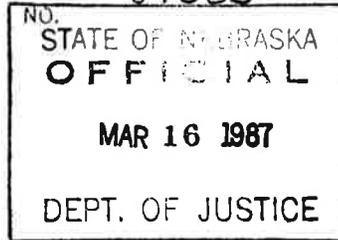


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: March 11, 1987

SUBJECT: Low-Level Radioactive Waste Disposal Act

REQUESTED BY: Senator Loran Schmit, Chairman
Committee on Natural Resources

WRITTEN BY: Robert M. Spire, Attorney General; Linda L.
Willard, Assistant Attorney General

You have requested our opinion regarding the legality of LB 426 and LB 427 in relation to the Central Interstate Low-Level Radioactive Waste Compact (Compact) and other federal provisions. We will attempt to address each of your concerns separately.

We will address your concerns about LB 426 first. With regard to Section 2, Page 4, Line 17-22, there does appear to be a conflict with the Compact. LB 426 states that the Act shall be applicable to only one site. The Compact provides, "There shall be provided within the region one or more regional facilities." (emphasis added.) By placing a limitation of only one site, the bill is potentially in conflict with the previously approved Compact. If only one site is chosen within the state, no conflict would arise. However, if two sites are chosen within the state, there would be a definite conflict with the Compact. By attempting to limit the number of sites to only one, the Act appears to be restricting the authority of the Compact members for selection of a site or sites.

Section 5 does not appear to create a conflict with the Radiation Control Act. However, it may create a problem of being unreasonably vague. Section 5 provides for a definition of "facility" that is the same as that contained within the Compact. However, where the Compact also contains the definition of "management" in relation to the management of waste, neither LB 426 nor the statutes involved here provide a definition of "management." This leaves open the possibility of misinterpretation of the term management and the claim of being unconstitutionally vague. A facility having some contact with low-level radioactive waste may not know whether it is

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encompassed by the statute since there is no definition of management.

Section 7 of LB 426, Page 8, Line 8-12, states that the Department of Environmental Control shall have the powers and duties to require proper operation and maintenance of a facility, including, but not limited to, the prevention of releases which cause or contribute to air, water, or land pollution and the prevention of exposure. Article VI of the Compact provides that no party shall pass or enforce any law or regulation which is inconsistent with the Compact. The Rules and Regulations promulgated by the federal government under the Atomic Energy Act state as one purpose for licenses under the Atomic Energy Act that they should "make every reasonable effort to maintain radiation exposures and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable. The term 'as low as is reasonably achievable' means as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest." 10 C.F.R. §20.1.

Section 7(9) of LB 426 is potentially in conflict with federal regulations which provides for keeping radioactive exposure as low as is reasonably achievable. This could result in the state not being eligible as a host site under the Compact and thus in violation of the Compact. Even if the state removes itself from the Compact, it still must have a waste disposal facility.

Lines 13-20 on page 8 of LB 426 relate to the licensees maintaining records. While there is no real conflict with other state statutes in this area, it does appear to be a duplication of the efforts by the State Department of Health under the Radiation Control Act. It would appear to be a better use of state resources to provide for only one department to require the record keeping and to review the record keeping.

Section 8 does not appear to be in conflict with the Compact or the licensing authority of the Department of Environmental Control. It does, however, seem to duplicate any licensing efforts of the Department since the Legislature is required to also take action on the proposed facility and thus appears to be "licensing" the facility also. There are no standards set out for the legislative approval or disapproval of a facility. If the Legislature is to use some criteria other than that established by the DEC under the authority given to them by the Legislature, a potential licensee may have an argument that the Legislature is arbitrary and capricious in its denial having established no standards for the potential licensee. If, however, the Legislature adopts the standards promulgated by the Department of Environmental Control, there would be a question as

to whether the Department of Environmental Control is creating the standards for the Legislature. If the Department of Environmental Control creates standards to be applied by the Legislature, it would appear to be unlawful delegation of the Legislature's authority to establish its own standards.

Section 10 does not appear to be in conflict with the regulatory authority of the Department of Environmental Control. It does remove the DEC's authority to promulgate and adopt Rules and Regulations regarding funding for long term site surveillance and care. Section 8 of the proposed bill, Page 9, Lines 8-11, requires that the funding arrangements be revealed. By removing the authority for adopting Rules and Regulations regarding these funding arrangements, the Legislature will be removing any control which the state or the Department may have over these funding arrangements.

Section 12 deletes wording relative to the Low-level Radioactive Waste Disposal Act superseding local ordinances. Deletion of this wording may create unnecessary problems and lead to litigation. A recent case in the Eighth Circuit, Ensco, Inc v. Dumas, 807 F.2d 743 (1986), dealt with the conflict between federal statutes and local legislation in relation to storage treatment or disposal of hazardous waste. Although the federal law was determined to pre-empt the local law, there is no surety that the same result would be obtained in a case involving the Nebraska statutes versus a local law. Deletion of wording that already exists would be an indication that the Legislature did not mean for state law to supersede local law. If such is the case, any effort by the state to establish statewide regulations or to establish a disposal site could be defeated by the passage of local legislation establishing local regulations and prohibiting placement of a waste disposal site at that location. In effect, Nebraska might well end up with a state law relating to low-level radioactive waste disposal with no authority to implement the statute because it would be superseded by local regulations prohibiting low-level radioactive waste disposal.

In relation to the added language requiring insurance in Section 12, we see no conflict with current statutes or the Compact although there may be practical problems in obtaining the insurance required.

LB 427 presents several serious conflicts with the Compact. The legislative bill provides that when the state is designated as a host state, the Governor shall initiate the process of withdrawing by notifying the Legislature of the designation and that the withdrawal shall be effective 90 days from the date of designation unless the Legislature approves the designation. The Compact provides that withdrawal may be accomplished by enacting a statute to repeal the same and the withdrawal shall be effective five years after the Governor notifies, in writing, the Governors of the other party states.

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While the Governor may initiate the process of informing the Legislature, withdrawal can only be accomplished by the action of the Legislature taking steps to pass legislation to withdraw. It may not be accomplished through inaction of the Legislature in failing to approve the designation. Also, the effective date for termination contained in LB 427 is in direct conflict with the Compact.

Article VI(c) of the Compact states, "All laws and regulations or parts thereof of any party state which are inconsistent with this Compact are hereby declared null and void for purposes of this Compact. . . ." Therefore, pursuant to the Compact entered into by this state, LB 427 would become null and void at the time of its passage as being inconsistent with the Compact itself. The Compact clearly outlines a method for withdrawal from the Compact and only this method, entered into by all of the party states, including Nebraska, would be valid in the state's withdrawal from the Compact.

Sincerely,

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LLW:bmh

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

APPROVED BY:


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