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March 5, 1987

ATTORNEY GENERAL OPINION NO. 87- 43

The Honorable Paul Feliciano, Jr.
State Senator, Twenty-Eighth District
State Capitol, Room 126-S
Topeka, Kansas 66612

Re: Public Health--Central Interstate Low-Level Radioactive Waste Compact--Definitions; Options; Consequences of Compact Membership

Synopsis: Low-level radioactive waste is specifically exempted from the definition of "hazardous waste" found in K.S.A. 65-3430(f) and, as such, is not precluded from underground burial pursuant to K.S.A. 65-3458. It is likely a ban on the disposal of low-level radioactive waste in Kansas would be found inconsistent with the terms of the Central Interstate Low-Level Radioactive Waste Compact (Compact), K.S.A. 65-34a01 et seq. Such a finding could expose Kansas to the membership revocation penalties of the Compact. Withdrawing from the Compact this year may cost the state as much as $25 million. Should Kansas delay beyond this year and then withdraw, these costs may increase. If Kansas remains in the Compact, costs have been estimated to be $5 million. A decision to pull Kansas out of the Compact guarantees a waste management facility in the state. Any attempt to limit disposal in such a facility to Kansas generated waste must be in conformity with federal law, which requires "emergency access" by out-of-state generators, and waste from certain federal generators.

This opinion is intended to aid the Legislature in making an informed decision regarding the Compact.

Cited herein: K.S.A. 1986 Supp. 48-1622; K.S.A. 65-3430; K.S.A. 1986 Supp. 65-3458; 65-34a01 et seq.; 42 U.S.C. § 2011 et seq.; 42 U.S.C. § 2014; P.L. 99-240; 40 C.F.R. § 261.4 (7-1-86 Edition); U.S. Const., Art. I, Sec. 8, cl. 3; Art. VI; 126 Congr. Reg. 33, 966 (1980).

* * *

Dear Senator Feliciano:

As Senator for the Twenty-Eighth District, you request our opinion on a variety of topics concerning low-level radioactive waste (LLRW). Specifically, you have asked: first, whether LLRW is considered hazardous waste under Kansas law and, if so, whether a ban on below-ground disposal of hazardous waste would preclude the below-ground disposal of LLRW in Kansas. Second, you inquire if Kansas can prohibit the "disposal" of LLRW in Kansas, but allow the "storage" of LLRW without violating the Central Interstate Low-Level Radioactive Waste Compact (Compact), K.S.A. 65-34a01 et seq. Third, you inquire as to the fiscal impact, long and short term, of Kansas' withdrawal from the Compact. Finally, you inquire as to the options available to Kansas at this time and the consequences of these options.

I. LOW-LEVEL RADIOACTIVE v. HAZARDOUS WASTE LAWS

As to your first inquiry, K.S.A. 65-3430(f) states in part:

> "'Hazardous waste' . . . shall not include: . . . (7) materials listed in 40 CFR 261.4, as in effect on July 1, 1983.

40 C.F.R. § 261.4 (7-1-86 Edition) lists in relevant part: "(4) Source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq." This material includes low-level radioactive waste. 42 U.S.C. §2014. Thus, low-level radioactive waste is specifically exempted from the definition of "hazardous waste" by Kansas law. As such, its underground burial would not be precluded under K.S.A. 1986 Supp. 65-3458.

II. PROHIBITING DISPOSAL

As to your second inquiry, the rights and obligations of each party state under the Central Interstate Low-Level Radioactive Waste Compact (K.S.A. 65-34a01 et seq.) are set forth in Article I of the Compact. The intentions of the members of the Compact are stated as follows:

> "It is the purpose of this compact to provide the framework for such a cooperative effort; to promote the health, safety and welfare of the citizens and the environment of the region; to limit the number of facilities needed to effectively and efficiently manage low-level radioactive wastes and to encourage the reduction of the generation thereof; and to distribute the costs, benefits and obligations among the party states." K.S.A. 65-34a01, Article I. (Emphasis added.)

Among the obligations outlined in the Compact is the selection of a host state for the site of a regional disposal facility. The function of such a facility can be gleaned from the following definitions appearing in Article II of the Compact:

> "b. '[D]isposal' means the isolation and final disposition of waste.
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> . . . .
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> "d. '[F]acility' means any site, location, structure or property used or to be used for the management of waste;
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> . . . .
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> "h. '[M]anagement of waste' means the storage, treatment or disposal of waste;
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> . . . .
>
> "p. '[S]torage' means the holding of waste for treatment or disposal;

> "q. '[T]reatment' means any methods, technique or process, including storage for radioactive decay, designed to change the physical, chemical or biological characteristics or composition of any waste in order to render such waste safer for transport or management, amenable for recovery, convertible to another usable material or reduced in volume." K.S.A. 65-34a01, Article II. (Emphasis added.)

The state could not ban the operation and development of a regional facility for the management of LLRW without being in direct conflict with the purpose of the Compact. K.S.A. 65-34a01, Article I. Since management of LLRW includes the storage, treatment and disposal of LLRW (K.S.A. 65-34a01, Article II § h), it is our opinion that the state cannot ban any of these functions without subjecting itself to a finding of noncompliance by the Compact Commission. This opinion is buttressed by a reading of the Compact in toto, in that the fundamental intent and duties of the member states and the intent of the federal law which mandated the Compact are the complete disposition of LLRW. See, e.g. Atchison v. City of Englewood, Colo., 568 P.2d 13, 18 (Colo, 1977).

The Compact, at Article VI, states in relevant part: "b. No party state shall pass or enforce any law or regulation which is inconsistent with this compact." However, this would not appear to preclude the State from enacting strict regulations concerning the methods by which LLRW should be stored, treated and disposed of should Kansas be chosen as the site for a regional facility.

III. FISCAL IMPACT

A finding of noncompliance by the Commission pursuant to K.S.A. 64-34a01, Article VI, § b, could be cause for revocation of Kansas' membership in the Compact. This leads to your third and fourth inquiries, regarding long and short term fiscal impact, options and consequences. Article VII, states in part:

> "e. Any party state which fails to comply with the terms of this compact or fulfill its obligations hereunder may, after notice and hearing, have its privileges suspended or its membership in the compact

revoked by the Commission. Revocation shall take effect one year from the date such party state receives written notice from the Commission of its action. The Commission may require such party state to pay to the Commission, for a period not to exceed five years from the date of notice of revocation, an amount determined by the Commission based on the anticipated fees which the generators of such party state would have paid to each regional facility and an amount equal to that which such party state would have contributed in accordance with section d of Article III, in the event of insufficient revenues. The Commission shall use such funds to ensure the continued availability of safe and economical waste management facilities for all remaining party states. Such state shall also pay an amount equal to that which such party state would have contributed to the annual budget of the Commission if such party state would have remained a member of the compact. All legal rights established under this compact of any party state which has its membership revoked shall cease upon the effective date of revocation; however, any legal obligations of such party state arising prior to the effective date of revocation shall not cease until they have been fulfilled. Written notice of revocation of any state's membership in the compact shall be transmitted immediately following the vote of the Commission, by the chairman, to the governor of the affected party state, all other governors of the party states and the Congress of the United States." K.S.A. 65-34a01, Article VII. (Emphasis added.)

Since it is our opinion that a ban on the disposal of low-level radioactive waste in Kansas could be found inconsistent with the terms of the Compact, the passage of a law banning disposal, and the ensuing finding would expose Kansas to the revocation penalties thereunder. The fees paid

for LLRW facility use, Kansas' annual contribution to the Commission, and Kansas' share of the LLRW facility cost is estimated to be at least $5 million. This presumes a $25 million cost for the regional facility, $5 million being Kansas' share, in addition to other fees and contributions.

The withdrawal provision of the Compact appears in Article VII, which states in part:

> "d. Any party state may withdraw from this compact by enacting a statute repealing the same. Unless permitted earlier by unanimous approval of the Commission, such withdrawal shall take effect five years after the governor of the withdrawing state has given notice in writing of such withdrawal to each governor of the party states. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal." K.S.A. 65-34a01, Article VII. (Emphasis added.)

A full 5-year liability is possible, assuming the other Compact states would advocate such liability. Liability could include contribution expenses to the Commission budget as well as regional facility construction costs. The current Kansas commitment to the Commission is $25,000 per year. This figure will undoubtedly increase as the Commission moves from planning to actual construction. This could be increased by whatever damages are ascertained, based upon the $25 million facility cost and additional penalties.

There are penalties that Kansas generators could incur upon the state's withdrawal from the Compact at this time if tardy in implementing a solo project. These penalties are based upon surcharges set forth in the Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 99-240, Section 5(d)(1) as follows:

> "The disposal of any low-level radioactive waste under this section (other than low-level radioactive waste generated in a sited compact region) may be charged a surcharge by the State in which the applicable regional disposal facility is located, in addition to the

> fees and surcharges generally applicable for disposal of low-level radioactive waste in the regional disposal facility involved. Except as provided in subsection (e)(2), such surcharges shall not exceed--
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> "(A) in 1986 and 1987, $10 per cubic foot of low-level radioactive waste:
>
> "(B) in 1988 and 1989, $20 per cubic foot of low-level radioactive waste; and
>
> "(C) in 1990, 1991, and 1992, $40 per cubic foot of low-level radioactive waste." (Emphasis added.)

The Act goes on to impose certain deadlines for states and/or compact regions in the establishment of waste management facilities. The failure to meet these deadlines will result in surcharges increased by penalties. In addition, access to the three operating regional disposal facilities would be restricted.

These surcharges would apply regardless of whether Kansas withdraws from the Compact. Kansas generators are responsible for these surcharges until a regional facility is established under the Compact, or until Kansas establishes its own waste management facility.

The deadline requirements are stated in relevant part at section 5(e)(1) of the Act:

> "(1) REQUIREMENTS FOR NON-SITED COMPACT REGIONS AND NON-MEMBER STATES.--Each non-sited compact region, or State that is not a member of a compact region that does not have an operating disposal facility, shall comply with the following requirements:
>
> "(A) By July 1, 1986, each such non-member State shall ratify compact legislation, or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level

radioactive waste disposal facility within such State.

"(B) By JANUARY 1, 1988.--

. . . .

"(ii) each non-member State shall develop a siting plan providing detailed procedures and a schedule for establishing a facility location and preparing a facility license application for a low-level radioactive waste disposal facility and shall delegate authority to implement such plan; and

"(iii) The siting plan required pursuant to this paragraph shall include a description of the optimum way to attain operation of the low-level radioactive waste disposal facility involved, within the time period specified in this Act. Such plan shall include a description of the objectives and a sequence of deadlines for all entities required to take action to implement such plan, including, to the extent practicable, an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning facility operation. Such plan shall also identify, to the extent practicable, the process for (1) screening for broad siting areas; (2) identifying and evaluating specific candidate sites; and (3) characterizing the preferred site(s), completing all necessary environmental assessments, and preparing a license application for submission to the Nuclear Regulatory Commission or an Agreement State.

"(C) By JANUARY 1, 1990.--

"(i) a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to

operate a low-level radioactive waste disposal facility within each non-sited compact region or within each non-member State; or

"(ii) the Governor (or, for any State without a Governor, the chief executive officer) of any State that is not a member of a compact region in compliance with clause (i), or has not complied with such clause by its own actions, shall provide a written certification to the Nuclear Regulatory Commission, that such State will be capable of providing for, and will provide for, the storage, disposal, or management of any low-level radioactive waste generated within such State and requiring disposal after December 31, 1992, and include a description of the actions that will be taken to ensure that such capacity exists.

"(D) By January 1, 1992, a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to operate a low-level radioactive waste disposal facility within each non-sited compact region or within each non-member State.

. . . .

"(F) Any State may, subject to all applicable provisions, if any, of any applicable compact, enter into an agreement with the compact commission of a region in which a regional disposal facility is located to provide for the disposal of all low-level radioactive waste generated within such State, and, by virtue of such agreement, may, with the approval of the State in which the regional disposal facility is located, be deemed to be in compliance with subparagraphs (A), (B), (C), and (D)." P.L. 99-240.

The penalties for failure to meet these deadlines follow in section 5(e)(2) of the Act:

> "(2) PENALTIES FOR FAILURE TO COMPLY.--
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> "(A) BY July 1, 1986. --If any State fails to comply with subparagraphs (1)(A)--
>
> "(i) any generator of low-level radioactive waste within such region or non-member State shall, for the period beginning July 1, 1986, and ending December 31, 1986, be charged 2 times the surcharge otherwise applicable under subsection (d); and
>
> "(ii) on or after January 1, 1987, any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b).
>
> "(B) BY JANUARY 1, 1988. --If any non-sited compact region or non-member State fails to comply with paragraph (1)(B)--
>
> "(i) any generator of low-level radioactive waste within such region or non-member State shall--
>
> "(I) for the period beginning January 1, 1988, and ending June 30, 1988, be charged 2 times the surcharge otherwise applicable under subsection (d); and
>
> "(II) for the period beginning July 1, 1988, and ending December 31, 1988, be charged 4 times the surcharge otherwise applicable under subsection (d); and
>
> "(ii) on or after January 1, 1989, any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in

paragraphs (1) through (3) of subsection (b).

"(C) BY JANUARY 1, 1990. -- If any non-sited compact region or non-member State fails to comply with paragraph (1)(C), any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b).

"(D) BY JANUARY 1, 1992. --If any non-sited compact region or non-member State fails to comply with paragraph (1)(D), any generator of low-level radioactive waste within such region or non-member State shall, for the period beginning January 1, 1992 and ending upon the filing of the application described in paragraph (1)(D), be charged 3 times the surcharge otherwise applicable under subsection (d)." P.L. 99-240 (Emphasis added.)

The most immediate deadline that Kansas faces is the January 1, 1988 deadline imposed by P.L. 99-240, § 5(e)(1)(B). The cost for preparing a siting plan has been estimated by the Kansas Department of Health and Environment to be from $500,000 to $1 million. ("Low-Level Radioactive Waste Management," pp. 30-31 KDHE, February, 1987).

In summary, Kansas as a Compact member could be liable for its share of the cost of the Compact site ($5 million estimate), minus license revenues, plus penalties should the Region miss deadlines. Kansas as a solo operator may be liable for its own $10-20 million facility, plus its share of the surcharges, penalties and costs under the Compact for building a facility in one of the other four states (withdrawal penalties), plus any federal deadline penalties, less any license revenues should Kansas be forced to accept out-of-state LLRW. Analysis reveals a potential $5 million or less cost to Kansas as a member of the Compact, and a possible $25 million cost to Kansas as a non-member. As a non-member, costs to Kansas could, at a minimum, include the $10-20 million costs of a solo facility.

IV. COMMERCE AND SUPREMACY CLAUSES

The question has arisen as to the ability of the state to prohibit disposal of out-of-state generated LLRW in light of the Commerce. A federal case dealing directly with an attempted ban on the importation of LLRW is Washington State Building and Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed. 2d 282 (1983). In Spellman, the Ninth Circuit invalidated a Washington law imposing such a ban using a commerce clause analysis. The state of Washington was one of only three states that had an operating facility at that time. In addition, Spellman was argued and decided prior to the passage of the Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 99-240, which provides that each state is responsible for disposal of LLRW generated within its borders, either in a facility of its own or pursuant to a compact. Thus, it is our understanding that the Act, as a general rule, would allow states to restrict out-of-state disposal, though there are exceptions to this general rule. The Nuclear Regulatory Commission could require a state to accept other states' LLRW in situations deemed by that agency to warrant emergency access. Additionally, waste generated by certain federal generators could be disposed of in any state facility. Thus, if Kansas should withdraw from the Compact and construct its own facility, the state could not prevent the disposal of all out-of-state generated waste. It is our opinion that any state restrictions on the disposal of LLRW generated out-of-state would have to conform with the 1985 Act due to application of the Supremacy Clause to the United States Constitution. U.S. Const., Art. VI.

V. OTHER CONCERNS

As mentioned previously in this opinion, we find no restrictions in the Act on the state's ability to determine the methods of disposal if the site is within its borders, as long as those methods are not inconsistent with the purpose of the Act. Thus, if the state is a member of a compact, it may design a state-of-the-art facility, perhaps even surpassing NRC safety regulations, using contributions from other members of the Compact. If not a member of the Compact, the state must fund such a facility on its own.

We should note that if all states selected as sites for regional facilities decide to withdraw from their various compacts, Congress may be forced to amend or repeal the

current provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 dealing with compact facilities, and may dispose of that option.

Finally, Kansas law requires state ownership of the land upon which a LLRW facility is located. K.S.A. 1986 Supp. 48-1622(e). It is our opinion that this requirement is merely a first step in the right direction. Public ownership and control of a LLRW site and facility should be the cornerstone of an active state policy protecting the citizens of this state from the dangers of improper disposal, storage and treatment of radioactive waste.

In conclusion, low-level radioactive waste is specifically exempted from the definition of "hazardous waste" found in K.S.A. 65-3430(f) and, as such, is not precluded from underground burial pursuant to K.S.A. 65-3458. It is likely a ban on the disposal of low-level radioactive waste in Kansas would be found inconsistent with the terms of the Central Interstate Low-Level Radioactive Waste Compact (Compact), K.S.A. 65-34a01 et seq. Such a finding could expose Kansas to the membership revocation penalties of the Compact. Withdrawing from the Compact this year may cost the state as much as $25 million. Should Kansas delay beyond this year and then withdraw, these costs may increase. If Kansas remains in the Compact, costs have been estimated to be $5 million. A decision to pull Kansas out of the Compact guarantees a waste management facility in the state. Any attempt to limit disposal in such a facility to Kansas generated waste must be in conformity with federal law, which requires "emergency access" by out-of-state generators, and waste from certain federal generators.

This opinion is intended to aid the Legislature in making an informed decision in deliberations regarding withdrawal from, or remaining in, the Compact.

Very truly yours,

Robert T. Stephan

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