Approved March 17, 1992
Date

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources.

The meeting was called to order by Senator Ross Doyen at
Chairperson

8:06 a.m./p.m. on March 5, 19 92 in room 423-S of the Capitol.

All members were present except: Quorum was present.

Committee staff present:
Pat Mah, Legislative Research Department
Raney Gilliland, Legislative Research Department
Don Hayward, Revisor of Statutes
Lila McClaflin, Committee Secretary

Conferees appearing before the committee:

The Chairman called for discussion or action on SB 430 - concerning amending the central interstate radioactive waste compact. Information regarding SB 430 was distributed: Staff memo (Attachment 1); and a letter to the Attorney General of Nebraska from the Governor of Nebraska (Attachment 2).

A motion was made by Senator Hayden to recommend SB 430 favorably. Senator Sallee seconded the motion. Motion carried.

The Chair called for action on SB 677 - concerning oil and gas; relating to abandoned wells. Senator Hayden moved to recommend SB 677 favorably. The motion was seconded by Senator Sallee. Motion carried.

The Chair called for action on SB 678 - enacting the Kansas underground utility damage prevention act; concerning prevention of damage to certain underground utility facilities. Information requested by Senator Martin was distributed (Attachment 3).

The Committee discussed the amendments that were recommended by Louis Stroup, Jr., representing the Kansas Municipal Utilities.

Senator Martin moved to conceptually amend the bill in Section 4, line 39, to read "one full working day. Motion was seconded by Senator Walker. Motion carried. Senator Langworthy move to conceptually amend Section 5, to mean only one statewide notification center, so that one call would be sufficient. Senator Sallee seconded the motion. Motion carried.

Senator Frahm moved a technical amendment on page 4, line 40, insert "to" after the word "person". Senator Langworthy seconded the motion. Motion carried.

Action on SB 678 was tabled until the meeting on March 6, 1992.

John Irwin distributed a balloon of SB 542, and discussed the amendments, and he responded to questions.

The meeting adjourned at 8:38. The next meeting will be March 6, 1992.

1991 SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

Date March 5, 1992

PLEASE PRINT GUEST LIST

NAME	REPRESENTING
Carl Daugherty	Empire District Electric
Irene Cotter	Peoples Natural Gas
Dan Haas	KCPL
Kristy Wetter	KNRC
Al LeDoux	CKFD
Janet Stubbs	KBAK

To: Representatives McClure and Grotewiel

From: Raney Gilliland, Legislative Research Department, and Mary Torrence, Revisor of Statutes Office

Date: August 22, 1991

Re: Questions Regarding the Low-level Radioactive Waste Compact

Below is the response to your series of questions regarding the low-level radioactive compact and associated issues.

Background

By way of background, the subject of low-level radioactive waste has been a topic of concern for the Legislature in past years. The process for the development of the Central Interstate Low-Level Radioactive Waste Compact was one that took a great deal of the Legislature's attention in the mid-1980s. This not only involved the Kansas reaction to federal mandates but, once a decision was made in terms of direction, the state had to react to the implications for the state as a result of that decision. Several legislative actions took place as a result of the issue surrounding low-level radioactive waste. These include the adoption of the Compact language in 1982 and the adoption of statutes that prohibit the burial of low-level radioactive waste below the surface of the disposal site, unless it provides greater protection to the environment and public health than above-surface disposal.

Low-level radioactive waste is defined by federal law as radioactive material that is not high level radioactive waste,

E&NR
3-5-92

attachment 1
1-1

spent nuclear fuel, or by-product material. Low-level wastes are produced in a variety of forms including contaminated paper towels, plastic gloves and clothes, machinery parts, medical treatment materials, animal carcasses, organic and aqueous liquids and sludge. Producers and generators of low-level waste include commercial reactors, hospitals, research institutions, industries and the federal government. In 1985, 26,806,594 cubic feet of low-level waste were produced in the United States and disposed of at three commercial disposal sites; Kansas produced 1,695 cubic feet of such waste in 1985.

Currently, there are three commercial low-level radioactive waste disposal facilities in the country. They are located in Beatty, Nevada; Richland, Washington; and Barnwell, South Carolina. In 1979, the states of Nevada and Washington temporarily closed their facilities, and South Carolina restricted the amount of waste it would accept. All three states announced that they did not intend to continue accepting all of the nation's commercial low-level radioactive waste. In response, Congress passed the Low-Level Radioactive Waste Policy Act of 1980 (P.L. 96-573) making each state responsible for disposal of commercial low-level radioactive waste generated within its borders. Congress further declared that low-level waste could be most efficiently and safely managed on a regional basis and authorized states to enter into compacts to establish and operate regional disposal facilities.

Under the 1980 act, states were to have facilities available

by 1986. The failure of states to develop regional facilities by that date led Congress to enact the Low-Level Radioactive Waste Policy Amendments Act (P.L. 99-240) which established a new series of requirements for the states to meet. Under the 1985 act, each state had to join a compact or indicate its intent to develop its own facility by July 1, 1986. Each compact commission must identify a "host state" for its low-level radioactive waste disposal facility by January 1, 1988, and each host state must have a plan for establishing the location for a facility. By January 1, 1990, each compact commission and each "go it alone" state was required to complete and file with the Nuclear Regulatory Commission an application to operate a low-level waste disposal facility or the governor of the state was required to certify that the state will manage its own waste by December 31, 1992. By January 1, 1992, it is expected that each application for a license to operate a low-level waste disposal facility will have been determined to be complete. By January 1, 1993, each state or compact region must be able to provide for the disposal of all low-level radioactive waste generated within its borders. This is the target date to initiate the operation of facilities. Failure to meet the deadlines or make adequate provision for "going it alone" will result in the imposition of penalties and possible exclusion from access to existing disposal facilities. By January 1, 1993, the three existing disposal facilities can refuse wastes from outside their respective compacts.

Responses to Primary Questions

The following are responses to the two primary questions contained in your March 11 memorandum.

1. What enforcement measures can the state of Kansas use to compel Ray Peery, director of the compact, to file his statement of substantial interest form in advance of Kansas's consideration of the language changes?

Although we could find no direct language that would compel Mr. Peery, the Executive Director and General Counsel of the Central Interstate Low-Level Radioactive Waste Compact Commission, to file a statement of substantial interest, there is language in the bylaws of the Central Interstate Low-Level Radioactive Waste Compact Commission that prohibits the Executive Director from having any beneficial personal interest either directly or indirectly in the purchase of any services or commodity. This prohibition includes having an interest in any firm, partnership, corporation or association furnishing any service or commodity to the Commission. It would appear that the Executive Director would have to submit a statement of substantial interest in order for the Commission to know whether this person was violating this bylaw. In the alternative, it would appear to us that the Commission could make this a condition of employment by the Commission. The representative of the state of Kansas on the Commission could make a motion to have this condition added to the bylaws. Of course, it would take an affirmative vote of a majority of the Commission members to adopt this condition.

2. If the state of Kansas refuses to ratify the Nebraska amendments to the compact and insists on retaining the existing compact, what liabilities will the state of Kansas incur? Could Nebraska in any way construe that Kansas broke the compact by refusing to ratify the amendments and charge Kansas with penalties for breaking the compact?

No liabilities would be incurred by failure to ratify the proposed amendments. If anything, Nebraska could be deemed to have broken the compact by adopting a statute which denies access to the facility by a state that does not ratify the amendments (section 1 of the amendments). This contravenes the terms of the compact which require access to be given and could be grounds for revoking Nebraska's membership. For penalties in the case of revocation, see the response to question 12 below.

Responses to Additional Questions

The following are responses to the 13 questions attached to your memorandum of March 11.

1. Has any party state to another compact asked for major changes in the compact?

Since 1971, changes have been proposed in two interstate compacts which Kansas has ratified; those are the Interstate Compact on Agricultural Grain Marketing and the Interstate Compact to Conserve Oil and Gas. With regard to the grain marketing compact, the original compact was never ratified by the required number of states, so it didn't take effect. The proposed amendments would have extended the date deadline for

ratification, as well as make other amendments. Kansas did not ratify the amendments. The oil and gas compact amendments provided procedures for withdrawal of a party state. Those amendments were ratified by Kansas. The source of the proposed amendments to the compacts is not known.

2. What is the progress status of the other low-level radioactive waste compacts in relation to meeting the 1996 deadline?

Attached you will find a summary of the progress of other low-level radioactive waste compacts and states that are developing their own low-level radioactive waste disposal sites. This material was provided by the Central Interstate Low-Level Radioactive Waste Compact Commission and compiled by its staff.

3. Is third party liability insurance available to the developer (U.S. Ecology)?

The staff of the Central Interstate Low-Level Radioactive Waste Compact Commission stated that third party liability insurance is assumed to be available through American Nuclear Insurers. Spokespersons from U.S. Ecology say that Nebraska law gives the Environmental Control Council of Nebraska the authority to set standards for the liability insurance on the project. Evidently no requirements have been set by the Council at this point in time.

Another spokesperson for U.S. Ecology indicated that American Nuclear Insurers had stated that they were willing to write up to $25 million in liability insurance without seeing the design of

the site in Nebraska. Once a review of the design has been completed, then the insurance company has stated it will write the insurance. One point to note is that the site being developed in Nebraska is an above-grade disposal facility. Since this type of facility has never before been built, a similar facility has never been insured. This spokesperson indicated that U.S. Ecology would purchase the maximum amount of insurance available.

4. What does third party liability insurance cover?

See response to question 3.

5. Are the Nebraska amendments inconsistent with the current compact (in contravention of Art. VI-b)?

Yes, in the following ways:

(a) The Nebraska statutory amendments provide that states that do not adopt the amendments may be denied access to the facility (section 1). This contravenes the current compact provision that requires the facility to accept waste from any party state and that gives party states the right to have their waste managed at the facility (Article III-a).

(b) The Nebraska statutory amendments give Nebraska two voting and one nonvoting member of the Commission (Section 2). The current compact allows only one voting member from each state (Article IV-a).

(c) The remainder of the Nebraska amendments are amendments to the compact itself, which cannot be effective without ratification by other party states.

6. Is the provision in section 1 of the Nebraska amendments

consistent with the present compact?

No. See paragraph (a) in response to question 5.

Can Nebraska unilaterally amend the compact and deny access to party states that do not ratify those amendments?

No. There is no provision in the compact that provides for its unilateral amendment by Nebraska or any other party state. Additionally, congressional consent to any compact is required (U.S. Constitution, Art. I, §10), so even if the proposed amendments were ratified by all party states, Congress would have to consent to the new compact before it became effective. Until that time, the current compact remains in effect, requiring that all party states have access to the facility.

7. How was the host site selected in Nebraska?

The Commission had two site exclusionary studies performed by a consulting firm. Those studies identified the areas in the compact states that are suitable for a low-level radioactive waste disposal facility. Based on criteria set forth in Article V-c of the compact, the Commission then selected U.S. Ecology to develop, construct and operate the facility. U.S. Ecology conducted studies of the suitable sites and selected three counties in Nebraska as potential sites and ultimately found the site in Boyd County to be most suitable for the facility.

8. Should Nebraska have the power to (unilaterally) establish fees?

This is a policy decision for the legislature and the party states to determine and would require amendment of the current

compact.

9. What benefits would Kansas gain by ratifying the amendments?

None, unless or until Kansas becomes a host state.

10. If Kansas does not ratify the amendments, can Nebraska deny Kansas access to the facility?

No. See response to question 6.

11. What are the penalties for withdrawal from the compact?

Unless unanimously approved by the Commission, withdrawal does not take effect for five years. The compact does not specify any penalties. However, the Commission rules provide that withdrawal is grounds for revocation of membership and that withdrawal is subject to the same penalties as provided for revocation (Rules 13.3 and 23.4). Those penalties are listed in the response to question 12. The Commission's authority to make withdrawal grounds for revocation and to provide penalties for withdrawal is not specified in the compact and may be subject to question.

12. What penalties would be imposed if Kansas' compact membership were revoked?

Article VII-e of the compact and Commission Rule 23.4 provide that revocation does not take effect for one year and that the following penalties may be imposed if a state's membership is revoked:

(a) The state must pay the Commission $125,000, representing the state's contribution to the Commission's budget for five

years following revocation.

(b) The state must pay the Commission an amount determined by the Commission to be the amount that the state's waste generators would have contributed to the Commission's budget during the five years following revocation.

(c) The state must pay the Commission an amount equal to any rebate funds that the withdrawal or revocation causes to be lost.

(d) The state must pay an amount determined by the Commission to be equal to the fees that the state's waste generators would have paid during the five years following revocation.

(e) The state forfeits its right to use the facility.

(f) The state cannot rejoin the compact.

(g) If the state is the host state, the state must continue to make the facility available to all party states until a new facility is operational and may be required to pay costs associated with development of a new facility.

The penalties described in (f) and (g) are provided by rule of the Commission and may be subject to question because they are not specified in the compact.

13. What are the implications of the bankruptcy language in the Nebraska amendments?

The Nebraska amendments to Article III-d of the compact provide that, if fees are not sufficient to pay costs associated with the facility, all state and generators using the facility

share liability for the deficit. However, recovery against other sources of funds is first required, including recovery from the facility operator. The bankruptcy language simply limits the collection efforts that must be made against the operator if the operator files for bankruptcy and the proceeding is not dismissed within 60 days. In that case, if a state is required to pay a part of the deficit the state would then have to try to recover its money from the operator.

HOUSE OF REPRESENTATIVES
STATE OF KANSAS

STATE CAPITOL, ROOM 330-N
TOPEKA, KANSAS 66612-1591
(913) 296-7643

REPRESENTATIVE, THIRTY-SEVENTH DISTRICT
WYANDOTTE COUNTY
2206 EVERETT
KANSAS CITY, KANSAS 66102-2602

COMMITTEE ASSIGNMENTS
VICE-CHAIRMAN: EDUCATION
MEMBER: TAXATION
LEGISLATIVE, JUDICIAL AND CONGRESSIONAL APPORTIONMENT
CALENDAR AND PRINTING
LEGISLATIVE COORDINATING COUNCIL

TOPEKA

WILLIAM J. REARDON
SPEAKER PRO TEM

March 11, 1991

TO: Arden Ensley and Raney Gilliland
FR: Jolene Grabill for Representatives McClure and Grotewiel
RE: Current Radioactive Waste Compact Questions

As discussed at last Thursday's meeting, a list of questions has been prepared for the two of you to hash out. These questions have been thrashed around in the discussions ensuing since Nebraska proposed new compact language.

Above all else, the interested parties are interested to know the answer to the following two questions, first:

1. What enforcement measures can the state of Kansas use to compel Ray Perry, director of the compact, to file his statement of substantial interest form in advance of Kansas's consideration of the language changes?

2. If the State of Kansas refuses to ratify any changes in the compact and insists that we should stick by the existing compact, what liabilities will ensue to the state of Kansas? Could Nebraska , in any way construe that Kansas broke the compact by refusing to ratify the language changes and therefore charge Kansas with penalties for breaking the compact?

Following is an additional page of questions which need the benefit of your respective policy and legal judgement. We look forward to your opinions on all 15 questions and any other issues that you see arising out of the proposed Nebraska language.

1 – 12

1. Have any of the other compacts Kansas is a member of ever asked for major changes in their compact agreements?

2. What is the progress status of the other LLRW compacts in relation to meeting the 1996 deadline?

3. Is third party liability insurance available to the developer? (U.S. Ecology)

4. What does third party liability insurance cover?

5. In the present compact law (Article VI, 6.b.) it states that no party state shall pass or enforce any law or regulation which is inconsistent with this compact. Are the changes Nebraska is asking for consistent with our present compact law?

6. Only Nebraska votes on the language in Section 1. "Any party state which does not adopt the amendments made herein to the Central Interstate low-level Radioactive Waste Compact may be denied access to a regional facility by the host state".

   Is this consistent with our present compact language?

   In the future can Nebraska vote in new provisions of their choice, and deny access to the other states in the compact if they do not adopt those provisions?

7. How was the host site selected in Nebraska?

8. Should we give Nebraska the power to set fees? In the new language the commissioners from the other states in the compact would not have a vote on establishing the fees. If we felt the fees were unreasonable we would have to take them to court.

9. What benefits would Kansas gain by adopting the new Nebraska language?

10. If Kansas does not adopt the Nebraska language can they deny us access to the site?

11. What penalties would there be for Kansans if we withdrew from the Compact?

12. What penalties would Kansas incur if our membership in the Compact were revolked?

13. What are the implications of the bankruptcy language?

STATE OF NEBRASKA

EXECUTIVE SUITE
P.O. Box 94848
Lincoln, Nebraska 68509-4848
Phone (402) 471-2244

E. Benjamin Nelson
Governor

January 31, 1992

Donald Stenberg
Attorney General
Rm. 2115 State Capitol
Lincoln, NE 68509-8920

Dear Don:

Thank you for meeting with me and my staff on January 27 on the allegations raised by Raymond Peery on the low-level radioactive waste issue. As I indicated, I would like your office to analyze the legal ramifications to the State of Nebraska if Mr. Peery's statements are true. Specifically, I would like your office to respond to the following questions:

1. If the other states participated in the "volunteering" of Nebraska as the host state, are there any legal actions that may be pursued?

2. Has the contract between U.S. Ecology and the Commission been breached if U.S. Ecology provided a performance bond, rather than a standby letter of credit from a bank, as required in the contract?

3. What are the ramifications to the State of Nebraska if Kansas and/or Oklahoma do not pass the shared liability amendments to the compact?

4. What, if anything, can Nebraska do to protect itself from becoming one of two or three national sites for the disposal of low-level radioactive waste?

3-5-92
E+NR
pg 1-10
attachment 2
2-1

If you have any questions, do not hesitate to contact my office.

Sincerely,

E. Benjamin Nelson
Governor

EBN/klf

STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

92017

DATE: February 7, 1992

SUBJECT: Low-Level Radioactive Waste Issues

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

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

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.

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.

Substitution of Bond for Letter of Credit

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

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.

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.

Possible Alternative for Dealing with Liability Issue

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 users 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."

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,

DON STENBERG
Attorney General

Linda L. Willard
Assistant Attorney General

PART 19 ILATIONS FOR GRANTS TO AID STATE PI .E SAFETY PROGRAMS

Subpart A - General

Sec.
198.1 Scope.
198.3 Definitions.

Subpart B - (Reserved)

Subpart C - Adoption of One-Call Damage Prevention Program

198.31 Scope.
198.33 (Reserved)
198.35 Grants conditioned on adoption of one-call damage prevention program.
198.37 State one-call damage prevention program.
198.39 Qualifications for operation of one-call notification system.

Authority: 49 App. U.S.C. 1674, 1687 and 2004; 49 CFR 1.53.

Subpart A - General

§ 198.1 Scope.

This part prescribes regulations governing grants-in-aid for State pipeline safety compliance programs.

§ 198.3 Definitions

As used in this part:

Adopt means establish under State law by statute, regulation, license, certification, order, or any combination of these legal means.

Excavation activity means an excavation activity defined in § 192.614(a) of this chapter, other than a specific activity the State determines would not be expected to cause physical damage to underground facilities.

Excavator means any person intending to engage in an excavation activity.

One-Call notification system means a communication system that qualifies under this part and the one-call damage prevention program of the State concerned in which an operational center receives notices from excavators of intended excavation activities and transmits the notices to operators of underground pipeline facilities and other underground facilities that participate in the system.

Person means any individual, firm, joint venture, partnership, corporation, association, state , municipality, cooperative association, or joint stock association, and including any trustee, receiver, assignee, or personal representative thereof.

Und ound pipeline facilities means bui pipeline facilities used in the transportation of gas subject to the Natural Gas Pipeline Safety Act of 1968 (49 App. U.S.C. 1671 et seq.) or the transportation of a hazardous liquid subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 App. U.S.C. 2001 et seq.).

Secretary means the Secretary of Transportation or any person to whom the Secretary of Transportation has delegated authority in the matter concerned.

Seeking to adopt means actively and effectively proceeding toward adoption.

State means each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico.

Subpart B - (Reserved)

Subpart C - Adoption of One-call Damage Prevention Program

§ 198.31 Scope

This subpart implements section 20 of the Natural Gas Pipeline Safety Act of 1968 (49 App. U.S.C. 1687), which directs the Secretary to require each State to adopt a one-call damage prevention program as a condition to receiving a full grant-in-aid for its pipeline safety compliance program.

§ 198.33 (Reserved)

§ 198.35 Grants conditioned on adoption of one-call damage prevention program.

In allocating grants to State agencies under section 5 of the Natural Gas Pipeline Safety Act of 1968 (49 App. U.S.C. 1674) and under section 205 of the Hazardous Liquid Pipeline Safety Act of 1979 (49 App. U.S.C. 2004), the Secretary considers whether a State has adopted or is seeking to adopt a one-call damage prevention program in accordance with § 198.37. If a State has not adopted or is not seeking to adopt such program, the State agency may not receive the full reimbursement to which it would otherwise be entitled.

§ 1 37 State one-call damage ti ogram.

A State must adopt a one-call damage prevention program that requires each of the following at a minimum:

(a) Each area of the State that contains underground pipeline facilities must be covered by a one-call notification system.

(b) Each one-call notification system must be operated in accordance with § 198.39.

(c) Excavators must be required to notify the operational center of the one-call notification system that covers the area of each intended excavation activity and provide the following information:

(1) Name of the person notifying the system.

(2) Name, address and telephone number of the excavator.

(3) Specific location, starting date, and description of the intended excavation activity.

However, an excavator must be allowed to begin an excavation activity in an emergency but, in doing so, required to notify the operational center at the earliest practicable moment.

(d) The State must determine whether telephonic and other communications to the operational center of a one-call notification system under paragraph (c) of this section are to be toll free or not.

(e) Except with respect to interstate transmission facilities as defined in section 2 of the Natural Gas Pipeline Safety Act of 1968, 49 App. U.S.C. 1671, and interstate pipelines as defined in § 195.2 of this chapter, operators of underground pipeline facilities must be required to participate in the one-call notification systems that cover the areas of the State in which those pipeline facilities are located.

(f) Operators of underground pipeline facilities participating in the one-call notification systems must be required to respond in the manner prescribed by § 192.614(b)(4) through (b)(6) of this chapter to notices of intended excavation activity received from the operational center of a one-call notification system.

(g) Persons who operate one-call notification systems or operators of underground pipeline facilities participating or required to participate in the one-call notification systems must be required to notify the public and known excavators in the manner prescribed by § 192.614(b)(1) and (b)(2) of this chapter of the availability and use of one-call notification systems to locate underground pipeline facilities. However, this paragraph does not apply to persons (including operator's master meters) whose primary activity does not include the production, transportation or marketing of gas or hazardous liquids.

E&NR
3-5-92

cover

attachment 3
3-1

Operators of underground pipeline facilities (other than operators of state transmission facilities as defined in section 2 of the Natural Gas Pipeline Safety Act of 1968, 49 App. U.S.C. 1671, and interstate pipelines as defined in § 195.2 of this chapter), excavators, and persons who operate one-call notification systems who violate the applicable requirements of this subpart must be subject to civil penalties and injunctive relief that are substantially the same as are provided under sections 11 and 12 of the Natural Gas Pipeline Safety Act of 1968 (49 App. U.S.C. 1679a and 1679b).

§ 198.39 Qualifications for operation of one-call notification system.

A one-call notification system qualifies to operate under this subpart if it complies with the following:

(a) It is operated by one or more of the following:

(1) A person who operates underground pipeline facilities or other underground facilities.

(2) A private contractor.

(3) A State or local government agency.

(4) A person who is otherwise eligible under State law to operate a one-call notification system.

(b) It receives and records information from excavators about intended excavation activities.

(c) It promptly transmits to the appropriate operators of underground pipeline facilities the information received from excavators about intended excavation activities.

(d) It maintains a record of each notice of intent to engage in an excavation activity for the minimum time set by the State or, in the absence of such time, for the time specified in the applicable State statute of limitations of tort actions.

(e) It tells persons giving notice of an intent to engage in an excavation activity the names of participating operators of underground pipeline facilities to whom the notice will be transmitted.