LLW
FORUM

LLW Notes

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Midwest Compact/Ohio

Ohio LLRW Facility Development Authority Gears Up

Board members of the recently constituted Ohio Low-Level Radioactive Waste Facility Development Authority met on November 3 and November 16-17 to handle organizational matters and discuss future action. In addition to various administrative tasks, the board is expected to perform the following activities within its first year:

- select a contractor to develop, construct and operate a low-level radioactive waste facility;
- develop a statewide program for public information and involvement; and
- begin development of a statewide screening process.

Board Membership The twelve members of the board were appointed on October 2—four by the Governor, four by the President of the Ohio Senate, and four by the Speaker of the Ohio House of Representatives.

Robert Teater, a soil scientist, was selected by the board as Chair, and J. Barry Maynard, a hydrogeologist, as Vice Chair. The rest of the board's membership comprises one biologist, one public health professional, two professional engineers, one generator of low-level radioactive waste, one geologist, one representative of a statewide environmental organization, one health physicist, and two representatives of the public.

Committees The board has established three standing committees:

- Administration and Finance,
- Research and Technology, and
- Public Information and Involvement.

Staffing At the group's initial meeting, Jane Harf of the Ohio Environmental Protection Agency was named as Secretary/Treasurer and Acting Executive Director. A decision regarding a permanent Executive Director is expected to be made in February 1996.

For further information, contact Jane Harf at (614) 644-2776.

Wisconsin Enacts Midwest Compact Amendments

On December 6, the Governor of Wisconsin signed into law amendments to the Midwest Interstate Low-Level Radioactive Waste Compact Commission. Wisconsin is the second member of the compact to adopt the amendments. Ohio, the compact's host state, enacted the amendments in June, along with enabling legislation. (See *LLW Notes*, July 1995, p. 5.) The amendments are expected to be introduced in the legislatures of the four other member states in early 1996.

For further information, contact Gregg Larson of the Midwest Compact Commission at (612) 293-0126.

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MASTER

LLW Forum

LLW Notes

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The Low-Level Radioactive Waste Forum is an association of state and compact representatives, appointed by governors and compact commissions, established to facilitate state and compact implementation of the Low-Level Radioactive Waste Policy Act of 1980 and 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 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

Code of Federal Regulations	CFR
U.S. Environmental Protection Agency	EPA
U.S. Department of Energy	DOE
U.S. Department of Transportation	DOT
U.S. General Accounting Office	GAO
U.S. Nuclear Regulatory Commission	NRC

Southeast Compact/North Carolina

Southeast Compact Sets Conditions for Funding of North Carolina Site

At a meeting of the Southeast Low-Level Radioactive Waste Compact Commission on November 14, Commissioners passed the following resolution setting additional conditions for funding facility development in North Carolina:

The Commission will not release any further funds to the siting process until such time as we receive a response from the contractor regarding its financial participation in the project and a comprehensive site assessment report from the North Carolina Low-Level Radioactive Waste Management Authority which includes the scope, cost, and length of time required to pursue a licensing decision. Such a report is expected in late January/early February, 1996. After such a report is received the Commission will consider the question of additional funding to North Carolina for the purpose of site development.

These conditions apply both to future appropriations and to moneys already committed to North Carolina, including a payment of \$3.1 million that was scheduled for November 15. The commission's decision, however, will not immediately impact the ability of the North Carolina Authority to pay for facility development, since the Authority currently has sufficient funding for projected costs through February 1996.

North Carolina Regulator Reports on Licensing Prospects

The Southeast Commissioners voted to impose the additional funding restrictions after receiving a report from the North Carolina Department of Environment, Health and Natural Resources (DEHNR) on the status of the agency's review of the license application for the planned low-level radioactive waste disposal facility.

In the report, dated November 13, Steven Levitas, Deputy Secretary of DEHNR, cited a November 9 letter to the Authority in which DEHNR's Division of Radiation Protection had stated that "(1) to date, none of [the] key site-related issues identified in March 1994 have been resolved or gone away; and (2) many months of expanded site characterization and confirmatory studies will be necessary without assurance that the key issues will be successfully resolved, given the complex nature of the Wake site." Despite improvements in the quality of data supporting the application, Levitas concluded that "based on the issues and concerns documented in the Division's November 9, 1995, letter, the current situation does not appear to be encouraging."

The Southeast Compact Commission had requested the report after learning of remarks by a regulator at an agency staff meeting in which he expressed concern over the potentially very high costs of proving the licensability of the North Carolina site.

Background: Previous Conditions on Funding

The November 14 resolution was the Southeast Compact Commission's second action this year seeking an increased stake in the project from the facility's developer, Chem-Nuclear. In August, Commissioners passed a resolution expressing "the sense of the Commission that continued funding (to North Carolina) will rely on an agreement between the Authority and Chem-Nuclear Systems, Inc. that will assure financial participation by CNSI in future site development." This resolution did not apply to funds already committed to the Authority. (See *LLW Notes*, August/September 1995, p. 5.) The Authority began negotiating with Chem-Nuclear concerning financial participation shortly after passage of the August resolution.

For further information, contact Kathryn Haynes of the Southeast Compact Commission at (919)821-0500.

Southeast Compact/North Carolina (continued)

North Carolina Authority Assessing Viability of Wake Site

At a meeting on November 15, the North Carolina Low-Level Radioactive Waste Management Authority began its assessment of the licensability of the proposed low-level radioactive waste disposal site in Wake County. The Authority's deliberations began after Chem-Nuclear, the facility developer/operator, presented its *Comprehensive Site Assessment Interim Report*. The Authority expects to reach a conclusion regarding the site by January 24, 1996.

Developer's Estimates re Timing, Cost

In its report to the Authority, Chem-Nuclear projects that a license could be issued in the fall of 1998, with additional expenditures of approximately \$21.8 million in pre-licensing costs. These estimates are preliminary and assume that the current license area layout remains unchanged, that "[n]o new issues or field work emerge," and that final design activities begin by the end of the first quarter of 1996.

Issue Areas for Assessment

As stated in the Authority's newsletter, the Authority's assessment will focus on six areas of concern raised by state regulators during the interrogatory process:

- Achieving an integrated groundwater model of the site that is supported by multiple lines of evidence;
- Demonstrating through the performance assessment that any possible radiation exposures from the site are below the regulatory limit;
- Identifying the relationship between the natural site features and facility design;

- Establishing a monitoring approach which provides reasonable assurance that the facility can be monitored and remediated throughout the operation and institutional control periods;
- Demonstrating that sufficient hydrologic, geologic and geochemical data exists to support a hydrogeologic site conceptual model; and,
- Developing a licensing workplan that defines the work to be performed after the assessment that will allow the N.C. Division of Radiation Protection (DRP) to make a licensing decision.

Background

The Authority's assessment of the site's viability builds on the findings of an independent evaluation of the site's hydrogeologic suitability that the Authority received in April 1995. (See *LLW Notes*, April/May 1995, p. 5.) That evaluation did not dismiss the site, but recommended that additional work be performed to support the license application.

For further information, contact Andy James of the North Carolina Authority at (919)733-0682.

Southwestern Compact/California

County Ordinance Targets Ward Valley Facility

The Ordinance

On November 21, the San Bernardino County Board of Supervisors voted 5 to 0 to pass an interim ordinance in order "to prevent and mitigate potential risks to public health and safety and to protect significant water resources from contamination from improper storage of radioactive wastes." The ordinance appears to be an attempt to prohibit the planned Ward Valley low-level radioactive waste disposal facility.

Section 2(b) of the ordinance provides:

Radioactive Waste shall be stored in repositories as defined in this ordinance and shall be limited to that waste generated within the borders of San Bernardino County. No radioactive waste repository shall overlie a significant water resource or be located within ten (10) miles from the point of extraction of a significant water resource. Repositories containing radioactive waste shall be waterproof vaults constructed of steel reinforced concrete with lead liners. Radioactive waste and contaminated materials shall be retrievable from the vault to aid in necessary repairs. This ordinance shall not apply to any radioactive waste repositories which as of July 1995 have been fully permitted, constructed, and has commenced operations.

By passing the interim ordinance as an "urgency measure," the board was able to avoid certain notice, comment, and hearing requirements. But, the ordinance is only effective until January 5, 1996, unless extended or amended by the board. In the meantime, however, opponents of the planned disposal facility continue seeking to place a citizens' initiative on the March 1996 primary ballot that would impose similar restrictions on radioactive waste disposal facilities located in the county. (See *LLW Notes*, August/September 1995, p. 9.)

California DHS

The California Department of Health Services provided the following comment on the interim ordinance:

The California Department of Health Services has taken the position that the ordinance is invalid. State law preempts the ordinance because the Ward Valley facility will be located on state land and not subject to local zoning restrictions, because the ordinance is inconsistent with, even antagonistic to, the statutory scheme established by the legislature for regulating sources of ionizing radiation, and because state law completely occupies the field of LLRW [low-level radioactive waste] disposal, so that there is no room for local regulation. Further, there is no evidence to support the requirement for lead-lined concrete vaults, or that an urgency ordinance was necessary to protect the public health and safety. The ordinance was not based on the required environmental impacts analysis under the California Environmental Quality Act (CEQA).

The ordinance is also preempted by federal law, which imposes specific requirements for the licensing of LLRW disposal facilities, and requires that the state maintain a regulatory program which is compatible with the federal regulatory program. The ordinance conflicts with the federal LLRW disposal requirements, and is incompatible with the federal regulatory program. Finally, the ordinance violates the Commerce Clause of the United States Constitution because it imposes a burden upon interstate commerce which far exceeds alleged local safety concerns.

Nevertheless, DHS intends to continue its dialogue with the County in an effort to improve the County's understanding of the Ward Valley facility and DHS's understanding of the County's legitimate needs.

Note: Attorneys for the San Bernardino County Board of Supervisors declined to comment for this story.

Appalachian States Low-Level Radioactive Waste Commission v. O'Leary

Appellate Briefs Filed in Surcharge Rebates Litigation

On May 22, 1995, the U.S. District Court for the Middle District of Pennsylvania ruled that the Appalachian Commission's contract of December 1, 1992, for 18 months' access to the Barnwell low-level radioactive waste disposal facility satisfies the Low-Level Radioactive Waste Policy Amendments Act's milestone for January 1, 1993, and entitles the Commission to a full 36-month reimbursement of surcharge rebates. (See *LLW Notes*, June 1995, pp. 16-19.) The U.S. Department of Energy, however, is appealing the district court's decision to the United States Court of Appeals for the Third Circuit. (See *LLW Notes*, July 1995, pp. 9-11.) The following is a brief summary of arguments and issues contained in briefs that were filed with the appellate court. Persons interested in a more detailed explanation of the appeal are directed to the briefs themselves.

On September 22, DOE filed an opening brief in its appeal of the Appalachian Commission's lawsuit challenging the distribution of surcharge rebates. The commission filed a reply brief on October 30, which was followed by DOE's reply brief on November 16. In addition, Babcock and Wilcox and the Commonwealth of Massachusetts have each filed amicus curiae briefs in the action. (See *LLW Notes*, October 1995, p. 26.)

U.S. Department of Energy's Brief

Secretary's Interpretation is Reasonable and Entitled to Deference

In its brief, DOE argues that Secretary O'Leary's interpretation of the Low-Level Radioactive Waste Policy Amendments Act is reasonable and warrants judicial deference. According to DOE, the Secretary's interpretation furthers the purpose of the act by encouraging states and compacts to continue to provide disposal capacity for their generators until disposal arrangements can be made for a longer period of time. It also furthers the related congressional interest in providing rebates to generators for periods in which the states and compacts do not provide disposal capacity. The commission's "snapshot" approach, on the other hand, is unreasonable according to DOE because it would entitle a state or compact to a full rebate as long as it provided for disposal capacity on a single day. "The statute surely does not mandate payment of the full rebate amount based on a contract to dispose of waste for any period, regardless of its length."

Secretary's Interpretation Has Not Been Inconsistent

DOE also contends that the district court erred in finding that the Secretary's interpretation of the Low-Level Radioactive Waste Policy Amendments Act has been inconsistent because the 1992 *Federal Register* notice rejected the pro rata approach adopted in the 1994 notice. "That premise is unfounded ... The 1992 notice did not address whether entering into an 18-month contract with the Southeast Compact qualified a State or compact region for a full rebate. The 1992 notice addressed only the issue of whether contracts in general could satisfy the requirements under the Act; it was not until the 1994 notice that the Secretary, in response to public comments, analyzed the 18-month Barnwell contracts." In any event, DOE points out, the Supreme Court has found that an agency's interpretation may be entitled to deference, even if it represents a sharp break from prior interpretations.

***Secretary's Actions Consistent with
Administrative Procedure Act***

DOE also disputes the district court's finding that the Secretary's actions were inconsistent with the Administrative Procedure Act (APA). According to DOE, the Secretary may not have been required to publish her interpretation of the Low-Level Radioactive Waste Policy Amendments Act at all and, in any event, she was not required to publish it prior to the signing of the 18-month Barnwell contracts. Moreover, DOE asserts that since the Secretary's rule is interpretative, it is exempted from APA notice and comment requirements. (DOE argues, however, that even if the 1994 *Federal Register* notice was not an interpretative rule, the Secretary satisfied the APA's notice and comment requirements because the final rule was a "logical outgrowth" of the 1992 notice and of the comments generated in connection with that notice, and because the 1992 notice therefore "fairly apprised interested persons of the 'subject and issues' before the agency.") In any event, DOE notes that even if the Secretary had failed to comply with APA requirements, that failure would not mean that the act entitled the commission to a full refund of the surcharge rebates.

***District Court's Ruling on Retroactivity
Is Incorrect***

As a final argument, DOE contends that the district court's retroactivity concerns are irrelevant to the case at hand. "Because the rule ... interprets, rather than alters, the rights and obligations provided for by Congress itself, there is simply no issue of retroactivity." Even if retroactivity concerns did apply, however, DOE argues that it would not follow that the commission is entitled to recover a full rebate under the Low-Level Radioactive Waste Policy Amendments Act. A legislative rule providing for the award of a full rebate would still be absent.

***Appalachian Commission's
Brief***

***Secretary Is Required to Pay All Surcharges
to Commission by January 31, 1993***

The Appalachian Commission contends that the district court properly construed the issues before it. According to the commission, the plain language of the Low-Level Radioactive Waste Policy Amendments Act imposes a ministerial duty upon the Secretary to pay all of the Appalachian region surcharges that are in escrow to the commission, in a lump sum, by January 31, 1993. "The region's meeting of the milestone and the Secretary's duty to pay the surcharges are not affected by subsequent events."

The commission contends that the Secretary has "interpreted" into the milestone a spurious condition for full payment—specifically, a continuing duty to provide disposal capacity from January 1, 1993, to January 1, 1996. The commission argues, however, that such an interpretation is immaterial because the act is neither silent nor ambiguous with regard to the conditions of the 1993 milestone. "[T]he Secretary cannot impose a spurious temporal condition under color of 'statutory interpretation.'"

continued on page 8

Appalachian States Low-Level Radioactive Waste Commission v. O'Leary (continued)

Secretary's Revised Eligibility Criteria Are Unreasonable and Impermissible

The commission also asserts that the district court correctly found the Secretary's revised eligibility criteria to be unreasonable and impermissible, and not entitled to deference. Contrary to the position taken by DOE, the commission argues that "[s]ince the Secretary's 1994 revised eligibility criteria would attach new legal consequences (deprivation of half of the surcharges) to events (the Contract) completed before their enactment, they result in retroactive rulemaking and are presumptively impermissible. Nothing in the Act rebuts this presumption."

The commission specifically identifies three reasons why the Secretary's revised eligibility criteria are unreasonable. First, the criteria impose a continuing duty to provide for disposal for three years upon states and compact regions that meet the 1993 milestone by contract, whereas the criteria impose no such continuing duty on state and compact regions that meet the 1993 milestone by siting a regional facility. "This disparity is unreasonable because disposal sites, like contracts, do not last forever." Second, all of the previous milestones were measured as of the applicable dates, without any

imposition of a continuing duty. And third, the Secretary's "interpretation" is inconsistent with the Low-Level Radioactive Waste Policy Amendments Act's mandate because it takes money away from the commission—money that may be used only for activities related to disposal facility development, mitigation, regulation, or decommissioning—and gives it to generators for any purpose.

Act Reflects Congressional Intent to Award Full Surcharges to States/Compacts that Provided for LLW Disposal by January 1, 1993

Finally, the commission argues that even if the court concludes that the act is ambiguous, it should still reject the Secretary's interpretation as unworthy of deference. To support its position, the commission notes that the act—by design—called for surcharge rebates to have been paid in a lump sum on or before January 31, 1993, without any provision for repayment and that the previous milestones were all measured as of their effective dates without any imposition of a continuing obligation. The commission also points to the act's legislative history as further proof that compliance with the 1993 milestone is measured as of January 1, 1993.

As Much as \$4.5 Million in Unclaimed Rebates to be Returned to Nevada, South Carolina, and Washington

According to staff of the Idaho National Engineering Laboratory (INEL), approximately \$4.5 million of the \$22 million in low-level radioactive waste surcharge rebates originally placed in escrow between January 1, 1990 and December 31, 1992, remained unclaimed as of October 2, 1995. In accordance with the Low-Level Radioactive Waste Policy Amendments Act of 1985, all unclaimed funds will be returned at the end of the year to the sited states of Nevada, South Carolina and Washington, from which they were collected.

The Law

Low-Level Radioactive Waste Policy Amendments Act Section 5(d)(2)(F) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 provides as follows:

PAYMENT TO STATES.—Any amount collected by a State ... that is placed in escrow ... and not paid to a State or compact commission ... or not repaid to a generator ... shall be paid from such escrow account to such State collecting such payment... Such payment shall be made not later than 30 days after a determination of ineligibility for a refund is made.

DOE's 1994 *Federal Register* Notice DOE's notice of final policies and procedures for payment of surcharge rebates was published on March 31, 1994 (59 *Federal Register* 15,188). Under Section IV(B) of the notice—"Notification to DOE of State or Compact Compliance With the Milestone"—compacts and unaffiliated states claiming full compliance with the January 1, 1993 milestone were required to provide notification to DOE by May 2, 1994. States and compacts claiming partial compliance, however, were not given a deadline for requesting payments under Section IV(D) of the notice—"Eligibility of States and Compacts for Partial Rebates." A deadline is included for generators requesting payments. Section IV(C) of the notice, which discusses the procedures for waste generators to request surcharge rebates, provides that requests by generators must be made "not later than December 31, 1995."

DOE Policy

Distribution of Surcharge Rebates In accordance with the 1994 *Federal Register* notice, in September 1994 DOE paid a lump sum to states and compact commissions holding 18-month standard disposal contracts with the Southeast Compact Commission. This payment was equal to half of the applicable surcharges in escrow. DOE determined that generators were eligible to receive at least a portion of the remaining funds, although states and compacts could still become eligible to receive additional funds by meeting certain requirements. (See *LLW Notes*, August/September 1994, p. 1.) Subsequently, several states and compact commissions requested additional payments from DOE using various claims. Four entities—the Appalachian Commission, the Central Midwest Commission, the Commonwealth of Massachusetts, and the Midwest Commission—sued DOE for the additional payments, while others—including the Central Commission and the Southwestern Commission—sent the department written requests for such payments. (See *LLW Notes*, August/September 1995, pp. 13–15 and *LLW Notes*, July 1995, pp. 9–14.)

To date, the department has agreed to withhold rebate payments to generators located in states and compact regions that have initiated litigation against the department over the funds in escrow. However, the department continues to make payments to generators located in all other states and compact regions—including to those generators in states and compacts that have filed written requests for additional rebate payments but have not initiated litigation.

Distribution of Unclaimed Funds According to INEL staff, unclaimed funds collected from generators located in states and compacts involved in litigation with the department will not be returned to the sited states at the end of the year. Instead, the department will wait for resolution of the litigation to determine if the funds should be returned to the sited states that initially collected them or if they should be paid to the unaffiliated state or the compact commission in the area from which they were collected. Unclaimed funds from generators located in states or compact regions that are not involved in litigation with the department, however, will be returned to the sited states from which they were collected on or about January 2, 1996. "Unclaimed funds" are those funds that are not requested from DOE by December 31, 1995, by the generator from whom the funds were collected.

The preceding information was distributed to Forum Participants and Alternate Forum Participants via facsimile transmission in a News Flash on November 29, 1995.

Nebraska v. Central Interstate Low-Level Radioactive Waste Commission

Court Rules Nebraska Is Not Entitled to Additional Commission Representation

On October 23, the U.S. District Court for the District of Nebraska found that the Central Interstate Low-Level Radioactive Waste Commission acted lawfully when it refused to seat two additional representatives appointed by Nebraska Governor E. Benjamin Nelson. According to the court, an amendment to the compact that allows Nebraska additional representation on the commission is not yet effective because all of the member states have not concurred in the proposed amendment. The court's decision is final since it was not appealed within the 30 day period provided by statute.

State Legislation

At issue in the litigation was whether state legislation to increase the number of commission representatives to which Nebraska is entitled has effectively amended the compact. Although the five compact member states have passed substantially identical legislation on this issue, one member state—Kansas—included a proviso in its legislation preventing the amendment from taking effect until Nebraska issues a license or permit for a disposal facility.

The court, after finding that “the ‘concurrence’ of all signatories to a compact is required to implement legislation which would impose burdens on the compact,” determined that the Kansas proviso is significant.

Where, as here, the voting power of every member state except for one is to be diminished or diluted by the legislative amendment, a compact is substantially burdened unless all members agree to the change in voting power. The “burden” arises because changes in “voting power” substantially alter the original expectations of the majority of states which comprise the compact. Moreover, as voting power in a compact has a direct relationship to the independence and sovereignty of each party state, a party state whose voting power has been reduced or diluted has lost a portion of its precious independence and sovereignty which

is otherwise guaranteed by the Constitution. Therefore, amendments to the Compact altering the voting power of member states must be accomplished through the “concurrence” of all member states, and most particularly by the member states whose voting power will be reduced or diluted.

The court found that by including the proviso in its legislation, Kansas has not effectively concurred in the proposed compact amendment. Accordingly, the court held that, as a matter of law, the compact has not been amended.

Negotiations/Agreements

The court rejected Nebraska's argument that the member states, through their commission representatives, agreed to adopt the proposed amendment. At most, the court states, the representatives agreed to propose legislation to their state legislatures. Legislation was proposed before all of the state legislatures but, the court notes, the Kansas legislature did not agree to the proposed amendment.

The court also found that the commission as an entity was not a party to the agreement asserted by Nebraska. Accordingly, the court held that the commission was not contractually required to deviate from the explicit terms of the compact.

Congressional Approval

Having found that there was no amendment to the compact and no agreement to amend the compact, the court found it unnecessary to address whether Congressional approval would be required to implement such an amendment.

While I tend to agree with the Commission that any amendment of the Compact like the one proposed by Nebraska would require Congressional approval before the amendment could become effective, it is unnecessary to resolve that issue in this case.

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

Plaintiff State of Nebraska

Defendant Central Interstate Low-Level Radioactive Waste Commission

The Facts The Central Compact, as ratified by the U.S. Congress in 1986, provides for the appointment of one voting member from each party state to the Central Commission. Nebraska, however, subsequently requested that the compact be amended to provide the host state with both an additional voting member and a non-voting member on the commission, as well as to specify the system under which member states will share liability for the facility with the host state. All five party states passed the requested legislation. However, the State of Kansas postponed the effective date of its legislation until the appropriate authority in Nebraska grants a license or permit for operation of the facility.

In December 1994, two days before a scheduled commission meeting, Nebraska Governor E. Benjamin Nelson sent a letter notifying the commission that he had appointed two new representatives. At the commission meeting, however, a resolution was passed stating that the new appointees would not be seated as commission members

because their seating would violate the compact as consented to in 1985 by the U.S. Congress. The resolution further stated that the commission would hold a meeting in Nebraska to hear the dispute concerning the seating of additional Nebraska commissioners. Subsequently, the State of Nebraska filed suit.

The Complaint The State of Nebraska alleges that statutes passed by Arkansas, Kansas, Louisiana, Oklahoma, and Nebraska provide the compact's host state with additional commission representation and that commission members representing these states were bound to vote to seat the additional commission members appointed by Governor Nelson. In addition, Nebraska argues that a compact amendment concerning the number of commission members does not require ratification by the U.S. Congress because it does not encroach upon or interfere with the United States' just supremacy. (See *LLW Notes*, January/February 1995, pp. 14-15.)

The Answer The Central Commission contends that compact amendments are not effective until (1) each of the member states enacts into law substantially identical reciprocal legislation, and (2) the U.S. Congress consents thereto. Since Kansas's legislation provides that it does not become effective until Nebraska has issued a facility license, and since Congress has not consented to the compact amendments, the commission argues they are not yet in effect. (See *LLW Notes*, January/February 1995, pp. 14-15.)

Motions/Trial The Central Commission filed a motion for summary judgment on April 11, 1995. The court, however, did not rule on the motion. A trial was held on October 10, 1995.

Court Calendar

Case Name	Description	Court	Date	Action
<i>Appalachian States Low-Level Radioactive Waste Commission v. O'Leary</i> (See related story, this issue.)	Seeks the release of all surcharge fees, collected from Appalachian region generators, being held in an escrow account by Department of Energy Secretary Hazel O'Leary.	United States Court of Appeals for the Third Circuit	November 16, 1995	DOE's reply brief was filed.
<i>Massachusetts v. O'Leary</i> (See <i>LLW Notes</i> , July 1995, pp. 12-14.)	Seeks payment of all escrowed surcharge fees, collected from generators in Massachusetts.	United States District Court for the District of Massachusetts	December 11, 1995	Oral argument is scheduled.
<i>Midwest Interstate Low-Level Radioactive Waste Commission v. O'Leary</i> (See related story, this issue.)	Seeks payment of surcharge rebates held in escrow with respect to funds payable for the period from July 1, 1995 through December 31, 1995.	United States District Court for the District of Minnesota	November 24, 1995 November 27, 1995 December 19, 1995 December 19, 1995	DOE filed a motion for summary judgment. Midwest Commission filed a motion for summary judgment. Midwest Commission's response to DOE's motion for summary judgment is due. DOE's response to Midwest Commission's motion for summary judgment is due.

Court Calendar *continued*

Case Name	Description	Court	Date	Action
<i>Cohn v. Connecticut Hazardous Waste Management Service</i> (See <i>LLW Notes</i> , January/February 1995, p. 19.)	Involves charges by a property developer that the Service's announcement of final candidate sites, including plaintiff's property, amounted to a taking of private property without due process of law.	Connecticut Superior Court, Judicial District of Hartford/New Britain	August 31, 1995 October 4, 1995	Plaintiff filed a brief in opposition to the defendants' motion for summary judgment. Defendant filed a response to the plaintiff's August 31 brief.
<i>Fort Mojave Indian Tribe v. California Department of Health Services</i> (See <i>LLW Notes</i> , October 1995, pp. 23-25.)	Appeal of a suit that seeks to void the certification of the final EIR/S and the issuance of a license for the Ward Valley facility based on alleged violations of state and federal law.	Supreme Court of the State of California	November 14, 1995 December 11, 1995	Petitioners filed a petition for review with the California Supreme Court. California DHS's response to the petition for review is due.
<i>Keyserling v. Beasley</i> (See <i>LLW Notes</i> , October 1995, p. 21.)	Challenges the inclusion of certain provisions relating to the Barnwell low-level radioactive waste disposal facility in the state's General Appropriations Act of 1995.	Supreme Court of the State of South Carolina	November 15, 1995 December 15, 1995 30 days after the filing of the respondents' brief	Petitioners' brief was filed. Respondents's brief is due. Petitioners's reply brief is due. (This brief is discretionary on the part of the petitioners.)

Congress Passes Reconciliation Bill— Clinton Vetoes It

USEC and California Land Transfer Were Included

Continuing Resolution

Following a budget impasse—during which non-essential services of the federal government were shut down for four working days—Congress and the President passed a continuing resolution to allow operation of the federal government until December 15. The resolution, which was passed on November 19, addresses funding levels for seven of the 13 appropriations measures for fiscal year 1996 which had not yet been passed by Congress. It allows the seven appropriations measures to be funded at the lowest of the House, Senate, or fiscal year 1995 funding levels, or in the case of programs scheduled for termination, at 75 percent of their funding level for fiscal year 1995.

The other six appropriations measures for fiscal year 1996—including the energy-water bill which, among other things, funds DOE and NRC—had already been passed by Congress and signed into law by the President, and therefore were not included in the continuing resolution. (See related stories regarding DOE, EPA, and NRC appropriations bills.) On December 1, the defense appropriations bill became law. Accordingly, six appropriations measures currently remain outstanding.

Reconciliation Bill

A reconciliation bill may be adopted to address funding shortfalls in entitlement programs and taxes. For this fiscal year, the House and Senate had adopted separate versions of the reconciliation bill, H.R. 2491, in late October. (See *LLW Notes*, October 1995, pp. 30–32.) Differences between the House and Senate bills were resolved by a conference committee made up of representatives of both chambers of Congress. (See page 16 for a list of the conferees.) The full U.S. Congress passed a reconciliation bill recommended by the conferees shortly after the continuing resolution was finalized.

On November 30, H.R. 2491 was forwarded to the President. The bill included many provisions of the Republicans "Contract with America," as well as a plan for balancing the federal budget in seven years. It also contained a provision to transfer federal land in Ward Valley to the State of California and language allowing states and compacts to refuse to accept waste generated by the U.S. Enrichment Corporation (USEC).

The President vetoed the reconciliation bill on December 6, sending it into a new round of congressional negotiations. As of press time, it is unclear whether the provisions concerning the Ward Valley land transfer and disposal of USEC waste will survive the negotiations process.

What Is the Reconciliation Bill?

The budget reconciliation bill is part of the overall budget process by which Congress has attempted to control federal spending. The process begins in the spring with the adoption of a joint budget resolution. The resolution sorts out federal spending according to 20 budget functions and specifies the dates for committee and floor action.

Two separate processes are used to implement the spending distribution outlined in the budget resolution—the appropriations process (for discretionary programs) and the reconciliation process (for changes in entitlement programs and taxes). The reconciliation process is only used if the budget resolution calls for levels of entitlement spending or taxation that differ from those specified under current law.

For information on how the reconciliation bill becomes a law, see LLW Notes, October 1995, p. 30.

Ward Valley Land Transfer

Language conveying Ward Valley to the State of California for use in siting a low-level radioactive waste disposal facility was included in the original drafts of both the House and Senate reconciliation bills. However, the California land transfer language was deleted from the Senate bill prior to passage after being challenged as "extraneous" under the Senate's Byrd rule. The Senate parliamentarian ruled that the income received by the federal government as a result of the land transfer would be "incidental." (See *LLW Notes*, October 1995, pp. 30-32.)

The land transfer language was reinstated by the conference committee, however, and it is included in the final reconciliation bill. In order to avoid another Byrd rule challenge, the conference committee rewrote the transfer language, deleting all references to usage of the land for a low-level radioactive waste disposal facility. The final language, as passed by both chambers of Congress, is as follows:

Sec. 5301. CONVEYANCE OF PROPERTY.

All right, title and interest of the United States in the property depicted on a map designated USGS 7.5 minute quadrangle, west of Flattop Mtn, AC 1984, entitled "Location Map for Ward Valley Site", located in San Bernardino Meridian, Township 9 North, Range 19 East, and improvements thereon, together with all necessary easements for utilities and ingress and egress to such property, including, but not limited to, the right to improve those easements, are conveyed to the Department of Health Services of the State of California upon the tendering of \$500,100 on behalf of the State of California and the release of the United States by the State of California from any liability for claims relating to the property in this section and, as part of the consideration paid for such property, such conveyance is declared to meet and fully comply with any otherwise applicable provisions of section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) and the National Environmental Policy Act of 1973 (49 U.S.C. 4332). The Secretary of the Interior shall issue evidence of title pursuant to this Act notwithstanding any other provision of law.

U.S. Enrichment Corporation (USEC)

The separate reconciliation bills passed by the House and Senate in late October both included language pertaining to the privatization of the U.S. Enrichment Corporation. However, while both houses' reconciliation bills required DOE—at the request of the corporation—to accept for storage, treatment, or disposal low-level radioactive waste generated by the corporation, only the Senate's bill included language providing that states and compacts would not be required to accept waste generated by USEC. (See *LLW Notes*, October 1995, pp. 30-32.)

The conference committee changed the language, but adopted the Senate's position that states and compacts should not be required to accept USEC-generated waste. The final language, as passed by both chambers of Congress, is as follows:

Sec. 5213. LOW-LEVEL WASTE.

(b) AGREEMENTS WITH OTHER PERSONS.—The Corporation or any other generator may also enter into agreements for the disposal of low-level radioactive waste subject to subsection (a) with any person other than the Secretary that is authorized by applicable laws and regulations to dispose of such wastes, but shall have no authority under this or any other law to require a State or interstate compact to treat, store, or dispose of such waste in a State or interstate compact facility without the State or compact's consent.

continued on page 16

U.S. Congress *continued*

**House Conferees on Reconciliation with
Senate Amendment to H.R. 2491**

For consideration of the House bill and the Senate amendment:

Republicans

John Kasich (OH)
Dick Armey (TX)
John Boehner (OH)
Tom DeLay (TX)
Robert Walker (PA)

Democrats

Martin Sabo (MN)
David Bonior (MI)
Charles Stenholm (TX)

Additionally, for consideration of the title of the reconciliation bill containing Ward Valley transfer language:

Republicans

Don Young (AK)
W. J. ("Billy") Tauzin (LA)

Democrat

George Miller (CA)

Additionally, for consideration of the title of the reconciliation bill containing U.S. Enrichment Corporation language:

Republicans

Thomas Bliley (VA)
Dan Schaefer (CO)

Democrat

John Dingell (MI)

**Senate Conferees on Reconciliation with
Senate Amendment to H.R. 2491**

For consideration of the House bill and the Senate amendment:

Republicans

Pete Domenici (NM)
Charles Grassley (IA)

Democrat

J. James Exon (NE)

Additionally, for consideration of the titles of the reconciliation bill containing Ward Valley transfer language and U.S. Enrichment Corporation language:

Republicans

Frank Murkowski (AK)
Mark Hatfield (OR)
Don Nickles (OK)
Larry Craig (ID)

Democrats

J. Bennett Johnston (LA)
Dale Bumpers (AR)
Wendell Ford (KY)

H.R. 1905: FY '96 Energy and Water Development Appropriations Signed Into Law

On November 13, President Bill Clinton signed into law the fiscal year 1996 energy and water development appropriations bill. A conference report on the bill, H.R. 1905, had been approved by both chambers of Congress on October 31. The law provides funding levels for the U.S. Department of Energy and the U.S. Nuclear Regulatory Commission, among other government entities.

U.S. Department of Energy

Under the two versions of the bill passed by Congress in August, DOE funding for fiscal year 1996 was set at \$14.7 billion by the U.S. House of Representatives and \$16.2 billion by the U.S. Senate. Following a conference to reconcile differences between the House and Senate versions of the bill, DOE's funding level for fiscal year 1996 was set at \$15.4 billion—approximately a \$300-million cut from the \$15.7 billion appropriated to DOE for fiscal year 1995.

Whereas activities for the commercial low-level radioactive waste management program were funded as a separate line item under past years' appropriations bills, they have been rolled up into environmental restoration and waste management (non-defense) for fiscal year 1996 according to staff of the Subcommittee on Energy and Water Development of the U.S. Senate Committee on Appropriations. Funding for environmental restoration and waste management (non-defense) is set at \$621 million for fiscal year 1996. This is a reduction of approximately \$123 million from the \$744 million appropriated to environmental restoration and waste management (non-defense) in fiscal year 1995.

U.S. Nuclear Regulatory Commission

Under the original House bill, NRC was appropriated \$468.3 million from users' fees to be spent for salaries and expenses, and \$11 million from the Nuclear Waste Fund to be used for NRC's high-level radioactive waste program. Fiscal year 1996 funding levels were higher than those proposed by the House in the original Senate bill, which appropriated \$474.3 million from users' fees and \$17 million from the Nuclear Waste Fund. Conferees agreed to include the House proposals in the final bill, funding NRC at a total of \$479.3 million for fiscal year 1996.

NRC was originally appropriated \$525.6 million in funding for fiscal year 1995. The funding level was subsequently reduced to \$523.9 million, however, as part of the fiscal year 1995 rescission package.

H.R. 2099: VA, HUD and Independent Agencies (Including EPA) Appropriations Pending

On November 16, House and Senate conferees agreed to a report on H.R. 2099—a bill that includes appropriations for the Environmental Protection Agency for fiscal year 1996. However, the full House subsequently rejected the report by a vote of 216 to 208, recommitting it with instructions to increase the funding levels allocated for veterans medical care by \$213 million. Accordingly, House and Senate negotiators will have to reconvene and conference on H.R. 2099.

President Clinton has indicated that he would veto the conference report in its current form due to proportionately larger cuts to environmental and housing programs.

Funds Appropriated

The bill, as it currently stands, would provide EPA with a funding level for fiscal year 1996 of about \$5.71 billion—approximately 21 percent below the funding level for fiscal year 1995 and 22 percent below President Clinton's budget request for fiscal year 1996. EPA was originally appropriated \$7.2 billion for fiscal year 1995; however, that figure was reduced by about \$600 million under the rescission bill signed by Clinton in July.

Legislative "Riders"

The original House version of the bill included several controversial legislative "riders," which would have restricted EPA's ability to enforce various environmental laws. Most of the riders were removed in conference. One of the remaining riders, however, would prevent EPA from overriding Corp of Engineers wetlands permitting decisions.

Although language was included in the conference report that addresses many of the issues raised by the riders, the language has no statutory impact.

Federal Agencies and Committees

U.S. Army

Army Corps Comments on Wetlands Classification

In a letter dated October 31, Michael Davis, Chief of the Regulatory Branch at the U.S. Army Corps of Engineers' Headquarters, submitted comments to the Federal Geographic Data Committee (FGDC) regarding the adoption of a wetlands classification system—the Cowardin System—as an FGDC standard. The Cowardin System presents a method for grouping ecologically similar wetlands in various classes. If adopted as an FGDC standard, the Cowardin System would be followed by all federal agencies for data collected directly or indirectly (through grants, partnerships or contracts).

Definition of Wetlands

In a July 6 *Federal Register* notice, the FGDC sponsored a public review of the Cowardin System and its adoption as an FGDC standard. The notice states:

For classification purposes, wetlands are defined as: *lands that are transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water, and that have one or more of the following attributes: (1) At least periodically, the land supports predominantly hydrophytes; (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is non-soil and is saturated with water or covered by shallow water at some time during the growing season of each year.* [italics in original.]

Army Corps Comments

In his letter to the FGDC, Davis commented:

The definition of wetlands provided “for classification purposes” is not consistent with other Federal definitions of wetlands used by the Corps, U.S. Environmental Protection Agency, and the U.S.D.A. Natural Resources Conservation Service. These definitions, which are explained in technical manuals, require the presence of all three attributes described in the classification definition: wetland hydrology, hydric soils, and hydrophytic vegetation The Corps would like assurances that the adoption of this standard will not modify our current data collection procedures It is our position that the Cowardin System, whether or not adopted as the Federal standard, will have no effect on the Hydrogeomorphic Classification System developed by the Corps Waterways Experiment Station for purposes of functional assessment of wetlands. We do not intend to modify our classification approach for the Hydrogeomorphic Classification System.

For further information, see “New Materials and Publications.”

U.S. EPA

EPA Reopens NESHAPs Public Comment Period

In a December 1 *Federal Register* notice, EPA reopened the public comment period for the proposal to rescind Subpart I of the National Emissions Standards for Hazardous Air Pollutants (NESHAPs). The comment period now expires on January 20, 1996. Subpart I applies to low-level radioactive waste disposal facilities, as well as to NRC and Agreement State licensees other than nuclear power reactors. EPA is proposing to rescind Subpart I once NRC adopts a "constraint" rule requiring licensees to limit emissions to a level resulting in a dose not greater than 10 millirems per year.

EPA had published a notice of proposed rulemaking on September 28 but has now extended the comment period due to NRC's delay in publishing the proposed constraint rule in the *Federal Register*. NRC staff expect the constraint rule to be published by the end of 1995. EPA has also scheduled a public hearing on January 9, 1996, regarding the proposal to rescind Subpart I. The hearing will be held in Arlington, Virginia. (For additional information, see the following issues of the *LLW Notes*: October 1995, p. 20; April/May 1995, p. 18; and Jan./Feb. 1995, pp. 22-23.)

For further information, contact Eleanor Thornton, EPA's Center for Federal Guidance and Air Standards, at (202)233-9773.

EPA Issues Hazardous Waste Identification Rule

On December 13, EPA Administrator Carol Browner signed the proposed Hazardous Waste Identification Rule (HWIR), shortly before federal budget disputes temporarily closed EPA. The proposed HWIR (40 CFR Part 261) establishes constituent-specific "exit levels" for low-risk solid wastes that are designated as hazardous wastes because they are listed, or have been mixed with, derived from, or contain listed hazardous wastes. Under this proposal, generators of listed hazardous wastes that meet the self-implementing "exit levels" would no longer be subject to the hazardous waste management system under Subtitle C of the Resource Conservation and Recovery Act (RCRA) as listed hazardous wastes. The proposal also

- modifies some of the land disposal restriction numerical treatment standards listed in Subpart D of 40 CFR Part 268;
- caps technology-based treatment standards with the risk-based exit levels which minimize threats to human health and the environment; and
- takes comment on several general approaches and one specific approach for conditional exemptions from Subtitle C management requirements.

At press time, the HWIR had not been published in the *Federal Register*. EPA staff anticipate publishing the proposed rule by mid-December. There will be a public comment period of 60 days from the date of publication in the *Federal Register*. EPA staff expect to issue the final rule by December 1996.

During the September meeting of the LLW Forum, the Mixed Waste Group recommended that Forum Participants be alert to the HWIR and recognize the significance the rule may have for mixed waste management and disposal.

To obtain a pre-published copy of the proposed rule on computer disk, call the EPA RCRA Docket at (703)603-8917. For further information, contact the RCRA/Superfund Hotline at (800)424-9346.

New Materials and Publications

Document Distribution Key

P	LLW Forum Participants	D	LLW Forum Document Recipients
A	LLW Forum Alternates		
F	LLW Forum Federal Liaisons	N	LLW Notes Recipients
L	LLW Forum Federal Alternates		
T	LLW Forum Media Contacts	M	LLW Forum Meeting Report Recipients
V	LLW Forum Press Monitors		

States and Compacts

Appalachian Compact/ Pennsylvania

*Community Partnering Plan
Draft for the Pennsylvania Low-Level
Radioactive Waste Disposal Facility
Project.* Prepared by Chem-
Nuclear Systems, Inc. under
contract to the Commonwealth of
Pennsylvania, Department of
Environmental Protection, Bureau
of Radiation Protection.
November 1995. To obtain a
copy, contact William Dornsife at
the Pennsylvania Department of
Environmental Protection at
(717)787-2480.

Northeast Compact/ Connecticut/New Jersey

*Managing Low-Level
Radioactive Waste in New Jersey: A
Challenge for the Future.* New Jersey
League of Women Voters. April
1995. The New Jersey League of
Women Voters Education Fund,
with a grant from the New Jersey
Low-Level Radioactive Waste
Disposal Facility Siting Board,
prepared the booklet. The
handbook is intended to be a
practical guide for communities
and individual citizens throughout
the state as they address the
disposal of low-level radioactive
waste in the 1990s and beyond.
This material is also available on
videotape. Copies of either the
booklet or videotape are available
for a mailing cost by calling
(609)394-3303.

~

*Low-Level Radioactive Waste
Management in Connecticut-1994.*
Draft management report.
Connecticut Hazardous Waste
Management Service. November
1995. Report informs the people
of Connecticut about low-level
radioactive waste management by
the state's generators and provides
information on low-level
radioactive waste shipped offsite
by Connecticut generators during
1994. Also, the draft report gives
information regarding on-site
storage of low-level radioactive

waste during 1994. To obtain a
copy, contact Steve Levine or
Anita Baxter of the Connecticut
Low-Level Radioactive Waste
Management Program at
(860)244-2007.

Federal Agencies

Department of the Army

Letter from Michael Davis,
Chief, Regulatory Branch
Operations, Construction and
Readiness Division, Directorate of
Civil Works, Department of the
Army, to Jennifer Fox, Wetlands
Standards Review, Federal
Geographic Data Committee
Secretariat, U.S. Geological
Survey, regarding the request for
comments on the wetlands
classification system,
"Classification of Wetlands and
Deepwater Habitats of the United
States," in the *Federal Register* on
July 6, 1995. October 31, 1995.

New Materials and Publications *continued*

Federal Agencies (continued)

Department of Energy (DOE)

Model Curriculum for the Training of Low-Level Radioactive Waste Operations Personnel (DOE/LLW-220). DOE's National Low-Level Waste Management Program, Idaho National Engineering Laboratory (INEL). This document includes an example of the suggested content for the training section of the license application for low-level radioactive waste disposal facilities. Due to the size of the document and the limited number of personnel who will be involved in overseeing the training efforts of low-level radioactive waste operations, the National Program has chosen to distribute the document only to those who request it. The document will be available on computer diskette in Word Perfect 6.0, and the National Program has the capability to convert the document to other formats upon request. To obtain a copy of the curriculum, contact Donna Lake at (208)526-6927.

Department of Interior

Letter from John Robertson, Principal Hydrogeologist, former member of the NAS Committee that studied Ward Valley, to Bruce Babbitt, Secretary, U.S. Department of the Interior, urging Babbitt to support the Ward Valley, California land transfer with protective conditions and covenants. Robertson also recommends further study of the Beatty site. November 10, 1995.

~

Letter from John Leshy, Solicitor, Office of the Solicitor, Department of the Interior, to Frank Murkowski, Chair, Committee on Energy and Natural Resources, U.S. Senate, responding to a October 23 letter regarding the proposed transfer of the Ward Valley site to the State of California. October 27, 1995.

Other

^D *Background and NCRP Activities Related to Classification of Radioactive Wastes*. Revised hard copies of slides presented by Allen Croff, Associate Director, Chemical Technology Division, Oak Ridge National Laboratory, at the National Academy of Sciences' Board on Radioactive Waste Management meeting on October 17, 1995.

State Efforts to Manage Low-Level Radioactive Waste. National Conference of State Legislatures (NCSL). October 1995. Summarizes the status of interstate compacts' and unaffiliated state's progress in implementing the Low-Level Radioactive Waste Policy Amendments Act. The cost of the eight-page document is \$5.00 plus shipping and handling. To obtain a copy, contact the NCSL Book Order Department at (303)830-2054.

Free Government Online Service Now Available

The U.S. Government Printing Office (GPO) has announced that the GPO Access online service will be available free of charge to Internet and dial-in users effective December 1. The GPO Access service offers the *Congressional Record*, *Federal Register*, congressional bills, and a growing list of government documents on the same day of publication. More than two dozen government databases are also available through the service. Until now, the GPO Access service has been free only to on-site users in some of the Federal Depository Libraries.

To access the service via Internet, point the web browser to the Superintendent of Documents' home page at http://www.access.gpo.gov/su_docs/. Dial-in users should use a modem to call (202)512-1661, then type "swais" and log in as "guest."

For general information on the GPO Access service, call (202)512-1530 or e-mail "help@eids05.eids.gpo.gov".

Obtaining LLW Forum and Other Materials and Publications

To obtain federal government information

By telephone

- DOE Press Office (202)586-5806
- DOE Public Information Office, Secondary Distribution Center (202)586-9642
- EPA Public Information Center (202)260-7751
- 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
- U.S. House of Representatives Document Room (202)225-3456

By FAX

- U.S. Senate Document Room (202)228-2815
- When making document requests, include a mailing address where the document(s) should be sent.

By Internet

- EPA Listserve Network
Contact John Richards for information on how to subscribe to the Listserve Network to receive *Federal Register* notices via e-mail at
voice (202)260-2253 • FAX (202)260-3884 • e-mail richards.john@epamail.epa.gov

Receiving *LLW Notes* by Mail

LLW Notes and the *Summary Report: Low-Level Radioactive Waste Management Activities in the States and Compacts* are distributed to state, compact and federal officials designated by LLW Forum Participants and Federal Liaisons. In April 1994, Forum Participants unanimously approved a change in LLW Forum procedures in order to allow representatives of industry, environmental and citizen groups—as well as other interest groups and members of the public—to receive these two publications directly by mail.

Members of the public may now apply to DOE's National Low-Level Waste Management Program at the Idaho National Engineering Laboratory (INEL) to be placed on a public information mailing list for copies of *LLW Notes* and the supplemental *Summary Report*. Afton Associates, the LLW Forum's management firm, will provide copies of these publications to INEL. The LLW Forum will monitor distribution of these documents to the general public to ensure that information is equitably distributed throughout the states and compacts.

To be placed on a list to receive *LLW Notes* and the *Summary Report* by mail, please contact Donna Lake, Senior Administrative Specialist, INEL, at (208)526-0234.

Low-Level Radioactive Waste Disposal Compact Membership

Appalachian Compact

- Delaware
- Maryland
- Pennsylvania
- West Virginia

Central Compact

- Arkansas
- Kansas
- Louisiana
- Nebraska
- Oklahoma

Central Midwest Compact

- Illinois
- Kentucky

Midwest Compact

- Indiana
- Iowa
- Minnesota
- Missouri
- Ohio
- Wisconsin

Northwest Compact

- Alaska
- Hawaii
- Idaho
- Montana
- Oregon
- Utah
- * • Washington
- Wyoming

Rocky Mountain Compact

- Colorado
- Nevada
- New Mexico

Northwest accepts Rocky Mountain waste as agreed between compacts

Northeast Compact

- Connecticut
- New Jersey

Southeast Compact

- Alabama
- Florida
- Georgia
- Mississippi
- North Carolina
- Tennessee
- Virginia

Southwestern Compact

- Arizona
- California
- North Dakota
- South Dakota

Texas Compact

- Maine
- Texas
- Vermont

Unaffiliated States

- District of Columbia
- Massachusetts
- Michigan
- New Hampshire
- New York
- Puerto Rico
- Rhode Island
- * • South Carolina

* *current host state*

• *future host state*

Maine, Texas and Vermont are named as members of a compact passed by all three states. The compact is awaiting consent by the U.S. Congress.

The Low-Level Radioactive Waste Forum includes a Participant from each regional compact, current host state, future host state and unaffiliated state. Graphic by Afton Associates, Inc. for the LLW Forum. July 1995.

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Available to DOE and DOE contractors from the Office of Scientific and Technical Information, P.O. Box 62, Oak Ridge, TN 37831; prices available from (423) 576-8401.

Available to the public from the National Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161

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For the Record

On October 11, 1995, the following letter was sent to The New York Times.

To the Editors:

Your article, "Waste Site Becomes a Toxic Battlefield," published in the National Report section of *The New York Times* on Monday, October 9, 1995, contains at least ten important factual errors on substantive matters, as well as errors in interpretation and at least one in direct quotation.

Elementary mistakes as to how many low-level radioactive waste disposal sites have been operating, when they closed, who sets disposal fees, and how many interstate compacts exist suggest insufficient research and invariably distort accurate analysis.

The following information corrects the major errors contained in the story.

- In reference to your headline, customarily the term "toxic" refers to materials that are chemically or biologically hazardous—not radioactive.
- From 1971 through December of 1992, there were three, not two, sites open to nationwide disposal of low-level radioactive waste. The site not mentioned by your reporter was located in Beatty, Nevada, and is now closed to all low-level radioactive waste disposal.
- The facility located at Hanford, Washington, closed to low-level radioactive waste nationwide in 1993, not 1985. This facility has remained open not just to the eight states in the Northwest Compact, but in addition, under contract, to the three states in the Rocky Mountain Compact.
- As of this date, the U.S. Congress has ratified nine, not ten, interstate low-level radioactive waste compacts. The tenth such compact—comprising Texas, Maine and Vermont—is currently awaiting Congressional approval.
- The Southeast Compact Commission did not set the disposal fees that the operators of the Barnwell facility could charge generators or control the surcharges that the State of South Carolina could impose. Over the last ten years, the Southeast Compact has imposed minimal fees on low-level

radioactive waste disposed of at the facility at Barnwell, South Carolina. The facility operator established a fee schedule, and the State of South Carolina imposed additional surcharges, including federally sanctioned surcharges between 1986 and 1993, and a \$160 state surcharge by the state from January 1993 through July 1994.

- The Governor of South Carolina did not originally insist that the State of North Carolina be expelled from the Southeast Compact, but rather requested that the compact impose sanctions on the State of North Carolina.
- The Governor of South Carolina could not withdraw his state from the Southeast Compact. Withdrawal required the affirmative vote of the South Carolina legislature, which occurred in June of 1995.
- Surcharges of \$220 per cubic foot were imposed between January 1993 and July 1994 on low-level radioactive waste disposed of at the Barnwell facility. The site operator charged a base fee of \$59 per cubic foot for a total of \$279 per cubic foot not including other possible fees. Clearly these fees add up to more than the \$200 claimed by your reporter.

In addition, there are a number of relevant facts that were omitted from your article. Here are some of them.

- Michael Munger is quoted as saying the system is "fundamentally flawed" without explaining what that means. Munger is also quoted as concluding that the system is now dead—neither he, nor your reporter, mentions that four licenses are currently pending in the states of California, Texas, Nebraska, and North Carolina.

Munger is also quoted as characterizing low-level radioactive waste as a problem handed to the states fifteen years ago. This is misleading. In fact states, individually and though the National Governors' Association, recommended and vigorously endorsed federal legislation that established the compact system.

For the Record *continued*

Contrary to Munger's assertion, Congress did not grant regulatory authority over low-level radioactive waste in exchange for states' assumption of disposal responsibility. In fact, states that met the U.S. Nuclear Regulatory Commission's criteria had been able to regulate low-level radioactive waste for more than a decade. There was no regulatory trade-off in 1980—rather, states actively supported legislation that allowed them to take responsibility for providing for disposal of waste generated within their borders.

- Remarks attributed to John Shanahan include the statement that “the high fees that South Carolina was charging for disposal will force other states to seek alternatives or go broke.” In fact, the fees paid for disposal at the Barnwell facility are paid by the generators of low-level radioactive waste, not by states or compacts. In addition, it is ludicrous to suppose that the amount of money spent by generators in any individual state for low-level radioactive waste disposal would cause that state to “go broke.”
- When withdrawing from the Southeast Compact, the South Carolina legislature also mandated that the State of South Carolina establish a committee to investigate forming a compact with other states “that have demonstrated a commitment to the compacting process and that have made substantial progress in implementing that process and who have passed an act authorizing representatives to enter compact negotiations.”
- A number of states have indicated the intention to proceed with siting a low-level radioactive waste disposal facility. For example, even after South Carolina had indicated its intention to reopen the Barnwell facility to generators nationwide, Ohio, the host state in the Midwest Compact, adopted siting legislation.

In addition, I am incorrectly quoted in the closing paragraph of the article. I spent considerable time discussing this very complicated issue with your reporter. Far from telling your reporter that states are likely to put their planning processes on hold, I specifically said that it is too soon to predict what will ultimately happen as a result of the reopening of the Barnwell facility to waste disposal for the nation. I stated categorically that no state or compact had indicated its intention to cease siting efforts as a result of South Carolina's decision to reopen the Barnwell facility.

I personally referred your reporter to a number of state and compact officials who have first-hand knowledge of the effect on siting efforts of the reopening of the Barnwell facility. Unfortunately, your reporter chose not to include comments from officials of key states such as California, Texas and North Carolina, or from any compact representative. Other than a South Carolina official and an employee of the Barnwell facility operator, those quoted are “observers” of the process.

The reporter compounds his errors by incorrectly identifying me. I have spent over fifteen years working on low-level radioactive waste disposal, first at the National Governors' Association, and now as the staff Facilitator of the Low-Level Radioactive Waste Forum, an association of state and compact representatives, appointed by governors and compact commissions. The LLW Forum was established in 1986 to facilitate state and compact implementation of the federal low-level radioactive waste law. The LLW Forum has no affiliation with, or support from, radioactive waste generators.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 is a complex, innovative federal law. Its implementation has been slowed by litigation, anti-nuclear opposition and political inertia. There are many significant policy lessons to be learned from the efforts made by states and compacts over the last fifteen years to implement the federal law. It is regrettable that your article, through a combination of factual errors and unfounded assertions, failed to provide an accurate and thoughtful picture of the current national situation—or to address some of the real policy issues encountered as the process has unfolded. These issues include the use of litigation to forestall progress, the effect of changing technologies on the siting process, and the impact of the public perception of risk on all decision-making in our society.

Sincerely,

Holmes C. Brown
Facilitator
Low-Level Radioactive Waste Forum

Director
State and Federal Programs
Afton Associates, Inc.