educator, research scientist, consultant, and entrepreneur in such fields as nuclear engineering, nuclear power sources in space, and medical and industrial applications of radioisotopes.

Before joining NRC, Diaz was a professor of nuclear engineering at the University of Florida and Director of the Innovative Nuclear Space Power and Propulsion Institute. He holds a Bachelor of Science degree in mechanical engineering from the University of Villanova, in Cuba, and both a Master of Science and Ph. D. degrees from the University of Florida in nuclear engineering sciences.

## Obtaining Publications

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- DOE Public Affairs/Press Office ..... (202) 586-5806
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- 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](http://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). ..... [listserv@unixmail.rtpnc.epa.gov](mailto:listserv@unixmail.rtpnc.epa.gov)
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- 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](http://www.access.gpo.gov)
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**To access a variety of documents through numerous links, visit the web site for the LLW Forum, Inc. at [www.llwforum.org](http://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](http://www.llwforum.org). The Summary Report and accompanying Development Chart, as well as LLW Forum News Flashes, have been available on the LLW Forum web site since January 1997.

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

## Low-Level Radioactive Waste Disposal Compact Membership



### Appalachian Compact

Delaware  
Maryland  
Pennsylvania \*  
West Virginia

### Atlantic Compact

Connecticut  
New Jersey  
South Carolina •

### Central Compact

Arkansas  
Kansas  
Louisiana  
Nebraska \*  
Oklahoma

### Central Midwest Compact

Illinois \*  
Kentucky

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Alaska  
Hawaii  
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Montana  
Oregon  
Utah  
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### Midwest Compact

Indiana  
Iowa  
Minnesota  
Missouri  
Ohio  
Wisconsin

### Rocky Mountain Compact

Colorado  
Nevada  
New Mexico

*Northwest accepts Rocky Mountain waste as agreed between compacts*

### Southeast Compact

Alabama  
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Georgia  
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Tennessee  
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### Texas Compact

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