TEXAS GOES IT ALONE:

POLITICAL AND LEGAL CONSIDERATIONS

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ABSTRACT

In 1979, because of emerging problems at the three national low-level radioactive waste (LLW) disposal sites and the mounting public outcry in Texas against in-state storage of LLW, the state found itself facing a rapidly developing crisis in the management and disposal of LLW. Initial attempts by the Texas Legislature to address the crisis failed. Passage by the United States Congress of the Low-Level Radioactive Waste Policy Act of 1980 (LLPA) increased the pressure for remedial legislation on behalf of the state. The sentiment in Texas during the 1979-1981 period was that Texas should handle its own LLW outside the mechanism of a compact. State leaders felt that the January 1, 1986 exclusionary date of the LLPA could more likely be met if Texas instituted its own LLW disposal program. The Legislature in 1981 passed two bills: one established a licensing and registration program for radioactive waste processing and storage facilities in the Texas Department of Health (TDH), and the other created the Texas Low-Level Radioactive Waste Disposal Authority (the Authority) to site, construct, and operate a LLW facility for Texas waste only.

The cornerstone of the Authority's statute is the provision that excludes out-of-state waste from a Texas disposal facility. Considerable debate has centered on the legality of that provision in light of the language of the LLPA and the possible applicability of the Preemption and Commerce Clauses of the United States Constitution. Concepts of state sovereignty embodied in several United States Supreme Court decisions provide the basis for the Texas statute and the Authority's continuing LLW program. Recent proposed changes to the LLPA have acknowledged the role of single states in the implementation of a national LLW program.

POLITICAL AND LEGISLATIVE CONSIDERATIONS

Texas as an Agreement State

The Atomic Energy Act of 1954 (AEA) was amended in 1959 to authorize, for the first time, a state role in the regulation of certain types of radioactive materials. Section 274 authorizes the U.S. Nuclear Regulatory Commission (NRC) to enter into agreements with states providing for states to assume regulatory authority with respect to by-produce materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. Pursuant to this authority, the State of Texas and the Atomic Energy Commission (AEC) in March of 1963 negotiated an agreement to establish a state regulatory program under the direction of the TDH.

In order to effectuate the delegation of these responsibilities to the TDH, the 57th Texas Legislature adopted a statute designating the TDH as the state radiation control agency and establishing a system of licensing of sources of radiation in the state. At the time of adoption of the AEC-Texas agreement and passage of the statute, there was no specific statutory authorization for LLW programs.

Impact of the Uranium Mill Tailings Control Act of 1978

The Uranium Mill Tailings Radiation Control Act of 1978 (UMTA) established a national mill tailings remedial action program. UMTA amended the definition of by-product material in the AEA to include mill tailings, and authorized states to assume regulatory authority over mill tailings by (1) allowing states to accept title to sites where the by-product materials were deposited; (2) authorizing states to require and accept adequate financial security from licensees to ensure that sites are properly decontaminated and decommissioned prior to to termination of the license; and (3) authorizing states to require, collect, and expend funds from licensees to finance long-term maintenance and monitoring of sites for as long as radiation levels pose a potential public health threat. States were given three years to secure the necessary authorizations for assumption of the mill tailings program. Thus, UMTA clearly required new legislation if Texas was going to secure Agreement State status with regard to the mill tailings remedial program. Other events were also taking place which compounded the need for prompt Texas action.

National Crisis in Low-Level Radioactive Waste Disposal

The first commercial LLW disposal site was opened at Beatty, Nevada in 1962. By the early 1970s, five additional commercial sites were in operation at Maxey Flats, Kentucky; Sheffield, Illinois; Hanford, Washington; West Valley, New York; and Barnwell, South Carolina. Problems dogged some of the early sites. At West Valley, seepage of radioactive elements from disposal trenches was detected, and the site was closed in 1972; at Maxey Flats, elevated radioactivity levels were detected outside the site boundary, and the site was closed in 1977; and at Sheffield, the licensed trench space was exhausted, and the site closed in 1979.

Thus, by mid-1979, only the Beatty, Hanford, and Barnwell sites were still operational. In July 1979, the Beatty site was temporarily closed because of improper packaging of a load of waste which resulted in leakage. In October 1979, the governor of Washington ordered the closing of the Hanford site because of observed leakage from poorly packaged waste containers and the poor condition of trucks transporting waste containers to the site. The Barnwell site remained open, but the governor of South Carolina announced

that the volume of waste which would be accepted at the site would be reduced by 50 percent.

Although Beatty and Hanford have subsequently reopened, it has become increasingly clear that the sited states are extremely nervous about the continued operation of disposal sites in their respective states. These operational concerns, plus the rapidly increasing volume of LLW being generated, signaled the start of a potential crisis in LLW disposal. Texas hospitals and universities, which have extensive nuclear medicine and research programs, are especially vulnerable to any restrictions on disposal capacity.

Proposed Legislation in the 66th Legislature

In the 1979 session of the Texas Legislature, legislation was introduced ostensibly to meet the mandates of UMTA. The legislation, while supported by the TDH, was drafted by lobbyists from Chem-Nuclear Systems, Inc., the company which operates the Barnwell disposal facility. Chem-Nuclear considered Texas as a prime site for another LLW facility to meet the country's growing need for additional capacity.

As drafted, the bills were much broader in scope than required to meet the provisions of UMTA: they allowed the TDH to take title for the state to any sites used for the storage or disposal of radioactive materials. The bills' sponsors testified that the proposed legislation was intended to regulate mill tailings and low-level waste disposal.

Initial legislative reaction to the bills was favorable; however, several questions arose that could not be answered satisfactorily. What did the term "radioactive materials" mean? Why was not coverage of the bill limited to mill tailings to conform to UMTA? Why did the Legislature have to pass a bill this session when the UMTA gives the states three years in which to comply? How much would the bill cost the state? Bill sponsors could not satisfactorily address these questions, support for the bills subsequently waned, and they were finally defeated.

The issue of what to do with mill tailings and LLW was down, but not out. Subsequent events further exacerbated the problem, so that action by the 1981 Legislature was all but assured.

Further Developments, 1979-1981

Until 1979, Todd Shipyards' Pelican Island facility at Galveston was the state's largest nuclear waste terminal. Wastes were sent to the facility, processed, and then shipped to licensed out-of-state disposal sites. Operating under a TDH permit, the company received both solid and liquid wastes, 80 percent of which came from out of state. In November 1979, public officials became alarmed at the growing inventory of waste at the site and the facility's vulnerability to hurricanes and flooding. TDH's monitoring of the facility was criticized as being too lax. In January 1980, the Governor and a state Senator called for closing of the site. The TDH placed new restrictions on Todd and ordered the company to reduce the number of barrels containing radioactive waste to 2,000 or less by October 15, 1980. In February 1980, several Todd workers were accidently contaminated with radioactive material. Todd failed to meet the October 15 deadline and, subsequently, the Texas Attorney General filed suit against the company. The company agreed under the lawsuit to eliminate all radioactive waste drums on site, and this was accomplished. At the present, the company is proceeding with site decontamination and expects to cease all operations shortly.

In late 1978, Nuclear Sources and Services, Inc., (NSSI) had obtained approval from the TDH to construct a radioactive materials processing facility adjacent to the Gulf Palms subdivision in Houston. The proposal elicited a storm of protest from public officials and nearby residents, who charged that the facility's location in a flood-prone area would present an unacceptable danger. The TDH in 1979 ordered construction halted temporarily. Opposition became strident, and several cases of suspected arson and sabotage of company vehicles were reported. Finally, the company bowed to public pressure and announced that the project had been abandoned.

NSSI announced in April 1979 that it had purchased land in Leon County, located off IH-45 about halfway between Dallas and Houston, for establishment of a storage facility for Texas LLW. The facility would partially fill the void left by the pending demise of Todd Shipyards and relieve pressure on an existing NSSI storage facility located in Harris County. Local opposition was fierce and unrestrained. Several residents threatened company officials with violence if the site ever opened. Despite the opposition, NSSI filed with the TDH an application to operate the facility. The application is still pending.

Following the close of the 1979 Legislature, Governor Clements and Lieutenant Governor Hobby appointed an Advisory Committee on Nuclear Energy which would work under the auspices of the Texas Energy and Natural Resources Advisory Council (TENRAC). Following several months of deliberation, the committee suggested that the following policies should govern the formulation of a LLW program for Texas:

(1) The people of Texas should be responsible for the disposal of LLW which is generated for the benefit of Texans, and the citizens of other states should bear similar responsibility.

(2) Technology is currently available for the proper disposal of LLW.

(3) While waste disposal costs at a new site may be higher than at some existing sites, the increased reliability of a Texas site will compensate to some extent for the potentially higher disposal costs.

(4) The loss of benefits of nuclear science cannot be tolerated if they result from the unavailability of LLW disposal facilities.

The committee recommended the following:

(1) A LLW disposal site should be established for Texas-generated LLW only. Provisions should be made for accepting LLW from other states only if the Legislature approves, on a state-by-state basis, mutually beneficial agreements.

(2) The LLW disposal site should be located on state-owned land to comply with federal laws and draft federal regulations (i.e., what is now 10 C.F.R. §61, "Licensing Requirements for Land Disposal of Radioactive Waste").

(3) The LLW site should be operated and maintained by an authority of the State of Texas.

(4) The LLW site should be self-supported by disposal fees which will recover operating costs and

pre-operating costs, contribute to an extended care fund, and assist local governments in the mitigation of socioeconomic impacts resulting from site operation.

(5) Waste deposited at the LLW site should be limited to carbon-14 or material with a half-life of 100 years or less, including waste from nuclear power plants but excluding irradiated nuclear reactor fuel and high-level waste as defined by federal law and regulations.

(6) LLW should be transported in accordance with existing regulations. In addition, the enforcement of LLW transportation regulations should be strengthened, and the TDH should draw up contingency plans in the event of transportation accidents.

(7) A schedule of surcharges should be established by the disposal authority for assessment when improperly packaged or processed wastes are shipped to the site, and violations of applicable regulations should be reported to the appropriate agencies.

(8) The state authority responsible for managing the proposed disposal site must remain abreast of improvements in LLW technology and implement those developments as appropriate.

Concurrent with the work of the Advisory Committee on Nuclear Energy, the House Committee on Environmental Affairs, through its Subcommittee on Low-Level Nuclear Waste Disposal, was conducting hearings on LLW issues. Representatives of the TDH, Texas A&M University, the University of Texas, Texas Medical Association, St. Luke's Hospital, and others testified that LLW disposal should be addressed quickly if research and nuclear medicine programs were to continue at current levels. Several persons expressed the belief that in a state like Texas, with its diverse geology, a disposal site could be found with relative ease.

The House Committee's final report endorsed the findings and recommendations of the Advisory Committee on Nuclear Energy and in addition recommended the following:

(1) The TDH should be the licensing and regulating agency for LLW disposal.

(2) Interim storage facilities should be expanded until a final disposal site is established.

(3) Review authority of disposal sites should be available to local governments prior to submission of license applications to the TDH. Citizen review and participation must be encouraged.

(4) Adequate appropriations must be given to the TDH for additional inspection and enforcement personnel.

(5) The TDH should continue to work with the NRC to develop a more appropriate definition of LLW.

(6) An advisory panel should be formed to deal with issues of LLW disposal.

(7) Texas should work closely with regional and national groups which are formulating plans for LLW disposal.

A third committee, the Senate Natural Resources Committee, conducted public hearings on LLW during November 1979 and February 1980. The committee commented favorably on the previous committees' recommendations and suggested several "legislative alternatives":

(1) One way to solve the problem of LLW disposal is to stop producing it. Research facilities and industrial concerns should seek alternatives to the use of radioactive materials whenever possible.

(2) Emphasis should be placed on a LLW disposal site's susceptibility to catastrophic natural phenomena and proximity to urban areas.

(3) Out-of-state shippers of LLW should be encouraged to send their LLW to other states. The TDH should be authorized to refuse to accept out-of-state waste.

(4) The TDH should request appropriate federal agencies to expedite development of environmental radiation protection standards in cooperation with state agencies.

On the federal level, Congress, faced with the escalating national crisis of LLW disposal, enacted the LLPA. The LLPA for the first time spelled out national policy on LLW disposal: Each state is responsible for providing for the availability of capacity either within or without the state for disposal of LLW generated within its borders except for waste generated as a result of defense activities of the Secretary of Energy or federal research and development activities; also, LLW can be most safely and efficiently managed on a regional basis. To carry out this policy, states may enter into such compacts as may be necessary to provide for the establishment and operation of regional LLW facilities. A compact shall not take effect until Congress has by law consented to the compact. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of LLW generated within the region.

The effect of the LLPA was immediate. States began organizing into regional compacts and drafting compact language for approval by Congress. However, organization of the compacts has been excruciatingly slow. Currently there are nine proposed compacts, of which five have submitted compact language to Congress. None of the compacts have been acted upon by Congress. Several states are still weighing the pros and cons of compact versus single state programs. Only Texas has chosen to pursue an independent course.

Remembering the defeat of the LLW bills by the 1979 Texas Legislature, the 1981 Legislature made another attempt to pass needed legislation. The bills that were introduced were similar to the 1979 bills, but the 1981 versions corrected most of the defects that led to the 1979 defeats. Under the proposed legislation, a licensing and registration program was established for the TDH for waste processing and storage facilities. Also, the Authority was created to construct and operate a LLW disposal site on state-owned land for Texas-only LLW. Two key powers were deleted from the bills during committee hearings: revenue bonding authority and the power of eminent domain. The latter deletion would later prove to be a major hindrance in the Authority's quest for a suitable disposal site. The legislation was approved and signed by the Governor on June 1, 1981.

Authority Siting Efforts, 1982-1984

On December 15, 1982, the newly created Authority entered into a contract with Ebasco Services Incorporated under which Ebasco agreed to provide waste

volume projections for a Texas site; prepare a conceptual design for a disposal facility; and perform an economic analysis of the cost of siting, licensing, construction, operation, and decommissioning of the facility. This work has been completed.

In February 1983, the Authority contracted with Dames & Moore to conduct the siting study required by statute. Phase I of the study, which involved statewide screening of potential siting areas based on technical criteria developed for siting, identified 15 potential regional siting areas covering 35,000 square miles and all or parts of 105 counties. Phase II assessed the 15 areas with regard to geological, groundwater, surface water, and surficial soil conditions. Eight of these areas exhibited more favorable siting characteristics. Within those areas, 280 tracts were identified for further screening. After the screening, 50 potential sites were identified within the tracts left. These sites were then ranked based on environmental and economic/engineering criteria. The rankings showed that all the top 40 ranked sites appeared in one of four areas: the Abilene-Haskell Plains (located generally north of Abilene and southwest of Wichita Falls), the Red Bed Plains (located generally north and east of Big Spring and southeast of Lubbock), the Nueces Plains (located generally south of San Antonio and north of Laredo), and Hudspeth County in west Texas. Phase III, recently completed, developed site-specific data needed to identify two preferred sites. Those two sites, which were named in August 1984, are in McMullen County and Dimmit County. Both are located in deep clay soil areas of the Nueces Plains in south Texas.

The two preferred sites were selected despite two difficult problems that faced the Authority in the siting process: lack of eminent domain powers and the statutory requirement that the Authority acquire fee simple title to its site. Finding two landowners willing to sell who owned both the surface and mineral estates proved to be a formidable task. Many sites were rejected because of title problems and the inability of the Authority to condemn land.

Political Intervention, January-February 1985

By January 1985, the Board had completed the required studies and was prepared to name the McMullen County site as the most suitable site for a LLW disposal facility in Texas. Following such designation, the Board would then be required to hold a public hearing in McMullen County, and, if the site still appeared most suitable, purchase the site and begin a 12-month characterization study of the land. Under January 1985 projections, the LLW facility could be operational by mid-1988.

Announcement of these plans led to a firestorm of protest from McMullen County residents, City of Corpus Christi citizens, and South Texas politicians. Although Corpus Christi is located about 100 miles from the proposed McMullen County site, local officials pointed out that the site is only 12 miles from Choke Canyon Reservoir, which provides drinking water to the city and surrounding areas. In the mind of Corpus Christi residents, the LLW facility would pose an intolerable threat to the health of the area.

The Texas Legislature convened on January 8, 1985. The Board had planned to announce the McMullen site on February 11, but South Texas legislators immediately intervened with proposed legislation. A resolution was introduced in the House and Senate calling for a moratorium on siting acquisition until additional legislation can be passed or until September 1, 1985, whichever occurs first. A bill was submitted calling for expanding the "waste disposal" oriented Authority into a "waste management" authority with additional responsibilities for waste processing and storage. A second bill would direct the Authority to look for additional sites, investigate alternative technologies, and prohibit the issuance of an operating license until July 6, 1987. An amendment to the second bill was offered that would prevent the Authority from making further siting decisions until July 6, 1987. One of the reasons offered for a moratorium is that Texas is moving too fast in siting, and if Texas opens a site before the other states, Texas will become the fourth national LLW disposal site.

The Authority has opposed any efforts to place a moratorium on siting for several reasons:

(1) The Authority has located two technically acceptable sites for a disposal site. A moratorium would result in the loss of the Authority's ability to acquire those sites. Two and one-half years of siting efforts and a lot of money will go down the drain.

(2) Without eminent domain powers, it is unlikely that the Authority can acquire additional sites from willing landowners. The landowners will question the credibility of the Authority if the existing sites are lost.

(3) The unwillingness of states and compacts to follow through on their obligations under the LLPA will send a bad message to Congress. Congress could "federalize" the LLW program with resulting loss of state controls.

Any legislative changes to the Texas LLW program will not be known until adjournment of the Legislature in May 1985.

TEXAS GOES IT ALONE - IS IT LEGAL?

As indicated earlier in this article, Texas is the only state to opt for pursuing LLW disposal on a single-state rather than a regional basis. Texas law, which provides that only LLW generated within Texas may be accepted by a Texas disposal site, has stirred considerable debate as to whether that provision violates the United States Constitution or the intent and spirit of the LLPA.

Preemption Doctrine

The Supremacy Clause of the United States Constitution provides that the Constitution and the laws of the United States made pursuant thereto shall be the Supreme Law of the Land. The federal preemption doctrine provides that Congress may preempt state authority to regulate in a particular area by stating so in express terms. Even in the absence of express preemptive language, Congress' *intent to* preempt state regulation may be inferred from a pervasive federal regulatory scheme or from the fact that the federal interest in an area is so dominant that the federal regulatory scheme will be presumed to preclude enforcement of state laws in the area. Preemption may also be inferred from the fact that a state regulation actually conflicts with federal law. Finally, federal

preemption may exist where a state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

The AEA established a comprehensive scheme for the regulation of nuclear energy. Congress intended the federal government to exercise exclusive authority over radiological safety aspects of nuclear energy. The states, however, retain their traditional role in the regulation of economic concerns. For instance, the United States Supreme Court has held that a state can regulate the siting of a nuclear power plant if the regulating statute is based on economic, rather than safety, considerations.

In 1959, the AEA was amended to add Section 274, which authorized the NRC to enter into agreements with individual states whereby certain regulatory functions of NRC--primarily relating to licensing-- could be assumed by the states. A state's power to regulate radiation hazards, a previously preempted field, is derived entirely from its Section 274 agreement. Therefore, the federal government solely occupies the field of nuclear safety concerns except for the limited powers expressly ceded to the states pursuant to Section 274.

The LLPA allows states to enter into compacts for disposal of LLW and authorizes Congress to withdraw its consent to the compacts every five years. Thus, it can be argued that Congress intended to maintain federal authority over LLW disposal by means of continuing federal review of the compacts. However, the LLPA does not specifically indicate whether states are permitted to go it alone, although at least one Texas commentator has argued that a state has the option to provide for LLW disposal as a single state or as a compact participant. The issue is whether the decision of a single state to exclude from its LLW disposal site all out-of-state waste is preempted by federal law in the area of LLW disposal.

A federal court in the Washington State Building and Construction Trades Council v. Spellman case has recently held that regulation of LLW disposal is a legitimate federal activity and that the federal government's exclusive regulatory authority over radiation hazards extends to this area. In November 1980, the voters of the State of Washington enacted an initiative measure prohibiting the transportation and storage within Washington of radioactive waste produced outside the state. The Hanford, Washington LLW disposal site is leased by the State of Washington from the federal government and is operated by a private company. The site operator and several out-of-state disposal groups joined as plaintiffs in filing suit seeking a declaration that the initiative was unconstitutional and requesting injunctive relief.

The court held that the initiative violates both the Supremacy Clause and the Commerce Clause of the United States Constitution. With regard to the preemption issue, the court stated without elaboration that neither Section 274 of the AEA nor the LLPA is a grant of total authority to the states over disposal of LLW within their own borders. Complete federal control of the Hanford site did not pass to the state with the assignment of regulatory responsibilities under Section 274. With regard to the LLPA, the opinion stated that until the state participates in a compact which has become law, the LLPA does not grant power to any state to close its borders to interstate traffic in LLW.

Commerce Clause

The Commerce Clause of the United States Constitution provides that the Congress shall have power to regulate Commerce among the several States. Courts have generally held that the Commerce Clause prohibits states from imposing unreasonable burdens on the flow of commerce among the several states. On the other hand, Congress, which has plenary authority to regulate commerce among the states, can authorize states to adopt restrictions on that commerce which otherwise would be constitutionally impermissible. The LLPA is an example of Congressional authorization to compact states to restrict interstate commerce in the field of LLW.

In the absence of clear Congressional intent to legitimize state restrictions on interstate commerce, state laws which do burden and affect interstate commerce can still be held valid under the following test of the 1970 Pike v. Bruce Church case:

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Assuming that the LLPA does not answer the question of whether a single state can restrict the interstate shipment of LLW, can a state such as Texas unilaterally exclude out-of-state waste under the Pike rule or other existing case law?

In Philadelphia v. New Jersey, the United States Supreme Court struck down a New Jersey statute which prohibited the importation from another state of any solid or liquid waste. Although the stated purpose of the state statute was to protect the declining landfill space in New Jersey, no similar restrictions were placed on the disposal of in-state generated waste. The Court found that all objects of interstate trade, including waste, merit Commerce Clause protection. While it is true that the protection of a scarce natural resource such as landfill space is a legitimate state concern, New Jersey's aims could not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently. The clearest example of protectionist legislation, said the Court, is a law that overtly blocks the flow of interstate commerce at a state's border. The Court hinted that the result might have been different if New Jersey had owned the landfill instead of private businesses.

A different result was reached in the Hughes v. Alexandria Scrap Corp. case. In that case, the State of Maryland adopted legislation which provided a subsidy to any person who delivered a junk car (hulk) to a licensed scrap processor; the subsidy was intended to clear Maryland streets and roads of used cars. The

subsidy was available to both Maryland residents and out-of-state residents, but Maryland imposed less restrictive documentation requirements on Maryland residents. This resulted in a slowing of hulk deliveries from out-of-state residents. The Supreme Court upheld the Maryland law and distinguished prior Commerce Clause cases, saying that Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. The Court concluded that the Commerce Clause does not prohibit a state, in the absence of congressional action, from participating in the market and exercising its right to favor its own citizens over others. Where the state is a participant in rather than regulator of market activity, the state is not subject to the restrictions of the Commerce Clause, and thus may favor its own citizens at the expense of citizens of other states.

The 1980 case of Reeves v. Stake involved a cement plant owned by the State of South Dakota which supplied out-of-state purchasers with cement when sufficient supply existed, but confined sales to state residents in times of shortage. A Wyoming cement buyer challenged the South Dakota law as an impermissible burden on interstate commerce. The Supreme Court upheld the South Dakota law, stating:

"The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. The precedents comport with this distinction."

The Court concluded that South Dakota, as a seller of cement, was unquestionably a "market participant" and free of Commerce Clause restraints when it acts as a "proprietor". Further, the Court observed:

"Considerations of sovereignty independently dictate that marketplace actions involving 'integral operations in areas of traditional governmental functions'--such as the employment of certain state workers-- may not be subject even to congressional regulation pursuant to the commerce power. It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere. Even where 'integral operations' are not implicated, states may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal."

The court in the Spellman case discussed above found that the market participant theory did not fit the facts of that case, and struck down the State of Washington statute on both supremacy and interstate commerce grounds. With regard to the interstate commerce issue, the court said:

"The State argues that the initiative is a proprietary measure enacted to limit the state's participation in the waste disposal market. Whether or not the State is a proprietor of the Hanford site, the initiative is cast in state regulatory rather than in proprietary terms. The measure is based on public safety rather than on economic considerations. The measure denies entry of waste at the state's borders rather than at the site the State is operating as a market participant."

Implications for Texas' LLW Program

The Texas statute providing for a state-owned LLW disposal site that may exclude out-of-state waste was drafted with Reeves v. Stake rationale very much in mind: Texas, as site owner, would operate the site as a participant in the low-level waste market. Fees set by the Authority will establish the market price for disposal of LLW in Texas. In addition, an integral governmental function of any state is the protection of the well-being of its citizens, medical establishment and industry. A failure by Texas to provide LLW disposal capacity could potentially disrupt the operation of some hospitals, cancer research facilities, industries, and utilities. Thus, the Texas statutory scheme embodies the basic Reeves v. Stake concepts of state sovereignty and market participation.

Although the Spellman case held that the State of Washington could not exclude out-of-state waste until it became a member of a compact under the LLPA, it is arguable that the facts and considerations in that case were unique and do not necessarily apply to Texas' situation. The Hanford, Washington LLW site is an existing site that accepts about 50 percent of the country's LLW. Closing that facility would seriously aggravate a national problem of LLW disposal. On the other hand, a Texas site does not yet exist; when it does come on-line, it will contribute to solving a national problem by accepting a small percentage of the waste that could be delivered to national sites. The Washington initiative would have stopped the importation of waste at the border of the site, thus imposing a direct burden on interstate commerce. This was also the problem in the Philadelphia case. The Texas statute was carefully worded to avoid a direct affront to interstate commerce: "Only low-level waste that is generated within the State of Texas may be accepted by a disposal site." LLW shipments may cross Texas borders without restriction. Finally, the Spellman court found that the initiative was cast in regulatory rather than proprietary terms and was based on public safety rather than on economic considerations. The Texas statute also mentions the protection of public health, but the thrust of the statute is the loss of economic benefits that the state would suffer if existing medical institutions, research facilities, and industries were adversely affected because of lack of LLW disposal capacity.

With these legal considerations in mind, Texas has embarked on an independent course of action that state officials believe comports with constitutional law and with the intent of the LLPA that each state provide for the disposal of its LLW, either as a single state or as a compact member.

CONCLUSION

Texas is committed to pursuing an independent course of action in establishing a LLW program. There is little or no support for changing the law to authorize the state's participation in a compact. A strong feeling exists that a Texas compact arrangement would ultimately work to Texas' disadvantage, because Texas has several excellent siting areas and plenty of land. Pressure would undoubtedly build in a compact for

Texas to become the host state for disposal. This is unacceptable to most citizens. The feeling is widespread that the state's legal position is on sound ground and will ultimately be sustained. The immediate concern is political rather than legal: Will the Authority be allowed to finish its siting effort now that the critical question of where the site will be located is about to be answered, or will political considerations halt the process and seriously impede the program for an indefinite period? This question should be answered in the next few months.