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#92117

NO.
STATE OF NEBRASKA
OFFICIAL
OCT 14 1992
DEPT. OF JUSTICE

DATE: October 13, 1992

SUBJECT: Authority of Compact Commission to Select Host State

REQUESTED BY: Governor E. Benjamin Nelson

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have requested answers to several questions regarding the Central Interstate Low-Level Radioactive Waste Compact. Your first question is whether the Compact had acted beyond its scope of authority in selecting Nebraska as the host state on December 15, 1987. In order to facilitate a timely response to your question, we have confined our review to your questions as they relate to the questions raised in the letter accompanying your request.

The accompanying letter cites to Article V of the Compact which states in relevant part:

> (b) If no state volunteers or if no proposal identified by a volunteer state is deemed acceptable by the commission, based on the criteria in section (c) of this Article, then the commission shall publicly seek applicants for the development and operation of regional facilities.
>
> (c) The commission shall review and consider each applicant's proposal based upon the following criteria:
>
> . . . .
>
> (d) The commission shall make a preliminary selection of the proposal or proposals considered most likely to meet the criteria enumerated in section (c) and the needs of the region.

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> (e) Following notification of each party state of the results of the preliminary selection process, the commission shall:
>
> (1) Authorize any person whose proposal has been selected to pursue licensure of the regional facility or facilities in accordance with the proposal originally submitted to the commission or as modified with the approval of the commission; . . .

This Compact was adopted by the Nebraska Legislature during the 1983 legislative session and became effective May 18, 1983.

The accompanying letter further cited from the Central Interstate Low-Level Radioactive Waste Compact Commission Annual Report of 1984-85 which states at page 5:

> The conferees reached a consensus that the Commission established by the compact should develop criteria for site selection. Following the development of the criteria, the Commission would then consider application from potential site operators. The Commission would select an operator best suited to meet the needs of the region, and then authorize the applicant to seek a license to operate a facility from the appropriate regulatory authority.

The Annual Report for 1984-85 also states at page 10:

> The Conferees considered several alternatives for facility designation. One option presented was to have the Commission designate a state within the region as a host state with the siting decision to be made by the state. The Conferees feared that such a designation process could be reduced to a political decision, so they chose instead to adopt the option currently found in Article V of the Compact. In general, the Commission takes application from potential facility operators and makes a choice of which proposal(s) will better serve the needs of the region.

It is unclear from the Annual Report whether the conferees feared that the selection of a host state or the selection of a site or both might be reduced to a political decision. The author of the letter, however, concludes that the Compact was designed so that the Compact Commission could not identify the host state because of their fear that the process would be reduced to a political decision.

The author of the letter accompanying your request makes much of the intent of the Compact members as reflected in the 1984-85 Annual Report. It should be noted that the representatives who sat on the Compact Commission in 1987, when Nebraska was selected as a host state, with the exception of the Kansas delegate, were either the member delegates or alternates to the Compact in 1984-85.

The author of the letter does not question the selection of a facility developer. The proposal selected by the Compact Commission was the one submitted by US Ecology as developer. This proposal included a proposal for selection of a host state. (US Ecology proposal: p. I-1-3; Appendix A.)

Subsequent to selection of the developer of the project, the Compact Commission charged US Ecology to look at three factors and compare the Compact states in relation to those factors. (Compact minutes, December 8, 1987, pp. 72-82.) These three factors were environmental considerations, waste generation, and transportation. Use of these criteria in the host state selection was approved by the Compact Commission. US Ecology evaluated each state in the Compact and ranked each state on the basis of these criteria. The rankings were then presented to the Compact Commission at the December, 1987, meeting in Louisiana. (Compact minutes, December 15, 1987, pp. 35-58.) After reviewing the criteria, the Compact Commission voted and selected Nebraska as the host state in which the developer should seek a site for development of the storage facility. (Compact minutes, December 15, 1987, pp. 58-63.)

Article V of the Compact does not forbid selection of a host state but provides for selection of a developer and a site. The plan submitted by US Ecology and approved by the Compact Commission, as noted above, included selection of a host state as part of the narrowing process in selection of a site.

The Compact provides that when no state volunteers to be the host state, the Commission shall make a preliminary selection of the proposal or proposals considered most likely to meet the criteria set out in the Compact. The members of the Compact Commission selected the proposal submitted by US Ecology. The proposal submitted by US Ecology called for selection of a host state and a procedure for selection of a facility site within the host state. Therefore, it does not appear that the Compact Commission acted beyond its scope of authority in selecting Nebraska as the host state as part of the US Ecology proposal which had been approved by the Compact Commission.

You next ask, if the Commission acted beyond its scope, what the state's legal recourse would be. Since we have concluded that the Compact Commission did not act beyond its scope of authority in

relation to the questions you presented, there is no need to address the state's legal recourse in this situation.

Your final question is what authority, if any, does the State of Nebraska have to unilaterally call a moratorium on the licensing process. As a member of the Central Interstate Compact, Nebraska has obligations to the Compact as well as to a license applicant.

Nebraska's participation in the Compact is in the nature of a contract with the other member states in order to accomplish common purposes of development and management of a low-level radioactive waste storage facility. The Compact Commission has subsequently contracted with the developer, US Ecology, to use its best efforts to site and develop a facility for the storage of low-level radioactive waste for member states which will meet the licensing standards of either the federal Nuclear Regulatory Commission or the host state, if it is a compliance state. Nebraska is a compliance state. US Ecology has submitted an application to the Nebraska Department of Environmental Quality for a low-level radioactive waste storage facility in the State of Nebraska.

The state, having received a licensing application pursuant to the rules and regulations established for that licensing, would have a duty to proceed with the licensing process. The applicant's failure to comply with the licensing conditions should result in the non-issuance of a license but would not be reason to suspend the licensing process if any deficiencies noted can and are being corrected.

Neb.Rev.Stat. § 81-1599 (Reissue 1987) provides in pertinent part, "[t]he department shall have and may exercise the following powers and duties to carry out the Low-Level Radioactive Waste Disposal Act: . . . (2) Issue, modify, suspend, or revoke licenses or orders; . . ." Statutes directed at public officers are ordinarily interpreted as either mandatory or discretionary. Use of the term "may exercise" purports to give the Department a discretionary duty as far as licensure. Thus, whether or not a license is issued is a discretionary matter which would be reviewed on the basis of abuse of discretion. However, the Department may not arbitrarily refuse to review the license application. If the Department suspended review of the license application, the applicant could seek a writ of mandamus from the state court. "Though [the state court] may require an inferior tribunal to exercise its judgment, or proceed to the exercise of any of its functions, it cannot control judicial discretion." Neb.Rev.Stat. § 25-2156 (Reissue 1989). Thus, the state court may mandate the Department to review the license application as part of the Department's functions, but it cannot require the Department to issue a license unless its refusal to do so is arbitrary and

capricious. Downs v. Nebraska State Board of Examiners, 139 Neb. 23, 296 N.W. 151 (1941).

You have presented this office with no facts which would justify a unilateral suspension of the Department's administrative duty to review the license submitted for a low-level radioactive waste facility. Because of the many variables which may exist in any situation, it is difficult to give an answer which would apply to all situations. However, if you have questions regarding a specific situation, please feel free to consult with our office.

Sincerely,

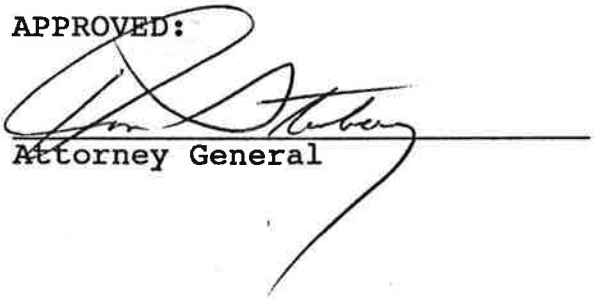
DON STENBERG
Attorney General

Linda L. Willard
Assistant Attorney General

28-04-14.92

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED:



Attorney General