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ATTORNEY GENERAL OPINION NO. 90- 34A

The Honorable John D. McClure
State Representative, One Hundred Sixth District
State Capitol, Room 272-W
Topeka, Kansas 66612

Re: Public Health--Central Interstate Low-Level Radioactive Waste Compact--Central Interstate Low-Level Radioactive Waste Compact; State Liability

Synopsis: Attorney General Opinion No. 90-34 addresses only the question of the State of Kansas' liability in a private lawsuit for damages caused by the operation of a regional low-level radioactive waste disposal facility. The opinion does not address the Kansas, Oklahoma, Arkansas, and Louisiana agreement to assist Nebraska in covering its costs associated with a disposal facility as provided for in Art. III(d) of the central interstate low-level radioactive waste compact. Such assistance, rendered to Nebraska pursuant to Art. III(d), would be required under the terms of the compact. Cited herein: K.S.A. 65-34a01, Article III(d); U.S. Const., Art. III, § 2, 11th Amend.

* * *

Dear Representative McClure:

On Thursday, March 22, 1990, I issued Attorney General Opinion No. 90-34. On that same day copies of the opinion were distributed in Nebraska. Apparently the opinion has been misinterpreted and is the source of concern. In order to clarify the opinion and address the concerns raised by it, I am issuing this supplemental opinion.

Your request for an opinion was received and processed under the belief you were concerned with the potential liability Kansas might face if sued by a private individual for damages sustained in the operation of a regional low-level radioactive waste disposal facility in the State of Nebraska. Due to that interpretation of your request, the opinion focused on the immunity provided from such private law suits by the Eleventh Amendment to the United States Constitution.

However, soon after the opinion was released, it became clear that some of those who received copies of the opinion were under the impression that Kansas was reneging on its commitment to the State of Nebraska made pursuant to Article III(d) of the central interstate low-level radioactive waste compact. It was thought by some that Kansas was abandoning Nebraska, in spite of the law and in spite of the fact that such an abandonment could necessitate the immediate construction of disposal facilities in all of the five compact states including Kansas.

In order that this misinterpretation may be laid to rest, I present the following:

Art. III(d) of the compact provides:

> "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."

Under this portion of the compact the states of Kansas, Oklahoma, Arkansas, and Louisiana are joined with Nebraska to share in its costs associated with the regional facility. These costs would include any unfunded or under-funded contingent liability of the State of Nebraska. This policy is, of course, fundamental to the entire compact.

In the event a person was harmed by the operation of a regional waste disposal facility, that person would, of course, seek damages from the private operator of the facility. However, if the operator's assets were insufficient

to meet such damages, the person could seek relief from the generators of the waste. In the event the various generators' assets could not cover such damages, that person might seek relief from the fees generated pursuant to Art. III(d). Similarly, in the unlikely event of the facility's failure after closure, the developer and generators would have the primary responsibility for remedial cost, with the Art. III(d) fees, collected from generators during the operations of the facility, serving as a backstop.

While we have no reason to believe that such fees, to be apprved by the commission's state representatives, would not fully cover any costs to the State of Nebraska associated with the operation and maintenance after closure of the facility, the State of Nebraska does have the protection of Art. III(d).

That protection is the sharing of shortfalls in a manner to be determined by the Commission. Such determination would, of course, be subject to the good faith provision of Art. III(f) of the compact as well as judicial review. Further, if a state were to believe another state had violated the terms of the mutually agreed upon compact it would seek relief in the United States Supreme Court, pursuant to Art. III, § 2 of the United States Constitution. Such a suit, state versus state, could not be barred by the Eleventh Amendment, nor the Kansas Tort Claims Act, K.S.A. 75-6101 et seq.

I hope this has cleared up any misunderstanding that might have immerged from the issuance of Attorney General Opinion No. 90-34. The purpose of that opinion was to assist the Kansas Legislature. It is unfortunate that the opinion became the subject of controversy in another state.

Very truly yours,

Robert T. Stephan

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RTS:JLM:JWC:RDS:jm