LOW-LEVEL WASTE LITIGATION: CURRENT STATUS AND FUTURE DEVELOPMENTS

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ABSTRACT

This paper discusses: (1) the current status of several recent cases related to the Low-Level Radioactive Waste Policy Amendments Act of 1985 and the regional interstate low-level radioactive waste compacts; and (2) the implications of this and possible future litigation for waste generators. Although predicting the results of litigation is an uncertain exercise, recent court decisions upholding the constitutionality of the federal low-level waste legislation suggest that it will remain viable. Moreover, the courts continue to interpret and define the scope and meaning of the 1985 Act. Future litigation appears certain and will increasingly affect the rights and responsibilities of waste generators.

INTRODUCTION

Over the last year, a number of lawsuits have been initiated involving implementation of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§2021b-2021j (1988) (LLRWPAA) and the interstate regional compacts. The results of this litigation will have a significant effect on implementation of the laws governing low-level radioactive waste (LLW) disposal, and on the success of the national policy established by the LLRWPAA. These cases provide the first opportunity for judicial interpretation of the federal LLW legislation. Their outcome will influence not only the area of LLW disposal, but also the continuing debate regarding the respective powers of federal and state government over the regulation of nuclear power and the use of radioactive materials. This paper discusses: (1) the history and current status of several key cases and decisions; and (2) the implications of this and possible future litigation for waste generators.

THE NEBRASKA LITIGATION: CONCERNED CITIZENS OF NEBRASKA v. NRC

On February 21, 1990, an organization calling itself "Concerned Citizens of Nebraska" or (CCN) and several individual plaintiffs filed an eleven count complaint in federal district court in Nebraska challenging the constitutionality of the LLRWPAA; the Central Interstate Low-Level Radioactive Waste Compact; and various other state regulations and federal statutes[1]. Among its more important allegations, the complaint argued that the LLRWPAA interfered with the sovereign rights of the State of Nebraska by forcing it to take title to and accept liability for LLW[2] in violation of the tenth amendment to the U.S. Constitution.

Plaintiffs also argued that Nebraska statutory provisions and administrative regulations were inconsistent with the language of the LLRWPAA and therefore violated the supremacy clause. Specifically, plaintiffs contended that the LLRWPAA defined "disposal" as the "permanent isolation" of LLW, while the Nebraska statutes and regulations specified that the Nebraska disposal facility "should attempt to achieve a so-called 'zero release objective'". Because plaintiffs believed that the "permanent isolation" standard of federal law prohibited any non-natural release of radioactivity from the Nebraska disposal facility, it argued that setting a "goal" or "objective" of no releases was inconsistent with federal law and, therefore, violated the supremacy clause.[3]

In addition, plaintiffs argued that the failure of the Compact members' state legislatures to formally re-ratify the Compact after Congress granted its conditional consent violated both the compact clause and the guaranty clause of the U.S. Constitution, and thus voided the Compact[4]. Consequently, plaintiffs sought a declaratory judgment that the federal and state statutes and state regulations were unconstitutional, and requested injunctive relief prohibiting the placement of radioactive waste in the planned Central Compact disposal site.

In response, defendants U.S. Ecology and the Central Compact Commission filed motions to dismiss plaintiffs' complaint. They argued, among other things, that Nebraska's sovereignty had not been violated, that the Nebraska "zero-release" requirements were consistent with the

1 Complaint for Declaratory Judgment and Injunctive Relief, Concerned Citizens of Nebraska v. NRC, (D. Neb. 1990) (CV90- L-70).

2 Id. at 22-23. The "take title" provision, among other things, requires that a state which is unable to provide disposal capacity for all LLW generated within that state by January 1, 1996, must, upon request of the generator or owner of the waste, take title to and possession of such LLW and be liable for all damages directly or indirectly incurred by the generator as a consequence of the state's failure to take possession of the waste after the January 1, 1996 deadline. 42 U.S.C. § 2021e(d)(2)(C).

3 Complaint at 24-27, 32-35. The "zero-release objective" is defined under the Nebraska Administrative Code as "a goal of preventing the release of any radioactive material into the environment." Title 194, Neb. Admin. Code Ch. 1, § .041.

4 Id. at 35-36.

LLRWPAA, and that plaintiffs' re-ratification arguments constituted "political questions" reserved to the judgment of the executive and legislative branches of government[5]. On October 18, 1990, the district court granted the motions to dismiss in full, holding that every count in plaintiffs' complaint failed to state a claim upon which relief could be granted.[6]

In response to plaintiffs' claim that the "take title" provision of the LLRWPAA interfered with the sovereign rights of the State of Nebraska, the court found that: (1) under Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), a state (and not a private body like CCN) must challenge a statute that allegedly violates a state's rights; (2) Nebraska requested congressional consent to the Central Compact and freely chose to enter into it; and (3) the complaint failed to demonstrate that Nebraska or its citizens were denied an opportunity to participate in the "national political process" that produced the LLRWPAA.[7]

The Garcia case had overturned the substantive test previously established in National League of Cities v. Usery, 426 U.S. 833 (1976), which essentially held that the tenth amendment protected the states' freedom to structure integral operations in areas of traditional governmental functions. In other words, the federal government could not intrude on the traditional governmental functions of the states. In Garcia, the Supreme Court established a "procedural" test in lieu of the National League of Cities substantive standard. "State sovereign interests" the Court held, "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[8] Consequently, the Nebraska court ruled that the LLRWPAA did not violate the tenth amendment.

Additionally, the court rejected plaintiffs' argument that the "zero release" objective was inconsistent with the LLRWPAA and, therefore, violative of the supremacy clause of the U.S. Constitution. The court stated that "Congress [and] the State of Nebraska . . . have never required" a "no release" standard.[9]

Finally, the district court rejected plaintiffs' allegation that the states must formally re-ratify a compact after congressional approval. The court first dismissed plaintiffs' guaranty clause claim, holding that under Baker v. Carr, 369 U.S. 186 (1962), plaintiffs' challenge presented a "political question" beyond the scope of the court's review. The court also found no authority which supported plaintiffs' claim that a compact must be re-ratified by the member states after Congress consents to the compact with conditions. Accordingly, the court ordered that the motions to dismiss filed by U.S. Ecology and the Central Compact Commission be granted on all grounds.[10]

THE NEW YORK LITIGATION: NEW YORK v. UNITED STATES

On February 12, 1990, the State of New York, joined by Allegany and Cortland counties, filed a complaint against various federal agencies challenging the constitutionality of the LLRWPAA. The plaintiffs first alleged that the LLRWPAA violated the guaranty clause by depriving the citizens of New York of a republican form of government. Second, the complaint stated that the LLRWPAA constituted an "unprecedented infringement" on New York's sovereignty (guaranteed by the tenth amendment) by requiring it to take title to and liability for privately generated LLW if it had not developed a disposal site by 1996. Plaintiffs contended that extraordinary defects in the national political process rendered the LLRWPAA invalid, because New York was deprived of its right to effectively participate in that process. New York also alleged that the "take title" provision "constitute[d] a coerced waiver of sovereign immunity and Eleventh Amendment immunity" by allowing findings of liability against New York, "with no such express waiver or uncoerced consent having been given by New York."[11] Finally, New York challenged the "severability" of the LLRWPAA. Since there was no severability clause in

5 E.g., Defendant U.S. Ecology, Inc.'s Brief in Support of Motion to Dismiss, Concerned Citizens of Nebraska v. NRC, (D. Neb. filed April 13, 1990) (CV90-L-70).

6 Concerned Citizens of Nebraska v. NRC, CV90-L-70, slip op. at 1-3, 21 (D. Neb. Oct. 19, 1990).

7 Id. at 8-9.

8 Garcia, 469 U.S. at 552.

9 Concerned Citizens, CV90-L-70, slip op. at 14-15.

10 Id. at 5-6, 21. A motion for judgment on the pleadings filed by the NRC is presently pending with the court. Essentially, NRC argues that the court lacks jurisdiction over plaintiffs' challenges to NRC regulations since the plaintiffs did not exhaust their administrative remedies with the NRC and then, if unsuccessful, bring an action in the court of appeals. See Defendant NRC's Memorandum in Support of Motion for Judgment on the Pleadings, Concerned Citizens of Nebraska v. NRC, (D. Neb. 1990) (CV-90-L-70).

11 Since New York had not joined a compact, it argued it had not "waived" sovereign immunity by implicitly accepting any congressional conditions on consent to a compact.

the statute[12], New York argued that the invalidation of any part of the LLRWPAA invalidated the entire Act. Consequently, New York requested that the entire LLRWPAA be declared unconstitutional.[13]

Subsequent to plaintiffs' complaint, several motions and cross-motions were filed. In defendants' motions, they argued that the LLRWPAA violated neither the tenth amendment nor any other constitutional principles, and made many of the same points raised in opposition to the complaint in the Nebraska case.

On December 7, 1990, the district court dismissed the plaintiffs' complaint in its entirety from the bench. The court's decision primarily focused on plaintiffs' tenth amendment claims. Consistent with defendants' arguments, the court held that, under the Garcia decision, judicial review was limited to a consideration of whether there was a failure of the "national political process". Specifically, the court ruled that where there was a validly enacted mandate of Congress that respected the constitutionally granted equality of each of the states, "[a]ny review of the substantive merits of such an action" would require a prohibited "judicially-determined definition of the contours of state sovereignty." There was no inequitable treatment of states as a result of the LLRWPAA. Thus, for the court to hold that a mandate to states to take responsibility for disposal of LLW was unconstitutional, would be to establish "a sacred province of state autonomy" -- a result forbidden by Garcia and subsequent judicial decisions. [14]

The court also indicated that a validly enacted congressional mandate (such as the LLRWPAA) would not foreclose New York from continuing to use the political process to obtain a remedy. It held that New York had not exhausted the national political process in search of a remedy, and that the case did not present "the type of political breakdown or . . . extraordinary situation . . . requiring judicial intervention." [15]

THE MICHIGAN LITIGATION: MICHIGAN v. NRC

A third suit filed by the State of Michigan and various Michigan state agencies, against the NRC, Department of Energy and Department of Transportation raises similar issues as the Nebraska and New York litigation as well as several additional issues. Like the Nebraska and New York cases, Michigan's complaint alleges that the LLRWPAA's mandatory "take title" provision violates the state sovereignty of Michigan under the tenth amendment. Michigan further argues that the LLRWPAA is invalid because it denies the State a republican form of government in violation of the guaranty clause. The complaint alleges that the LLRWPAA illegally makes Michigan accountable only to the federal government and not to the citizens of Michigan.[16]

Separate from the constitutional challenges, Michigan also seeks an order compelling the NRC to prepare two Environmental Impact Statements (EIS) pursuant to the National Environmental Policy Act. First, Michigan argues that the NRC must supplement its 1982 EIS on 10 CFR Part 61 because of significant new circumstances and information relevant to environmental concerns bearing on NRC's Part 61 regulations[17]. Second, Michigan asserts that the NRC must prepare an additional programmatic EIS analyzing the cumulative environmental impacts of the proposed LLW facilities. Michigan seeks a declaratory judgment ruling that the LLRWPAA is unconstitutional and ordering the NRC to prepare the two EISs[18]. At present, defendants' September 10, 1990 motion to dismiss is still pending before the district court.

LESSONS FROM THE NEBRASKA, NEW YORK AND MICHIGAN LITIGATION

While the district courts in the Nebraska and New York cases have rendered their decisions, appeals are possible and probably should be anticipated. Although results of litigation can never be predicted with certainty, there is cause for optimism that the "take title" provision of the LLRWPAA will not be overturned by the courts. The cur-

12 A severability clause typically states that in the event any particular provision of a statute is held invalid, the remainder of the statute will not be affected.

13 Complaint, New York v. United States, (N.D.N.Y. Feb. 12, 1990) (90-CV-162).

14 New York v. United States, 90-CV-162, Transcript at 6-7, 10 (N.D.N.Y. Dec. 7, 1990).

15 Id. at 9-10. The court only briefly addressed New York's guaranty clause argument stating that such claims were "inextricably intertwined" with New York's tenth amendment arguments, Id. at 10. Moreover, the court was not required to address whether the "take title" provision was severable from the remainder of the LLRWPAA.

16 Complaint, Michigan v. United States, (W.D. Mich. April 18, 1990) (No. 5:90-CV-27).

17 Michigan argues that the proliferation of LLW disposal facilities resulting from the LLRWPAA and the reduced volumes of LLW now generated have made the original 1982 EIS obsolete.

18 Complaint at 41-49, 50-55, Michigan v. United States, (No. 5:90-CV-27).

rent legal standard focuses on whether there has been an extraordinary defect in the national political process that significantly impedes a state's ability to participate in that process. The process underlying adoption of the LLRWPAA involved extensive state participation and unanimous state approval of the final legislation. New York itself actively participated in that process and its representatives strongly supported the Act. Under the facts, the "take title" provision should survive judicial scrutiny.

That is, of course, very good news for LLW generators. Should states not make adequate progress in developing new disposal facilities, generators will have available to them a remedy which has been tested and upheld by the courts. Furthermore, under the applicable law of federal preemption, it does not appear that states may legitimately take actions which impede implementation of the take title provision. State actions are preempted by federal law under the supremacy clause when, among other things, the state law conflicts with federal law or stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress[19]. Efforts to impede implementation of the "take title" provision would conflict with the LLRWPAA.

Moreover, judicial acceptance of the "take title" provision also places added pressure on unsited states and regions to develop disposal facilities by 1996, or be forced to take title to, possession of, and liability for such wastes. This pressure is compounded by the fact that the scope of possible state liability is broadly defined. Under the LLRWPAA, states unable to provide for waste disposal by January 1, 1996, will be liable for all consequential damages directly or indirectly incurred by such generators (including, potentially, punitive damages) should such a state fail to take possession of the waste.[20]

Another very helpful precedent is the Nebraska court's reaffirmation that states that have not formally re-ratified compacts after congressional consent must still adhere to the conditions imposed by Congress. While prior caselaw clearly held that no such formal re-ratification was necessary, the Nebraska decision affirms this principle in the specific context of the LLRWPAA. The decision therefore establishes that the compacts remain subject to the congressionally imposed conditions (including the condition that actions taken under the compacts must be consistent with the LLRWPAA). This condition clarifies that while the compact regions may take actions to implement the provisions of the compacts, no such action may be taken in a manner inconsistent with the LLRWPAA. Thus, for example, compacts may not levy fees or surcharges or deny access on terms that would be inconsistent with the LLRWPAA.

No decision on the "severability" of the LLRWPAA was made in the New York litigation. This is likely to resurface as an issue as other challenges to the Act arise. There has been, as yet, no judicial interpretation on this point. However, there is a strong case to be made that the Act is indeed severable, and that should any particular provision be found unconstitutional in the future, the balance of the legislation would remain operative.

THE MICHIGAN GENERATORS' LITIGATION: MICHRAD v. GRIEPENTROG

In the summer of 1990, the sited states informed the State of Michigan that its "failure to maintain the 1988 milestone siting plan time schedule" and the Michigan legislatures' strict siting requirements made "a prima facie case that Michigan will not honor its host state commitment." Unless Michigan enacted a revised siting criteria bill or provided evidence of good faith actions to site a disposal facility within the state, the sited states threatened they would, "in fulfillment of our duties under Section 5(e)(1)" of the LLRWPAA, deny disposal access to Michigan.[21] The sited states carried out their threat on November 10, 1990, denying disposal access to any waste generated in Michigan.

Responding to this denial, an association of Michigan LLW generators, the Michigan Coalition of Radioactive Materials Users, Inc. (MICHRAD) filed suit against the States of South Carolina, Washington and Nebraska. Plaintiffs sought, among other things, a declaratory judgment that the three sited states be required to accept Michigan's waste, and a permanent injunction prohibiting the sited states from denying access prior to January 1, 1993.[22]

MICHRAD alleged that: (1) absent a failure by Michigan or the Midwest Compact to comply with the LLRWPAA milestones, the sited states are legally bound to permit Michigan waste generators access to the regional facilities until December 31, 1992; (2) the sited states discriminatorily denied access only for waste generated in Michigan; (3) the denial of access to MICHRAD interferes with interstate commerce; (4) the denial of access violates

19 See e.g., English v. General Elec. Co., 58 U.S.L.W. 4679, 4681 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 247 (1984).

20 See 42 U.S.C. § 2021e(d)(2)(C); 131 Cong. Rec. S18,113 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston).

21 See Letter from Jerry Griepentrog, Director of Nevada Department of Human Resources, to State of Michigan Governor James J. Blanchard (June 28, 1990).

22 Complaint for Declaratory Judgment and Permanent Injunction, Michigan Coalition of Radioactive Material Users, Inc. v. Greipentrog, (W.D. Mich. filed Nov. 12, 1990) (5-90-CV-94).

the appointments clause of the U.S. Constitution; and (5) the sited states lack any legal or factual basis for their denial of access based on their allegation that there is a "prima facie case that Michigan will not honor its host state commitment."[23] In response, the sited states have filed a motion to dismiss which is pending with the court.

The sited states' decision to deny access to Michigan generators hinges on their assertion that the LLRWPAA authorizes such action if it appears that an unsited state or compact will not meet one of the milestones. It does not appear that the sited states have this much discretion. The LLRWPAA merely states that access may be denied if a compact region or state fails to comply with the milestones. No mention is made as to whether a sited state may deny access if it decides that a state or compact will not meet the next milestone. Thus, although no court has interpreted this aspect of the LLRWPAA, it appears that MICHRAD can make a reasonable argument that the sited states' denial of access to the regional disposal facility is in contravention of the LLRWPAA. If MICHRAD is successful in its suit, generators should be guaranteed access to the three regional disposal facilities until December 31, 1992.

If MICHRAD's suit is unsuccessful and the sited states are able to deny access, the implications for private waste generators could be significant. First, a decision in favor of the sited states would give them greater discretion and control over what waste they allow to be disposed of at their facilities. That discretion could possibly lead to premature denial of access to generators in "compliant" states prior to 1993. Moreover, the sited states could discriminate among states in a given region if they determined that a state was now out of compliance with the milestones.

AREAS RIPE FOR FUTURE LITIGATION

Future litigation over the LLRWPAA and the compacts should be anticipated. Areas of potential dispute include generator liability for fees or surcharges imposed by states, compacts or disposal facility operators and state responsibility for mixed waste disposal.

Under the LLRWPAA, South Carolina, Washington and Nevada may impose surcharges on generators for LLW disposed of prior to 1993. Similarly, nothing in the LLRWPAA prohibits the sited states or compacts from assessing other "generally applicable" fees and surcharges (i.e. fees imposed on the disposal of LLW prior to 1993 to cover the disposal costs of the compact or state), provided such fees are not imposed discriminatorily. After 1993, however, sited states may be able to discriminate against out-of-state or region LLW pursuant to applicable compact provisions. Since the regional compacts were approved by Congress, Congress thereby implicitly endorsed limitations on interstate commerce set forth in the compacts. Thus, the imposition of discriminatory fees or charges on out-of-state waste may not be an unconstitutional barrier to interstate commerce. As new disposal facilities become operational, and as more states are denied access to the existing sites, questions regarding the imposition of fees and surcharges will likely become much more important.

The disposal of mixed waste (and the potential for states to be required to "take title" to such waste) may also prompt litigation between generators and states in the future. Mixed waste is currently subject to full dual regulation by the Environmental Protection Agency (EPA) under the Resource Conservation and Recovery Act (RCRA) and by the NRC under the Atomic Energy Act. Pursuant to current regulations, persons who handle mixed waste may become owners or operators of mixed waste storage, treatment or disposal facilities, and therefore become subject to extensive RCRA requirements, including the filing of complex and costly permit applications and compliance with extensive RCRA technical requirements. Since mixed waste is considered LLW under the LLRWPAA, states may be compelled to take title to and possession of such mixed waste by 1996, and with it accept the related regulatory consequences and costs. Further-more, most states will not have disposal facilities to adequately handle mixed waste by 1996. Consequently, states may attempt to refuse to accept mixed waste, and may resort to litigation.

CONCLUSION

The present spate of LLW litigation is not yet finally resolved. Appeals of existing judicial decisions can be expected and new issues are likely to arise as the final LLRWPAA milestones approach. Over the next several years, the rights and responsibilities of LLW generators will increasingly be decided by the judicial system. Moreover, given the fact that the federal LLW legislation has not been previously interpreted by the courts, court decisions in specific cases brought by individual parties may have very significant ramifications for other generators that have not participated in the litigation.

23 Id.