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STATE OF NEBRASKA
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SUBJECT: Low-Level Radioactive Waste Issues

REQUESTED BY: E. Benjamin Nelson, Governor
State of Nebraska

WRITTEN BY: Don Stenberg, Attorney General
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This is in response to several questions you have asked us in a letter dated January 31, 1992 regarding low-level radioactive waste issues and related concerns. We will address each of your questions separately.

Peery Allegations

We understand that some of your questions arise as a result of statements made by Raymond Peery, former Executive Director of the Central Interstate Low-Level Radioactive Waste Compact. The substance of those statements, as reported in the news media, are generally as follows:

1. Peery alleged that Nebraska volunteered to be the host state. The January 25, 1992, Omaha World Herald reported in part as follows:

> Raymond Peery said Nebraska had given early indication that it wanted to be the host state for a low-level radioactive waste facility. . . .
>
> In late 1987, Peery said, the Compact was desperately seeking a state willing to have the facility. None of the five Compact states wanted it, he said.

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> Based on 10 citing criteria, however, it appeared that Nebraska and Kansas were the front runners, Peery said. . . .
>
> Then in November 1987, Thorson developed ten conditions that would have to be met before Nebraska or another compact state would accept the waste facility.
>
> "No one else is doing that. Why does Nebraska do it?" Peery asked.
>
> Peery said an active debate over selection criteria by Kansas ended after Thorson presented his ten conditions to Compact Commissioners at a gathering in Peery's hotel suite prior to the compact's Dec. 8, 1987 meeting in Kansas City, Missouri. . . .
>
> Peery, Thorson, and Patton worked together to rewrite the Compact selection criteria to `get Nebraska chosen', Peery said.

2. Peery also alleged that the final site in Boyd County was selected for political reasons. The Omaha World Herald reported as follows:

> Peery said Thorson steered the selection of a final site to Boyd County during the closed door meeting in October, 1989, at Lincoln's Cornhusker Hotel - two months before the selection was made public....
>
> At the meeting, Peery said, US Ecology officials announced that the Nemaha County site was unsuitable because the geology was too complex.
>
> Then, Peery said, Thorson said the Nuckolls County site was politically unacceptable to Mrs. Orr, leaving Boyd County as the remaining alternative. . . .
>
> Thorson said there was no question that Boyd County had the best site. That was confirmed by studies by geologists from three independent monitoring committees and a report by the federal General Accounting Office, Thorson said.

3. Finally, Peery alleged a breach of contract between U.S. Ecology and the Compact Commission because U.S. Ecology provided a performance bond rather than a standby letter of credit from a bank.

Denials

It should be noted that the allegations that Nebraska volunteered to be the host state and that Boyd County was selected on political grounds have been strongly denied in the news media by former Orr administration officials and US Ecology officials. Although Mr. Peery's credibility is very low, we will analyze the legal effect these alleged facts would have if they could be proven to be true.

Effect of "Volunteering" or Being "Volunteered"

Your first question is whether there are any legal actions that may be pursued if the other states party to the Central Interstate Low-Level Radioactive Waste Compact participated in the "volunteering" of Nebraska as the host state.

It is our determination that, even if the other states party to the Compact worked in concert to assure that Nebraska would be the host state, there is no law or regulation which prohibits them from doing so and therefore no legal action is available based on being "volunteered", assuming that in fact happened.

In our opinion, the Compact has the authority to select a host state. The Low-Level Radioactive Waste Policy Amendments Act of 1985, Title I, Section 5, Subsection (e)(1)(B)(i) provides, "By January 1, 1988 each non-sited compact region shall identify the state in which its low-level radioactive waste disposal site is to be located. . . ." Clearly federal law contemplates that a compact will have the legal authority to select a host state. Also the Compact's Description of Work Breakdown, p. 6, states as follows, "By December 31, 1987, the Commission, working with US Ecology, must designate one of its members to serve as the region's first Host State to remain in compliance with the Act."

Moreover, it should be noted that Peery's allegation is not so much that other states conspired to select Nebraska as it is that Nebraska itself, through its officials, volunteered to be the host state. Article V of the Compact specifically authorizes a state to volunteer to be the host state. Therefore, even if Mr. Peery's claim that Nebraska volunteered is true it did not violate the Compact or any other laws we are aware of. If rather than volunteering directly, Nebraska proposed and/or supported selection

criteria that would have the inevitable result of Nebraska being selected as the host state, that indirect "volunteering" likewise would not provide a legal basis for Nebraska to challenge the process. We know of no legal theory under which the State of Nebraska could now challenge host state selection criteria which it itself voted for.

To the extent the opinion of a majority of Nebraska voters bears on this issue, it should be noted that Nebraska was officially selected as the host state in December 1987. Eleven months later, knowing that Nebraska had been selected as the host state, the people of Nebraska, by a vote of 414,394 to 225,174, voted against Nebraska withdrawing from the Compact.

Selection of Boyd County on Political Grounds

Related to the question which you asked is the legal question of the effect of the selection of Boyd County on political grounds rather than technical merit. Assuming this allegation is true, US Ecology could potentially be liable for damages, particularly if the Boyd County site proves to be unlicensable. Under its agreement with the Compact, it was US Ecology's responsibility to, "Select three sites with input from the State Advisory Committee. The three sites will be designated as the `prime candidate site,' `the first alternate site' and the `second alternate site.'" See Description of Work Breakdown, p.8.

In a letter to Raymond J. Peery and the Central Interstate Compact Commission dated December 29, 1989, Richard Patton, Vice President of US Ecology stated, "In consultation with the facility review committee and in keeping with the Commission's directive of identifying a superior technical site with evidence of public support, the Boyd County site has been identified as our preferred site. As we have indicated on numerous occasions, the Boyd County site has several unique and very positive attributes including the fact that site characteristics enhance the ability to perform emergency remedial action quickly and effectively, a characteristic not easily demonstrated at the other two sites."

On December 29, 1989, US Ecology issued a press release naming the Boyd County site as the preferred site for the Nebraska waste facility. This press release contained a two page addendum titled "Selection of a Preferred Site" which detailed the process of identifying a preferred site and several key factors that support preference of the site in Boyd County. Those factors all deal with either geologic or environmental factors. The only other reference to requirements for the site selection appear to be those

in the Compact itself at Article V(c) primary among those being the capability of the applicant to obtain a license from the applicable authority.

In a letter to Mr. Patton of US Ecology dated January 19, 1990, Mr. Peery clearly stated that it was the Commission's understanding that the site near Butte was the preferred site for which a license application would be filed, that it was the only site in Nebraska under consideration and that the sites in Nuckolls and Nemaha Counties were no longer under consideration.

In a deposition taken on August 31, 1990, Norm Thorson, then Chairman of the Compact Commission, stated under oath that US Ecology was charged with preparing the license application, selecting a site and preparing a license application and that the site selection was made by US Ecology. Also, in a deposition taken on April 10, 1991, Ray Peery, then Executive Director of the Compact Commission, stated under oath that US Ecology determined the site to be licensed.

Additionally, the U.S. General Accounting Office (GAO) conducted an inquiry into the site selection process at the request of Senator Exon. That report dated July 5, 1991, concluded in part

> The detailed geologic and hydrologic assessments at the three candidate sites appear to have been conducted in a technically correct manner. Furthermore, the independent geologists hired by the three local communities being assessed agreed that US Ecology's selection of the Boyd County site over the Nemaha and Nuckolls sites was correct. Information obtained from the on-site assessments showed that the other two sites have geologic conditions that would make them technically challenging to license.

If the site in Boyd County was selected by US Ecology purely for political reasons and there was knowledge on the part of US Ecology at the time of selection that it would not be licensable, then there is a breach of duty under the Agreement and US Ecology could be liable to the Commission pursuant to Section 2.03 of the Agreement.

<u>Substitution of Bond for Letter of Credit</u>

Your next inquiry concerns the substitution of a bond for the letter of credit required in the contract between US Ecology and the Compact. The contract between US Ecology and the Compact required "an irrevocable letter of credit, issued by a Bank and in a form reasonably satisfactory to the Commission. . .as a surety

bond to guarantee performance of US Ecology's obligations. . . ." On April 11, 1988, Richard Patton of US Ecology wrote to Raymond Peery, Executive Director of the Compact Commission, requesting permission to file a bond statement in order to meet the contractual requirement. Mr. Peery responded to Mr. Patton's letter indicating that the Compact had no problem with the performance bond and approved proceeding with the purchase of the bond to meet the contractual requirement. There is no indication that the Compact Commission ever took formal action to approve the substitution.

The ultimate question is whether the performance bond provided by US Ecology is in a form reasonably satisfactory to the Commission to substitute for an irrevocable letter of credit issued by a bank. To date we have uncovered only Mr. Peery's letter to Mr. Patton of U.S. Ecology indicating that the performance bond would be satisfactory to the Commission. There is no indication that the Compact was not in agreement with Mr. Peery on this issue. Because of the lapse of time since the performance bond was provided, it would appear that the Compact Commission has acquiesced in accepting the performance bond in lieu of a letter of credit. The determination of whether or not the performance bond is acceptable is ultimately a matter for the Compact Commission. The State of Nebraska is represented on the Compact Commission and has an opportunity to voice its acceptance or rejection of the substitution through its representative on the Compact Commission.

Shared Liability Amendments to Compact

You next ask what the ramifications to the State of Nebraska would be if Kansas and/or Oklahoma do not pass the shared liability amendments to the Compact. It is our understanding that the shared liability statute was passed in Nebraska as part of LB 837 in the 1991 Legislative session. Specifically, the bill calls for shared liability by the Compact states as part of Article III of the Compact. In order to become a part of the Compact and thus binding on the states, a provision must be approved by all party members of the Compact and ratified by Congress. If Kansas and Oklahoma do not approve of the provision then it does not become a part of the Compact.

"A state, by reason of its sovereign immunity, is immune from suit and it cannot be sued without consent in its own courts, the courts of a sister state, or elsewhere. . . ." 81A C.J.S States § 298. Therefore, if any state within the Compact does not pass the shared liability legislation, unless a statutory waiver of immunity already exists in this area, they could not be sued for liability

relating to the Compact or low-level radioactive waste as it relates to the Compact. Each state could pass legislation, outside of the Compact, which would permit the state to be sued on low-level radioactive waste liability issues. Legislation passed outside of the strict guidelines of the Compact, however, could easily be rescinded.

LB 837 states at its outset, "Any party state as defined in the Central Interstate Low-Level Radioactive Waste Compact which does not adopt the amendments made by this legislative bill to the Compact may be denied access to the facility by the host state as defined in the Compact." However, if this legislation is not passed by all of the Compact members and ratified by Congress, it would not become a part of the Compact. Therefore, if all states do not agree to the shared liability issue, it is not a part of the Compact and the host state could not deny access to the facility to any state based upon non-participation in shared liability.

Specifically, Article VI(b) of the Compact states: "No party state shall pass or enforce any law or regulation which is inconsistent with this compact." A statute outside of the Compact which would seek to restrict use of the facility by member states of the Compact would be deemed contrary to the Compact.

Moreover, Article III, subsection (a) of the Compact states in part as follows:

> It shall be the duty of regional facilities to accept compatible wastes generated in and from party states, and meeting the requirements of this act, and each party state shall have the right to have the waste generated within its borders managed at such facility.

Obviously, it would have been much better to deal with this issue prior to Nebraska's entry into the Compact. At that time, Nebraska could have insisted upon such provision as one the prerequisites for Nebraska's entry into the Compact.

<u>Possible Alternative for Dealing with Liability Issue</u>

Although you did not ask us for any alternatives for dealing with the liability issue, we would offer the following observation.

It may be possible to impose joint and severable liability on all the <u>users</u> of the facility without amending the Compact. Article III, subsection (b) of the Compact provides as follows: "To the extent authorized by federal law and host state law, a host state shall regulate and license any regional facility within its borders and ensure the extended care of such facility."

Article III, subsection (d) of the Compact provides as follows:

> A host state may establish fees which shall be charged to any user of a regional facility, and which shall be in addition to the rates approved pursuant to section (c) of this Article, for any regional facility within its borders. Such fees shall be reasonable and shall provide the host state with sufficient revenue to cover any costs associated with such facilities. If such fees have been reviewed and approved by the Commission, and to the extent that such revenue is insufficient, all party states shall share the costs in a manner to be determined by the Commission. (Emphasis added).

Under this language of the Compact it might be possible for Nebraska as the host state to require that part of the "fees" to be paid by the users of the facility would be a written agreement by each user to be jointly and severably liable in the event of a spill or leak and to pay any other unanticipated costs regarding the extended care of the facility.

Certainly the cost of cleaning up a spill (if one were ever to occur) would be "costs associated with such facility" and since these "fees" would be no more than the cost of caring for and cleaning up the facility it would seem that they would be "reasonable".

Legal Test or Legislation

If the State of Nebraska wishes to pursue this approach we may either wish to structure a declaratory judgment action to test whether Nebraska has legal authority to impose such a "fee" under the above theory or we might seek legislation in each of the other Compact states amending the Compact to specifically authorize a host state to require each user of the facility, as a condition of use, to agree to be jointly and severably liable for cost of cleanup of leaks, permanent maintenance and so forth. Since this would not impose liability on the states themselves it might stand a better chance of passage in the other states.

Policy Alternatives

Finally, you ask what, if anything, can Nebraska do to protect itself from being one of two or three national sites for the disposal of low-level radioactive waste. This is more a policy question than a legal one, but given the importance of the issue we will deviate from our general practice of not responding to policy questions.

One alternative would be to obtain the agreement of one of the three currently existing disposal sites in the United States to continue to accept low-level nuclear waste from the five states in our Compact so that it would not be necessary to build a site in Nebraska.

A second alternative would be for Nebraska's congressional representatives to obtain a change in the federal law to make storage of low-level nuclear waste a federal responsibility and specifying that federal storage sites be located in arid, non-populous areas of the United States.

Third, Nebraska might seek to have the Compact merge with another compact so long as we could be assured that the storage site of the merged compact would be located in a state other than Nebraska.

Fourth, Nebraska and/or the Compact might explore whether it would be legally and technically possible to enter into agreements for the disposal of low-level nuclear waste in a foreign country.

Withdrawal from the Compact

A fifth alternative which you have mentioned from time to time is for Nebraska to withdraw from the Compact. Apart from the potential liability which might be incurred, this does not entirely assure that a facility would not be constructed in the State of Nebraska. As you know, East Coast garbage is being or has been dumped in a number of states including the State of Nebraska. Some states which have sought to ban this garbage through restrictive laws have been unsuccessful because those laws have been stricken down under the Commerce Clause of the United States Constitution.

If Nebraska is not a member of a Compact, we could have the same problem with nuclear waste. More specifically, the Compact might continue to pursue the licensing of the Boyd County facility even if the State of Nebraska withdrew from the Compact. If the facility meets all federal and state technical requirements, the Compact might even be successful in obtaining a court order requiring the State of Nebraska to issue a license. While it is perhaps unlikely the Compact would pursue this approach, it is not impossible.

Moreover, if Nebraska does withdraw from the Compact some arrangement will need to be made for the disposal of the nuclear waste being generated within the State of Nebraska. Unless some other state could be persuaded to take our nuclear waste, Nebraska might eventually wind up having to arrange for the construction of a facility somewhere in the State for its own needs.

There may very well be other policy alternatives for Nebraska which might occur to you and your staff or to the Legislature. These five alternatives are not meant to be exclusive.

Further Investigation

In conclusion, even if Mr. Peery's allegations are true they do not appear to affect Nebraska's legal status so far as the Compact is concerned. Therefore, if an investigation is to be undertaken it would be more for purposes of public information and the development of facts which might affect future legislative decisions on this issue.

If those are the principal purposes of an investigation, it would appear that the best format would be through an investigation by a committee of the legislature. This investigation could and should be conducted in public and should focus on determination of facts rather than being a political witch hunt.

Sincerely,

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