

TESTIMONY OF
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ROCKY MOUNTIAN LOW-LEVEL RADIOACTIVE WASTE BOARD
TO THE
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENERGY AND THE ENVIRONMENT
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING H.R. 515
A BILL TO PROHIBIT IMPORTATION OF CERTAIN
LOW-LEVEL RADIOACTIVE WASTE INTO THE UNITED STATES

OCTOBER 16, 2009

Mr. Chairman and Members of the Subcommittee, I am Leonard Slosky, Executive Director of the Rocky Mountain Low-Level Radioactive Waste Board (“Rocky Mountain Board”). Thank you inviting me to present the views of the Rocky Mountain Board on the importation of low-level radioactive waste (LLW). The Board is responsible for implementing the Rocky Mountain Low-Level Radioactive Waste Compact (“Rocky Mountain Compact”). While I am here today officially representing the Rocky Mountain Board, I have discussed these issues with the Northwest Interstate Compact on Low-Level Radioactive Waste Management (“Northwest Compact”) and they are in agreement with the testimony that I am providing today. Most of the perspectives that I will present are also shared by the other LLW compacts and states in which LLW treatment and disposal facilities are located. The primary message that I would like to leave with you with today is the importance of the compacts’ exclusionary authority – the authority of compacts to control what waste can be brought into and removed from the compact regions.

Background

By way of background, I have been involved in LLW issues since 1979. I was on the staff advisory council of the National Governors’ Association (NGA) Nuclear Power Subcommittee when the NGA recommended the idea of LLW compacts to Congress in 1980. While on the Governor of Colorado’s staff, I chaired the committee of governors’

representative that negotiated the Rocky Mountain Compact in the early 1980s. I became the Executive Director of the Rocky Mountain Board in 1983 when it was first formed. I was closely involved in negotiating the compromise with the states and Congressional staff that led to the Low-Level Radioactive Waste Policy Amendments Act of 1985 (“1985 Act”).

I was a founding officer and I am now Chair-Elect of the Low-Level Radioactive Waste Forum, Inc (“LLW Forum”). The LLW Forum is the national association of states and compacts on LLW. We count among our members all 10 LLW compacts, 11 host and unaffiliated states, 5 federal agencies, and private companies engaged in LLW generation, treatment, and disposal.

History of the Compact System

By 1979, only three non-federal LLW disposal facilities remained in operation in the United States (in Nevada, South Carolina, and Washington). During 1979, the Nevada and Washington facilities temporarily closed due to irregularities in waste shipments received, and the Governor of South Carolina announced that he was reducing by 50 percent the volume of LLW that would be accepted at its facility. The governors of these three states were very clear in refusing to continue to shoulder the entire burden of disposing of the Nation’s LLW.

The states, largely through the NGA, proposed to Congress that they would be willing to accept responsibility for LLW in exchange for the authority to prohibit the importation of waste from outside compact regions. This proposal led to the passage of the Low-Level Radioactive Waste Policy Act of 1980 (“1980 Act”).

By 1985, however, there was an impasse. Seven compacts, including the compacts of the three “sited” states, had been submitted to Congress for consent. The consent of Congress was necessary for the compacts’ authorities concerning interstate commerce to become effective. Congress was justifiably concerned that if it consented to the sited states’ compacts they would exercise their exclusionary authority, thereby depriving the majority of the LLW generators in the nation of a place to dispose of their waste.

The compromise that was struck allowed Congress to consent to the seven then-existing LLW compacts in return for the three “sited” states and compacts agreeing not to restrict access to the operating LLW disposal facilities up to certain limits for a seven year transition period. In exchange for continuing to accept LLW from outside their compact boundaries, the generators in non-sited compacts had to pay “surcharges” to the sited states and meet specific milestones toward the development of new LLW disposal facilities.

This compromise was embodied in 1985 Act (Pub Law 99-240). Title I of Pub Law 99-240 set forth the compromise (in addition to other provisions). Title II of Pub Law 99-240 (the Omnibus Low-level Radioactive Waste Interstate Compact Consent Act) consented to seven compacts (adopting those compacts as federal law), including the

three compacts with operating disposal facilities – the Northwest Compact, the Rocky Mountain Compact, and the Southeast Interstate Low-Level Radioactive Waste Compact (“Southeast Compact”).

Subsequent to 1985, Congress has consented to three additional LLW compacts bringing the total number of LLW compacts to ten. The ten compacts now include 42 states. All compacts approved by Congress are federal law.

As demanded by the governors of the three sited states, one of the primary purposes of the 1980 Act and 1985 Act was to achieve greater equity in the burden of LLW disposal. Besides the milestones and surcharges in the 1985 Act, the ultimate “hammer” is the authority of the compacts to exclude out-of-region LLW from facilities within the compacts.¹

When the compacts were being drafted and during the Congressional consent process, there was no expectation that foreign LLW would be disposed at non-federal LLW facilities in the United States. However, all of the compacts that have received Congressional consent contain exclusionary authority over out-of-region LLW, regardless of the source of that waste. There is no question that foreign LLW is out-of-region waste. It is inconceivable that Congress intended to authorize the compacts to exclude LLW from states outside their compact regions, but not from foreign nations.

While not as many new LLW disposal facilities have been developed as envisioned in 1985, the compact system has facilitated the development of three new commercial facilities – the Clive, Utah facility in the Northwest Compact; the Andrews County, Texas facility in the Texas-Vermont Compact (construction is planned to begin in January 2010; and the Clean Harbors Deer Trail (Colorado) facility in the Rocky Mountain Compact (which receives only certain NORM wastes). Most importantly, the compacts have provided for the disposal of nearly all of the LLW that was designated a state responsibility nearly 25 years ago.

In the early 1990s when the Rocky Mountain Compact facility in Beatty, Nevada was approaching closure and our waste generation rates were very low, the Rocky Mountain Compact entered into a contract with the Northwest Compact and the State of Washington for our generators to dispose of certain quantities of LLW at the Richland, Washington facility.

Authority of the Rocky Mountain Board

The role of the Rocky Mountain Board is primarily to: (1) control the flow of LLW into the compact region; (2) control the flow of LLW out of the compact region; and (3) approve of facilities within the compact region for the disposal of LLW. These three

¹ The 1985 Act contained a so called “take title” provision that required a state which had not provided for disposal of all its LLW by January 1, 1993, upon the request of a generator, to take title to and possession of the generator’s LLW (42 USC 2021e(d)(C)). The “take title” provision was ruled to be unconstitutional by the United States Supreme Court (*New York v. United States*, 505 U.S. 767 (1992)).

functions are authorized by Article VII the compact statute as consented to by congress (99 Stat. 1907-1908):

(a) It shall be unlawful for any person to dispose of low-level waste within the region, except at a regional facility . .

(b) After January 1, 1986, it shall be unlawful for any person to export low-level waste which was generated within the region outside the region unless authorized to do so by the board . . .

(c) After January 1, 1986, it shall be unlawful for any person to manage any low-level waste within the region unless the waste was generated within the region or unless authorized to do so both by the board and by the state in which said management takes place.

The Rocky Mountain Compact statute established procedural requirements and criteria for approval of regional facilities. The Rocky Mountain Compact statute establishes criteria to be used by the Rocky Mountain Board in acting on applications to export and bring LLW into the region under sections (b) and (c), respectively. The Rocky Mountain Compact statute also establishes civil penalties for violations of these provisions. The Rocky Mountain Board has adopted rules that implement these authorities.

The Challenge Posed by Foreign LLW Disposal

The threat of foreign waste disposal places the entire compact system and the existing and planned LLW disposal facilities in peril. Foreign waste disposal is one of the most serious threats to the compacts in their 25-year history.

The Northwest Compact was adopted by the State of Utah and received Congressional consent before the Clive, Utah facility, originally owned and operated by Envirocare, was licensed by the state of Utah to accept LLW. The State of Utah has made clear that it would not have licensed the Clive facility for LLW if it did not believe that it had the ability, through the Northwest Compact, to control out-of-region LLW going to the facility.

The importation of foreign waste became a significant issue following *EnergySolutions'* submission of an import license application (IW023) to the United States Nuclear Regulatory Commission (NRC) requesting authorization to import 20,000 tons of LLW from Italy. *EnergySolutions* estimated that, following processing, approximately 1,600 tons or 80,000 cubic feet of Italian waste would require disposal at their Clive, Utah facility in the Northwest Compact.

Under Article IV, Section 2 of the Northwest Compact, no facility located in any member state may accept any out-of-region LLW without prior approval of an arrangement by the Northwest Compact Committee (the entity that implements the Northwest Compact). The current arrangement (Third Amended Resolution and Order) does not provide access for foreign LLW. Therefore, the Committee would have to adopt a new arrangement prior to foreign waste being provided access to the Northwest Compact region. Under Article V of the Northwest Compact, such an arrangement requires a two-thirds affirmative vote of the Committee members as well as the affirmative vote of the Committee member from the state in which the affected facility is located. Once the Governor of Utah announced that he had directed his representative to vote against such an arrangement, it became clear that the State of Utah had no interest in having foreign waste disposed within the state.

On May 8, 2008, the Northwest Compact Committee adopted a resolution clarifying that the current arrangement only provided that other states and compacts could dispose of waste at the Clive facility and that a new arrangement would be required before *EnergySolutions* could dispose of foreign waste at the Clive facility.

This is not a “Not In My Back Yard” (NIMBY) issue. It is a matter of national importance. As stated by the Chair of the Utah Radiation Control Board on similar legislation last year: The State of Utah has done its fair share and more in disposing of LLW within the state. The Clive facility provides an important national service as it accepts approximately 2.5 million cubic feet of commercial Class A LLW annually. This amounts to approximately 98 percent, by volume, of the “commercial” LLW disposed annually in the United States. By comparison, the Barnwell, South Carolina facility accepts 10,000 to 15,000 cubic feet of LLW per year, and the Richland, Washington facility accepts 25,000 to 30,000 cubic feet of LLW annually. The Clive facility also accepts mixed LLW (that is both hazardous and radioactive) as well as millions of cubic feet of LLW annually and other waste from the United States Department of Energy.

In a March 10, 2008 letter to the Chairman of the NRC, the Utah Radiation Control Board Chair added: “We recognize that there are legitimate reasons why radioactive materials cross international borders. One country may have more skill than another in reducing the volume or contamination level of wastes. In these cases, countries may agree that wastes can be processed by the country with the expertise and returned to the country of origin for disposal. We also recognize that under certain circumstances it may be beneficial for two or more countries to share a waste disposal site where all contribute to the financing and operation of the facility and when it is acceptable to the host community. None of these situations exist for the proposed importation of Italian waste.”

While the State of Utah and the Northwest Compact have been willing to allow the vast majority of the Nation’s LLW to be disposed of at the Clive facility, a broad reaching concern is that as *EnergySolutions* attempts to continue to expand the wastes it receives, public sentiment will grow against Utah becoming a dumping ground for LLW. While the citizens of Utah are now firmly opposed to the acceptance of foreign LLW, this

opposition could expand to threaten the continued operation of the Clive facility all together – to the serious detriment of the entire country.

It is also important to remember that the capacity at the Clive facility is not unlimited. It could be exhausted within 30 years at the current waste disposal rate WITHOUT foreign waste imports. Thirty years is not a long period of time when one considers the difficulty in developing new LLW disposal sites. The United States LLW capacity is an important and limited national resource. The Federal Government needs to conserve the Nation's capability to safely dispose of our own future LLW.

The most important issue to the compacts is to maintain the compacts' authority to control the out-of-region (including foreign) LLW. While the 1985 Act and the compacts are silent on the issue of foreign waste, it is inconceivable that Congress would have authorized the compacts to control out-of-region LLW from within the United States but not the authority to prevent foreign waste from being brought into the compacts.

In addition to the Northwest Compact's and the State of Utah's opposition to the disposal of Italian LLW at the Clive facility, officials of the Atlantic Compact and the State of Washington have stated that efforts to require the Barnwell, South Carolina or Richland, Washington sites to take non-regional waste (including foreign-generated waste), either through change in federal law or litigation, would most likely result in the complete closure of both facilities.

While many aspects of LLW have changed over the last 30 years, one has remained constant – states are unwilling to host LLW disposal facilities unless they have the ability, through compacts, to control the flow of waste to the disposal sites.

Thus, the greatest threats to the LLW disposal system are those that jeopardize the ability of states and compacts to control the wastes to be received by the disposal facilities. The most imminent of these threats is the lawsuit by *EnergySolutions* challenging the exclusionary authority of the Northwest Compact over the Clive, Utah disposal facility.

Status of Italian Waste Import to the NWC

As mentioned above, *EnergySolutions* has applied to the NRC for a license to import certain LLW from shutdown nuclear power plants and other fuel cycle facilities in Italy. On October 6, 2008, NRC issued an order holding in abeyance until further notice further review of *EnergySolutions'* application – as well as requests for a hearing on the application and petitions by the State of Utah and other interested stakeholders to intervene in the proceeding. The Northwest Compact and the State of Utah have requested that the NRC not act on the application until after the *EnergySolutions* lawsuit against the Northwest Compact, et al. is finally adjudicated.

Energy Solutions, LLC v. the Northwest Compact, et al.

Shortly before the May 8, 2008 meeting of the Northwest Compact Committee, *EnergySolutions* filed suit against the Northwest Compact in the United States District Court for the District of Utah claiming, among other things, that the Northwest Compact does not have the authority to control foreign LLW from coming to the Clive, Utah facility in the Northwest Compact. The State of Utah and the Rocky Mountain Compact intervened as defendants. In May 2009, the District Court issued a Memorandum and Order granting, in part, *EnergySolutions* motion for summary judgment. In June 2009, the District Court entered judgment on Count I, ruling that the Northwest Compact does not have the authority to control out-of-region LLW going to the Clive, Utah facility. The District Court completely disregarded explicit language in the Northwest Compact that was approved by Congress as federal law. Instead, the District Court ruled that the only authority over interstate commerce that Congress granted to the Northwest Compact is the authority to control the disposal of out-of-region waste at “regional disposal facilities” which, according to the District Court, the Clive facility is not.

The Northwest Compact, the State of Utah, and the Rocky Mountain Compact all appealed the decision of the District Court to the United States Court of Appeals for the Tenth Circuit (“Tenth Circuit”). The three Appellants filed Opening Briefs in August 2009. *EnergySolutions* filed its Response Brief in September 2009. The three Appellants also filed their Reply Briefs in September 2009. All parties have requested oral argument. At this point, we are waiting for the Tenth Circuit to take action on the requests for oral argument.

Of particular note is that Amicus Curiae Briefs in support of the Appellants’ position were filed in the Tenth Circuit by the Atlantic Interstate Low-Level Radioactive Waste Compact, the Central Interstate Low-Level Radioactive Waste Compact, the Central Midwest Low-Level Radioactive Waste Compact, the Southeast Compact, the Texas Low-Level Radioactive Waste Disposal Compact, the Midwest Interstate Low-Level Radioactive Waste Management Commission, the State of New Mexico, and the Council of State Governments. Thus eight of the ten LLW compacts (representing a total of 34 states) are Defendants or Amici Curiae in this case.

This extraordinary coalition of compacts and states is due to the far-reaching implications of the District Court decision. While the litigation began with the controversy over *EnergySolutions*’ proposal to import the Italian waste, the decision of the District Court is broader than merely a ruling on disposal of foreign waste and it will affect every LLW compact and may affect interstate compacts created for other purposes as well. H.R. 515, if passed, could address some of the questions faced by compacts related to the disposal of foreign waste but the bill, as currently drafted, does not address all the issues raised for compacts by the District Court ruling.

If the District Court’s decision stands, the compact system could well be destroyed because of the District Court’s very narrow interpretation of compact authority. The

following are a few examples of how, if the District Court's decision stands, the compact system would be eviscerated.

- It is very unlikely that any new LLW disposal facilities will be developed, due to uncertainty as to whether the "host" compact will have the authority to control out-of-region waste in order to avoid becoming the dumping ground for the Nation's and the world's LLW.
- A private company could develop a disposal facility on private land in any compact and the compact would be powerless to control out-of-region waste, including foreign waste, from coming to such a facility.

While the State of South Carolina has worked since 1979 to limit the amount of LLW disposed in the state, a privately owned and operated LLW disposal site could be developed in the State and the Atlantic Compact (of which South Carolina is now a member) would be powerless to control out-of-region waste, including foreign waste from coming to such a facility.

- Compacts may no longer be able to control out-of-region LLW (including foreign LLW) other than for disposal at a "regional disposal facility" placing into question the compacts' authority over processing and storage facilities, which could become de facto disposal facilities for out-of-region and foreign waste.
- The authority in any compact to control the *out-flow* of waste including, for example, the authority to prohibit removal of waste from the compact in order to ensure the economic viability of a facility in the compact region would be effectively repealed.

The State of Texas has worked for more than two decades to develop a facility to dispose of LLW within the Texas-Vermont Compact region. In September 2009, Texas issued the final license for a facility that will accept Class A, B, and C LLW. If the Texas Compact is unable to control the removal of waste from the region, the Clive facility could simply set its disposal rates below those of the Texas facility, thereby enticing generators located in the Texas-Vermont Compact region to instead dispose of their Class A waste at Clive. As a result, the Texas facility could become economically unviable (as the majority of waste is Class A), and Texas and Vermont would have no place to dispose of their more-radioactive Class B and C LLW.

These issues are more fully explained in the Appellants' and Amici Curiae Briefs that have been filed in the Tenth Circuit.

Comments on H.R. 515

While the Rocky Mountain Board has not taken a position on the proposed legislation we would like to offer several observations relative to H. R. 515.

1. H.R. 515 should not preempt the authority contained within LLW compacts. Whether or not Congress requires the NRC to ban or allow the import of foreign LLW, any legislation it adopts should reaffirm that the authority within federally-approved compacts to exclude out-of-region waste will remain intact. To that end, we would propose the addition of a savings clause as follows:

Nothing herein shall be interpreted to abrogate, impair, or preempt the authority in any Congressionally-approved LLW compact over the flow of LLW into or out of a compact region.

2. The current federal system for approving LLW import applications is lacking a policy component. The NRC has indicated that it does not have authority to make policy decisions about importing radioactive waste. NRC is limited to conducting a technical evaluation of whether: (1) the proposed import is inimical to the common defense and security; (2) will constitute an unreasonable risk to public health and safety; and (3) an appropriate facility has agreed to accept the waste (10 CFR Part 110.43). Thus, the current system does not address the question of whether it is in the best interest of the United States and the states to dispose of LLW from other nations.

3. The Subcommittee should be aware that even if H.R. 515, as presently drafted, were to become law, it would not resolve the compacts' and states' issues in the *EnergySolutions* lawsuit against the Northwest Compact, et al. As discussed above, if the District Court's decision stands, many authorities within individual compacts that have been approved by Congress would be voided in addition to the authority to restrict the disposal of foreign LLW.

4. Most LLW compacts and states do not have a problem with foreign LLW being imported for treatment or recycling, so long as several conditions are met: (1) there is a viable pathway for disposal; (2) wastes from the treatment or recycling of the foreign LLW not be attributed as domestic waste; and (3) if their exclusionary authority remains intact.

5. Historically, foreign LLW has been imported into this country for processing. Any wastes remaining contaminated following processing were to be shipped back to the country of origin. However, in at least one case, foreign LLW was disposed at the Clive, Utah facility without the knowledge of the State of Utah or the Northwest Compact. Under NRC-approved Import License IW017, LLW from Monserco Limited in Ontario, Canada was processed at the Duratek facility in Tennessee (now owned by *EnergySolutions* and known as the Bear Creek facility). The ash resulting from the incineration of the Canadian waste was attributed to Duratek and shipped to the Clive facility as Tennessee waste. In considering the import license application, the NRC

sought comments only from the State of Tennessee and the Southeast Compact. The NRC did not provide the State of Utah or the Northwest Compact with the opportunity to comment on the import license application even though the Canadian waste was ultimately disposed in the State of Utah. It is totally unacceptable to the host states and compacts for foreign LLW to be disposed as domestic waste.

The NRC has a rulemaking underway to revise the waste import regulation (10 CFR Part 110). It appears that NRC is proposing to increase consultation with the host states and compacts. However, consultation is not enough. If LLW is to be imported into the United States for treatment/recycling or disposal, approval for import should not be granted unless all the compacts and states in which the treatment/recycling and disposal would occur, formally approve of the foreign LLW being treated/recycled and/or disposed with the compact/state.

6. The Subcommittee should consider expanding the definition of LLW in H. R. 515 to include Naturally Occurring Radioactive Material (NORM).

Thank you for the opportunity to present this testimony. I will be happy to respond to questions.

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