



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY

4 September 2001

AFLSA/JACE
1501 Wilson Blvd STE 629
Arlington, VA 22209-2403

Karen D. Cyr, Esq.
General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: *U.S. Air Force v. Executive Secretary, Utah Radiation Control Board*

Dear Ms Cyr

As legal advisor to the U.S. Air Force Radioisotope Committee, I commenced an administrative action before the Utah Radiation Control Board in July. The Air Force petition challenges the validity of a condition in the license approved by the Executive Secretary of the Utah Radiation Control Board which requires the licensee (Envirocare of Utah, Inc.) to confirm that all generators sending waste to the facility have received export approval from the low-level radioactive waste compact of origin.

Prior to the commencement of the Utah action, the Executive Director of the Rocky Mountain Low-Level Radioactive Waste Compact brought an administrative action against the Air Force seeking a penalty of up to approximately \$180,000 because the Air Force had failed to obtain export permits and pay export permit application fees prior to shipping waste generated within the Rocky Mountain Compact region to licensed disposal facilities outside the region. Although the Director of the Rocky Mountain Compact withdrew his complaint at the conclusion of a two-day hearing, the Rocky Mountain Low-Level Radioactive Waste Board now seeks to intervene in the Utah proceeding to argue that the Utah Radiation Control Board should not hear the Air Force petition.

Because the petition to intervene raises issues which the Nuclear Regulatory Commission expressed concern about when the Rocky Mountain Board was seeking Congressional authorization for its compact, I attempted to serve the Nuclear Regulatory Commission with the Air Force's motion to deny the petition to intervene. Although I used an address for service of process which is provided for at 10 C.F.R. § 1.5(a), the materials I sent to your attention at that address were returned to me today as undeliverable.

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ERFDS OGCO1

Enclosed are the materials I sent by mail. They are a copy of the Air Force pleading which commenced the action ("Request for Agency Action"), the Rocky Mountain Low-Level Radioactive Waste Board's Petition to Intervene, and the Air Force's Motion to Deny the Petition to Intervene. Should you or a member of your staff have any questions, please let me know. I can be reached at (703) 696-9195.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale Murad", written over a thin horizontal line.

Dale Murad
Attorney-Advisor
Environmental Law and Litigation Division

Enclosures

**BEFORE THE RADIATION CONTROL BOARD
OF THE STATE OF UTAH**

In the Matter of)	
)	
United States Air Force, Petitioner)	Record No.
v.)	
Executive Secretary,)	
Radiation Control Board, Respondent)	

Request for Agency Action

Petitioner United States Air Force states as follows.

Jurisdiction

1. The Radiation Control Board has jurisdiction over this matter pursuant to Utah Admin Code R. 313-17-6(2)(governing administrative proceedings under the Radiation Control Act, Utah Code Ann 19-3-1 et seq.) and Utah Code Ann § 63-46b-3(governing the commencement of proceedings under the Administrative Procedures Act, Utah Code Ann 63-46b-0.5).

Statement of Facts

2. Petitioner is an Agency of the United States government. As a generator of low-level radioactive waste (LLRW), Petitioner disposes of LLRW at a disposal facility operated in Tooele County by Envirocare of Utah, Inc.

3. Envirocare of Utah, Inc. submitted a license application to receive and dispose of containerized Class A, B, and C LLRW at its Tooele County facility. Respondent proposed to issue a permit and invited public comment on the draft permit.

4. Paragraph 9 of the draft permit states, in relevant part:

Prior to receiving any LLRW shipment for disposal, the Licensee shall demonstrate to the Executive Secretary that the LLRW to be received have been approved for export to the Licensee. Export approval is required from the LLRW compact of origin (including the Northwest Compact), or for states

unaffiliated with a LLRW compact, the state of origin, to the extent a state can exercise such approval.

5. Petitioner filed a timely comment on the draft permit. In its comment, Petitioner advised Respondent that the Low-Level Radioactive Waste Policy Act (the source of the states' authority to form compacts to regulate commerce in LLRW) does not permit states to require Federal facilities to obtain export approval prior to shipping their LLRW to disposal sites outside the compact region in which the waste originated. Specifically, Petitioner pointed to 42 U.S.C. § 2021(d)(1)(B), the codification of the section of the Low-Level Radioactive Waste Policy Act which addresses the extent to which Federal facilities are subject to the compacts' authorities. Section 2021(d)(1)(B) states as follows.

Low-level radioactive waste owned or generated by the Federal Government -- that is disposed of at a regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact shall be subject to the same conditions, regulations, requirements, fees, taxes, and surcharges imposed *by the compact commission, and by the State in which such facility is located*, in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government.

Federal agencies are only subject to regulation to the extent Congress has clearly and unambiguously waived the Federal government's sovereign immunity. Therefore, the absence of statutory language in § 2021(d)(1)(B) subjecting Federal agencies to regulation by the compacts in the situation provided for in paragraph 9 of the draft license operates to deny such compacts the authority to require export permits as a prerequisite to shipping waste to disposal facilities, like the Tooele facility, in other compact regions.

6. In its comment, Petitioner requested that Respondent modify the permit to clarify that the license applicant would not be required to demonstrate that Federal facilities, which are not subject to export permit requirements, had export permit authorization from the compacts of origin. Petitioner pointed out the payment of export permit application fees by Federal agencies constitutes a violation of Federal law. (The Purpose Statute, 31 U.S.C. § 1301(a), provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.") Petitioner requested that Respondent modify the language of paragraph 9 of the draft license to make such paragraph read as follows (without underlining, which is shown here to identify language Petitioner asked to have added to the license):

Prior to receiving any LLRW shipment for disposal, the Licensee shall demonstrate to the Executive Secretary that the LLRW to be received have been approved for export to the Licensee, if such approval is required by an authority competent to require it. Export approval is normally required from the LLRW compact of origin (including the Northwest Compact), or for states unaffiliated with a LLRW compact, the state of origin, to the extent a state can exercise such approval.

A copy of the comment is appended to this Request for Agency Action and identified as Attachment 1 thereto.

7. On July 9, 2001, Respondent issued a final decision in which it declared that the technical requirements of the license application had been satisfied. The provision on which Petitioner commented is contained in paragraph 10(D) of the license Respondent approved. The language of paragraph 10(D) is unchanged from the language in paragraph 9 the draft license. A copy of the page of the approved license containing paragraph 10(D) is appended to this Request for Agency Action as Attachment 2 thereto.

8. Utah Admin Code R. 313-17-3 requires Respondent to issue a Response to Comments at the time of the final decision on a license application. The response to comments must contain a "response to all significant comments raised during the public comment period."

9. Respondent has posted a "Database of Commentors and Comments" and a "Summary of Comments and Responses to Comments" on its website. In the "Database," Petitioner's comment is identified as comment #232. The comment is summarized as "Suggest license revision to not offend federal law to allow LLRW to proceed from the government to Envirocare." The "Database" indicates the response to the comment is located in "Response Group 5." In the "Summary," the commentary in "Response Group 5" states, in relevant part that Envirocare "can accept LLRW from generators within other states and/or compacts with the prior approval of that state or compact." Petitioner has found no language in the "Summary" which indicates the basis for its rejection of Petitioner's comment. Nor has Respondent raised to Petitioner any concerns not addressed in the comment, as Petitioner invited Respondent to do in the comment letter.

10. Last year, the Rocky Mountain Low-Level Radioactive Waste Compact (RMC) initiated an enforcement action against Petitioner for Petitioner's admitted failure to obtain export permits from RMC. Central to the enforcement action was the legal issue of whether Federal agencies are required to obtain export permits before shipping LLRW to disposal facilities in other compact regions, as RMC maintained. The Executive Director of the RMC, acting as plaintiff in that action, and Petitioner (in this Utah action) US Air Force submitted written briefs to the Board of the RMC. In addition, the RMC Board presided over a hearing in the matter, held on April 23, 2001 and on June 21, 2001. The parties addressed the central issue exhaustively. Just prior to and in lieu of presenting closing argument to the Board, the Executive Director of the RMC withdrew his complaint. In his written withdrawal, he stated that he expected the Air Force to take any decision rendered against it by the RMC Board for review by a Federal court and that "Such litigation has the very real potential to destabilize the national compact system."

11. While Petitioner believes that RMC would prefer that Petitioner acquiesce to its rules governing export permits and the payment of fees therefor, Petitioner maintains that termination of the RMC proceeding by withdrawing the complaint to head off a ruling which could be reviewed by a US District Court is tantamount to an admission that Federal facilities are not legally subject to export permit requirements. In any case, Petitioner will make available to the Radiation Control Board, upon its request, copies of the briefs and transcripts of the RMC hearing.

12. As indicated in the attached Certificate of Service, this Request for Agency Action is being sent to the following:

Executive Secretary, Utah Radiation Control Board
Division of Radiation Control
168 North 1950 West
PO Box 144850
Salt Lake City, Utah 84114-4850

Charles A. Judd,
Registered Agent for Service of Process
Envirocare of Utah, Inc.
46 West Broadway, Suite 240
Salt Lake City, Utah 84101

HQ US Army Corps of Engineers
ATTN: Office of Chief counsel (Ann Wright)
441 G Street, NW
Washington, DC 20314-1000

Mike Garner, Executive Director
Northwest Interstate Compact
on Low-Level Radioactive Waste Management
P.O. Box 47600
Olympia, Washington 98504-7600

Relief Requested

Wherefore, Petitioner respectfully requests that the Radiation Control Board:

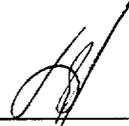
(A) afford Petitioner the opportunity to

(1) brief the issues in this matter once Respondent has provided the basis for its denial of Petitioner's request and

(2) present its case at a hearing on the matter, and;

(B) rule that the licensee, Envirocare of Utah, Inc. is not required to verify that Federal agencies have obtained export permits and;

(C) direct Respondent to modify the license of the Tooele facility in accordance with the request made during the comment period by adding the language "if such approval is required by an authority competent to require it" and "normally" as shown in paragraph five, above.



July 26, 2001

Dale Murad
Attorney for Petitioner US Air Force

AFLSA/JACE
1501 Wilson Boulevard, Suite 629
Arlington, Virginia 22209-2403

(703) 696-9195



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY

28 February 2001

AFLSA/JACE
1501 Wilson Blvd., Suite 629
Arlington, VA 22209-2403

Mr. Bill Sinclair
State of Utah
Division of Radiation Control
P.O. Box 144850
Salt Lake City, UT 84114-4850

Dear Mr. Sinclair

On behalf of the United States Air Force, I am writing to comment on the draft Initial License which the Utah Department of Environmental Quality's Division of Radiation Control has proposed to issue to Envirocare of Utah, Inc. Specifically, I would like to comment on proposed paragraph 9, which states, in relevant part, as follows.

Prior to receiving any LLRW shipment for disposal, the Licensee shall demonstrate to the Executive Secretary that the LLRW to be received have been approved for export to the Licensee. Export approval is required from the LLRW compact of origin (including the Northwest Compact), or for states unaffiliated with a LLRW compact, the state of origin, to the extent a state can exercise such approval.

While that provision may seem rather innocuous on its face, it has the potential to be problematic for the Federal Government's LLRW generators. Federal LLRW generators, which would otherwise not be subject to regulation by the states and compacts under the legal doctrine of sovereign immunity, comply with the requirements of states and of compacts with jurisdiction over LLRW disposal sites because of a provision in the Low Level Radioactive Waste Policy Act of 1980, as amended (LLRWPA). As codified at 42 U.S.C. § 2021d(b)(1)(B), that law waives the Federal Government's immunity from regulation as follows:

Low-level radioactive waste owned or generated by the Federal Government that is disposed of at a regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact shall be subject to the same conditions, regulations, requirements, fees, taxes, and surcharges imposed *by the compact commission, and by the State in which such facility is located*, in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government.

(Emphasis added.) Thus, while Federal generators are subject to the requirements of the states and compacts with jurisdiction over sites to which the Federal generators send their LLRW for disposal, they are not subject to requirements imposed by compacts and states of origin. As a

Attachment
1

consequence, Federal generators are not subject to export approval requirements and will not normally have complied with such requirements. (Federal generators do, of course, comply with NRC and DoT requirements respecting the safety of LLRW management, but the legal reasons they do so are independent of the LLRWPA, which was enacted to address problems relating to the flow of commerce in LLRW between the states.)

Complying with export approval requirements that Congress did not envision would create problems for Federal generators. Federal generators are prohibited by statute from spending Federal appropriations except as directed by Congress. The "Purpose Statute," codified at 31 U.S.C. § 1301(a), provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." Thus, we have concerns about the legality of using Federal appropriations to pay export permit fees. And leading compacts/states with jurisdiction over the site of LLRW generation to believe they must approve Federal exports could give them the mistaken impression they have other authority over Federal agencies. We therefore have concerns that compacts/states which exercise export approval authority over non-Federal entities could impose restrictions on the flow of Federal LLRW which Congress never anticipated.

As it is well settled under the law that only Congress can waive the Federal Government's sovereign immunity, the waiver contained in section 2021d cannot be delegated by compacts and states in which disposal facilities are located to compacts and states of origin. And no one has suggested to us that the State of Utah, by inserting the export approval language, in a disposal facility's permit had any intent to delegate its authority to regulate the flow of Federal LLRW into Utah. To prevent any confusion by third parties as to the intent of the State of Utah, we would urge you to modify the proposed language in Envirocare's draft permit. One way to do so would be to add language to the permit condition quoted above so that the condition would read as follows (with added language underlined):

Prior to receiving any LLRW shipment for disposal, the Licensee shall demonstrate to the Executive Secretary that the LLRW to be received have been approved for export to the Licensee, if such approval is required by an authority competent to require it. Export approval is normally required from the LLRW compact of origin (including the Northwest Compact), or for states unaffiliated with a LLRW compact, the state of origin, to the extent a state can exercise such approval

If you have concerns that we have not addressed, we would be happy to discuss these with you to identify a way to satisfy those concerns without offending Federal law. I can be reached at (703) 696-9195.

Sincerely,



DALE MURAD

Legal Advisor to the Air Force Radioisotope
Committee

**DIVISION OF RADIATION CONTROL
RADIOACTIVE MATERIAL LICENSE for
CONTAINERIZED CLASS A, B, & C LOW-LEVEL RADIOACTIVE WASTE DISPOSAL
SUPPLEMENTAL SHEET**

License #UT_____

- (B) Passage of legislation by the Utah legislature providing authority for the State of Utah to take ownership of the site 100 years following closure.
- (C) Sufficient resources provided to the Department of Environmental Quality to oversee the management of containerized Class B and C low-level radioactive waste by this licensee.

The Licensee shall not commence construction nor accept Class B and C low-level radioactive waste until all conditions specified in this License Condition are met as determined by the Executive Secretary. If either the Utah legislature or Governor do not approve the facility to receive Class B and C low-level radioactive waste, this license is immediately terminated.

10. (A) Licensee may receive, store, and dispose by near-surface land disposal, containerized low-level radioactive waste (LLRW) as defined in License Conditions 6, 7, and 8 and as constrained by URCR R313-15-1008 and License Conditions 10 (B) and 10 (C).
- (B) The Licensee shall ensure that the average concentrations in the embankment of berkelium-247, californium-249, calcium-41, and chlorine-36 do not exceed the values assumed in groundwater performance modeling (0.00016, 0.00030, 530, and 0.44 picoCuries per gram, respectively) at any time prior to embankment closure.
- (C) For all areas of the Containerized LLRW Disposal Embankment, the Licensee shall ensure that the actual concentration of disposed chlorine-36 does not exceed 0.44 picoCuries per gram in accordance with the following formula:
- $$\frac{\text{Total Activity of Chlorine-36 Received (pCi)}}{\text{Total Mass of Waste in the Embankment (g)}} \# \quad 0.44 \quad \text{picoCuries per gram}$$
- (D) Prior to receiving any LLRW shipment for disposal, the Licensee shall demonstrate to the Executive Secretary that the LLRW to be received have been approved for export to the Licensee. Export approval is required from the LLRW compact of origin (including the Northwest Compact), or for states unaffiliated with a LLRW compact, the state of origin, to the extent a state can exercise such approval.
11. The Licensee shall comply with all applicable portions of the Utah Radiation Control Rules, Utah Administrative Code (UAC) Chapter R313-25, "License Requirements for Land Disposal of Radioactive Waste -- General Provisions."
12. The Licensee shall fulfill and maintain compliance with all conditions and shall meet all compliance schedules stipulated in the Ground Water Quality Discharge Permit, number UGW 450005, issued by the Executive Secretary of the Utah Water Quality Board

SITE LOCATION

A Attachment 2

CERTIFICATE OF SERVICE

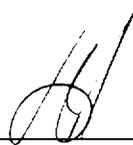
I hereby certify that on this twenty-sixth day of July 2001, a true copy of the foregoing **Request for Agency Action** was sent by certified U.S. mail, return receipt requested, to the following:

Executive Secretary, Utah Radiation Control Board
Division of Radiation Control
168 North 1950 West
PO Box 144850
Salt Lake City, Utah 84114-4850

Charles A. Judd,
Registered Agent for Service of Process
Envirocare of Utah, Inc.
46 West Broadway, Suite 240
Salt Lake City, Utah 84101

HQ US Army Corps of Engineers
ATTN: Office of Chief counsel (Ann Wright)
441 G Street, NW
Washington, DC 20314-1000

Mike Garner, Executive Director
Northwest Interstate Compact
on Low-Level Radioactive Waste Management
P.O. Box 47600
Olympia, Washington 98504-7600



Dale Murad
Attorney for Petitioner U.S. Air Force

AFLSA/JACE
1501 Wilson Boulevard, Suite 629
Arlington, Virginia 22209-2403

(703) 696-9195

**BEFORE THE RADIATION CONTROL BOARD
STATE OF UTAH**

In the Matter of:

**UNITED STATES AIR FORCE
v
EXECUTIVE SECRETARY,
UTAH RADIATION CONTROL BOARD**

**ROCKY MOUNTAIN LOW-LEVEL RADIOACTIVE WASTE BOARD
PETITION TO INTERVENE AND MOTION TO DISMISS THE UNITED
STATES AIR FORCE PETITION FOR AGENCY ACTION**

Comes now the Rocky Mountain Low-Level Radioactive Waste Board, by and through its attorneys SullivanGreen LLC and submits this Petition to Intervene and Motion to Dismiss the Petition for Agency Action in the above-reverenced matter.

I. STATEMENT OF FACTS

1. The Rocky Mountain Low-Level Radioactive Waste Board ("Rocky Mountain Board") is the Board charged with administration of the Rocky Mountain Low-Level Radioactive Waste Compact ("Rocky Mountain Compact").
2. The Rocky Mountain Compact comprises the states of Colorado, Nevada and New Mexico.
3. The Northwest Interstate Compact ("Northwest Compact") prohibits the disposal of low-level radioactive waste ("LLW") in the Northwest Compact region unless otherwise agreed to by the Northwest Compact Commission.
4. The Northwest Interstate Compact and the Rocky Mountain Compact are parties to an agreement that *inter alia* allows the Rocky Mountain Compact to authorize export of a fixed quantity of LLW generated within the Rocky Mountain Compact region for disposal at the Northwest Compact regional facility in Richland, Washington.
5. The Northwest Compact has issued a Second Amended Resolution and Order ("Order") that allows Envirocare of Utah ("Envirocare Facility") to accept LLW under certain conditions. The Envirocare Facility is located within the Northwest Compact region. One of those conditions is that only the LLW approved by the compact of origin may be disposed of at the Envirocare Facility

6. The provision of the Order that requires approval from the compact of origin has been included as a condition in the Envirocare license issued by the State of Utah (“Approval Condition”).

7. Under the Rocky Mountain Compact, export of LLW from the Rocky Mountain Compact region is prohibited without prior authorization of the Rocky Mountain Board. The Approval Condition is important to ensuring compliance with this export requirement, in addition to ensuring compliance with the Northwest Compact and the Order.

8. The Rocky Mountain Compact has from time to time since the inception of the compact system processed and approved applications for export of the United States Air Force (“USAF”) LLW for disposal at the Richland Washington facility and the Envirocare Facility in Utah.

9. Earlier this year, shipments of LLW by the USAF were the subject of an administrative enforcement action by the Rocky Mountain Compact for failure to receive authorization to export LLW from the Rocky Mountain Compact region.

10. During the hearings held before the Rocky Mountain Board relating to the administrative enforcement action, the USAF argued that the doctrine of sovereign immunity obviates the need for federal agencies to obtain export authorization for shipments from the Rocky Mountain Compact region.

11. Because several of the alleged violations had been mooted by the USAF and to avoid protracted litigation, the Executive Director of the Rocky Mountain Compact withdrew the Complaint before the Rocky Mountain Board ruled on the alleged violations.

12. Since its creation, the Rocky Mountain Board has applied and enforced its export requirement on all LLW (except for United States Department of Energy and exempt United States Department of Defense LLW not subject to the Rocky Mountain Compact) leaving the Rocky Mountain Compact region, including LLW generated by the USAF and other federal agencies, and has never agreed that the doctrine of sovereign immunity applies to federal LLW covered by the Rocky Mountain Compact.

13. In spite of its sovereign immunity arguments, the USAF has historically, and currently continues to apply for and receive export authorization from the Rocky Mountain Board.

14. USAF is seeking to amend the language of the Envirocare Facility license so that it can attempt to circumvent the Rocky Mountain Compact export requirement and ship LLW to the Envirocare Facility in violation of the Rocky Mountain Compact.

II. FIRST FORM OF RELIEF REQUESTED (PETITION TO INTERVENE)

15. Petitioner Rocky Mountain Board restates and incorporates the allegations of paragraphs 1-14.

16. Based on the facts of paragraphs 1-13, the legal rights and interests of the Petitioner Rocky Mountain Board are substantially affected by the USAF Request for Agency Action.

17. The Rocky Mountain Board qualifies as an intervenor under Section 63-46b-9 of the Utah Code.

18. This petition to intervene has been timely filed in accordance with R313-17-7(2)(a) of the Utah Administrative Rules.

Wherefore, the Rocky Mountain Board respectfully requests that the Radiation Control Board enter an order granting the Rocky Mountain Board the right to intervene in the above-referenced matter for the *limited purpose* of its Motion to Dismiss incorporated herein.

III. SECOND FORM OF RELIEF REQUESTED (MOTION TO DISMISS)

19. Petitioner Rocky Mountain Board restates and incorporates the allegations of paragraphs 1-18.

20. The disposition of the Request for Agency Action filed by the USAF will substantially affect the ability of the Rocky Mountain Board to protect its legal interests and comply with the terms of the Compact to which it is bound under federal and state law.

21. The disposition of this proceeding is likely to be prejudicial to the interests of Petitioner Rocky Mountain Board and in equity and good faith the proceeding cannot continue without the participation of the Rocky Mountain Board.

22. Petitioner Rocky Mountain Board is a necessary and indispensable party to this proceeding, yet it is not a party to this proceeding, and it is not legally feasible to join the Rocky Mountain Board as a party to this proceeding.

Wherefore the Rocky Mountain Board respectfully requests the Radiation Control Board to dismiss the USAF Petition for Agency Action for failure to join a necessary and indispensable party.

Respectfully submitted this 15th day of August, 2001.

A handwritten signature in cursive script that reads "Barbara J. B. Green". The signature is written in black ink and is positioned above a horizontal line.

Barbara J. B. Green
SULLIVANGREEN LLC
Attorneys for
The Rocky Mountain Low-Level Radioactive
Waste Board

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2001 the foregoing Rocky Mountain Low-Level Radioactive Waste Board Petition to Intervene and Motion to Dismiss the United States Air Force Petition for Agency Action was served upon the following parties and other interested persons by placing a correct copy in the United States mail, certified mail, return receipt requested, addressed to:

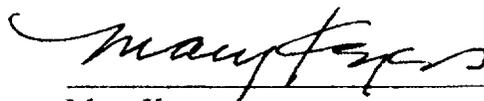
AFLSA/JACE
Attn: Dale Murad
1501 Wilson Boulevard, Suite 629
Arlington, Virginia 22209-2403

Executive Secretary, Utah Radiation Control Board
Division of Radiation Control
168 North 1950 West
P. O. Box 144850
Salt Lake City, Utah 84114-4850

Charles A. Judd
Registered Agent for Service of Process
Envirocare of Utah, Inc.
46 West Broadway, Suite 240
Salt Lake City, Utah 84101

HQ US Army Corps of Engineers
ATTN: Office of Chief Counsel (Ann Wright)
441 G Street, NW
Washington, DC 20314-1000

Mike Garner, Executive Director
Northwest Interstate Compact on Low-Level Radioactive Waste Management
P. O. Box 47600
Olympia, Washington 98504-7600



Mary Keyes
SULLIVANGREEN LLC
Attorneys for
Rocky Mountain Low-Level Radioactive Waste Board

**BEFORE THE RADIATION CONTROL BOARD
OF THE STATE OF UTAH**

In the Matter of)	
)	
United States Air Force, Petitioner)	Record No.
v.)	
Executive Secretary,)	
Radiation Control Board, Respondent)	

**Petitioner's Response to Rocky Mountain Low-Level Radioactive Waste Board's
Petition to Intervene and Motion to Dismiss**

Comes now United States Air Force ("USAF") and responds, in accordance with Utah Administrative Code rule 313-17-7(2)(c), to the Rocky Mountain Low-level Radioactive Waste Board's ("RMC's") Petition to Intervene as follows. USAF shows, in the attached Memorandum of Points and Authorities, that (a) RMC has no legal rights or interests which are substantially affected by the adjudicative proceeding, (b) the interests of justice and the orderly and prompt conduct of the adjudicative proceeding will be materially impaired by allowing the intervention, and that (c) the relief requested by RMC (dismissal of this action) is not appropriate. USAF therefore moves that the Radiation Control Board deny RMC's Petition to Intervene. In the event that the Radiation Control Board does allow RMC to intervene, the United States Nuclear Regulatory Commission will be a necessary party to the proceeding and should be joined as a party and allowed to respond to the Motion to Dismiss.

As indicated in the attached Certificate of Service, this Request for Agency Action is being sent to the following:

Executive Secretary
Utah Radiation Control Board
Division of Radiation Control
168 North 1950 West
PO Box 144850
Salt Lake City, Utah 84114-4850

Charles A. Judd
Registered Agent for Service of Process
Envirocare of Utah, Inc.
46 West Broadway, Suite 240
Salt Lake City, Utah 84101

HQ US Army Corps of Engineers
ATTN: Office of Chief Counsel (Ann
Wright)
441 G Street, NW
Washington, DC 20314-1000

Mike Garner, Executive Director
NW Interstate Compact on Low-Level
Radioactive Waste Management
P.O. Box 47600
Olympia, Washington 98504-7600

Barbara J.B. Green
Sullivan and Green, LLC
Attorneys for the Rocky Mountain Low-
Level Radioactive Waste Board
2969 Baseline Road, 2nd Floor
Boulder, Colorado 80303

Karen D. Cyr, General Counsel
U.S. Nuclear Regulatory Commission
2120 L Street, NW
Washington, D.C. 20037

Relief Requested

Wherefore, Petitioner USAF respectfully requests that the Radiation Control Board deny RMC's Petition to Intervene. In the event the Radiation Control Board grants RMC's Petition to Intervene, USAF respectfully requests that the Board condition RMC's intervention upon the joinder of the Nuclear Regulatory Commission as a party to this adjudication and allow the Nuclear Regulatory Commission to respond to the Motion to Dismiss.



Dale Murad
Attorney for US Air Force

August 29, 2001

AFLSA/JACE
1501 Wilson Boulevard, Suite 629
Arlington, Virginia 22209-2403

(703) 696-9195

**BEFORE THE RADIATION CONTROL BOARD
OF THE STATE OF UTAH**

In the Matter of)	
)	
United States Air Force, Petitioner)	Record No.
v.)	
Executive Secretary,)	
Radiation Control Board, Respondent)	

**Petitioner USAF's Memorandum of Points and Authorities
in Response to Rocky Mountain Low-Level Radioactive Waste Board's
Petition to Intervene**

UT Admin Code Rule 313-17-7(2)(b)(ii) provides that a petition to intervene in an adjudicative proceeding commenced under rule 313-17-6(2) must contain a "statement of facts demonstrating that the [intervention] petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding and the [intervention] petitioner qualifies as an intervenor under [Utah Code] § 63-46b-9." Utah Code § 63-46b-9(2) requires the presiding officer to grant a petition for intervention only if he determines that:

- (a) the [intervention] petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and
- (b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

Subsection (d) of Utah Admin Code Rule 313-17-7(2) further provides that "[i]ntervention may only be granted by order of the Board to a petitioner who meets the requirements of R 313-17-7(2)(a) and (b)." The petition of the Rocky Mountain Low-Level Radioactive Waste Board ("RMC") must, therefore, be denied unless the Board finds (a) that RMC's legal rights or interests are substantially affected by the proceeding and that (b)(1) the interests of justice and (b)(2) the orderly and prompt conduct of the proceedings will not be materially impaired by allowing the intervention.

RMC's Legal Rights are Not Affected by the Proceeding

From RMC's statement of facts, it appears that the gravamen of RMC's argument that its legal rights and interests are substantially affected by USAF's Request for Agency Action is that "the export of low-level radioactive waste (LLRW) from the Rocky Mountain Compact Region is prohibited without prior authorization of RMC, and the license provision is important to ensuring compliance with this [Rocky Mountain Compact] requirement." Para 7¹. RMC argues that "USAF is seeking to amend the language of the Envirocare Facility license so that it can attempt to circumvent the Rocky Mountain Compact export requirement and ship LL[R]W to the Envirocare Facility in violation of the Rocky Mountain Compact." Para 14. In other words, RMC argues that it has a right to have the State of Utah enforce RMC's requirements by proxy through the Envirocare license. RMC thereby raises issues as to (a) whether the State of Utah is statutorily accountable to RMC and (b) whether, as a practical matter, RMC's legal rights are impaired by Utah's actions.

RMC has cited no provision of state or federal law that makes Utah accountable to RMC and USAF is aware of no such provision. To the extent the legislature of the State of Utah has chosen to subject Utah to any compact requirements, they are the requirements of the Northwest Compact, not of RMC. *See* Utah Code Ann. 19-3-204. And, while RMC argues about potential harm to the Northwest Compact as justification for its position², the issue raised by this Petition for Intervention is not whether the Northwest Compact's legal rights are affected by the proceeding, but whether RMC's rights are so affected. Moreover, USAF notes that the Northwest Compact, which USAF has joined as a party in this proceeding, is the most appropriate entity to defend its own interests. Intervention by a third party is not warranted when there are others who can more appropriately raise the issues the third party seeks to raise as an intervenor. *Sierra Club, Utah Chapter v. Utah DEP, Division of Solid and Hazardous Waste*, 857 P. 2d 982 (1993).

In terms of the practical effect of this action on RMC's ability to enforce its Compact provisions, RMC has acknowledged that it can enforce its own requirements in court. *See* para 11, where RMC states that the Executive Director of RMC withdrew his administrative complaint against the USAF "to avoid protracted litigation,³" a reference to a follow-on proceeding in federal court which would necessarily have resolved the dispute between RMC and USAF. Thus, if RMC's ability to enforce its Compact

¹ Cites to paragraphs are to the numbered paragraphs of RMC's Petition to Intervene.

² RMC cites a Northwest Compact "Resolution and Order" which, it alleges, provides that only the LLRW approved by the compact of origin may be disposed of at the Envirocare Facility. Para 5. RMC argues that the Envirocare license provision at issue in this proceeding "is important to ensuring compliance with the Northwest Compact and the Order." Para 7.

³ In fact, the administrative action which the Executive Director brought before the RM LLRW Board in August 2000 and which he withdrew on June 21, 2001, just prior to closing argument, is the only protracted litigation that need have occurred, assuming such litigation was necessary and proper. Briefs which were written for the litigation before the RM LLRW Board cover the same issues which would be before a US District Court and there are no relevant facts in dispute.

provisions is impaired, such impairment flows not from any action of the State of Utah, but from RMC's own failure to bring an action in court. Moreover, RMC's Compact, set out at § 226 of Pub. L. No. 99-240, 99 Stat. 1859 (1986), presumes that enforcement litigation will take place in a judicial forum. Both of the two provisions in the RMC's Compact addressing the manner of enforcement of Compact terms specify that enforcement take place "in any court of general jurisdiction within the region where necessary jurisdiction is obtained by an appropriate proceeding commenced on behalf of the board." See RMC Compact Article VII, paragraph (g) (pertaining to the enforcement and collection of civil penalties) and paragraph (j) (pertaining to enjoining of the unauthorized exportation of LLRW, among other things).

As RMC's right to bring an enforcement action against USAF does not depend on whether or not the Envirocare license contains a provision requiring export permit authorization, RMC's legal rights and interests are not substantially affected by USAF's Request for Agency Action. And, unless one accepts that a tribunal of the State of Utah is a proper forum for resolving a dispute between an out-of-state compact and and a LLRW generator which ultimately arises because of actions taking place in that out-of-state compact region (a position that not even RMC takes⁴), it is difficult to see how RMC's interests should even be considered in this action.

The Interests of Justice and the Orderly and Prompt Conduct of the Adjudicative Proceedings Will Be Materially Impaired by Allowing the Intervention.

In his Notice of Withdrawal of Complaint in the action before the RM LLRW Board, the Executive Director of RMC stated that litigation in federal court "has the very real potential to destabilize the national compact system." USAF vehemently disagrees with that statement and notes that litigation restricted to the issue of whether federal agencies are subject to LLRW export restrictions does not have the potential to destabilize RMC, let alone to destabilize compacts with disposal sites. But, given RMC's insistence on operation of the export permit system in accordance with RMC's current regime, we feel it is necessary to review that system to understand why the enforcement of RMC's requirements by a tribunal without jurisdiction to interpret implementation of the RMC Compact works an injustice against those subject to such enforcement.

At the time Congress consented to the RMC Compact, RMC had a regional disposal facility.⁵ In hearings leading to Congressional consent of the RMC Compact, RMC represented to Congress that RMC needed the authority to restrict the exportation of LLRW in order to preserve the viability of its regional disposal facility. See Testimony of Leonard C. Slosky, Executive Director fo the RM LLRW Compact Board to the Committee on the Judiciary, United States Senate, January 12, 1984, wherein Mr.

⁴ RMC states that "it is not legally feasible to join the Rocky Mountain Board as a party to this proceeding." Para 22.

⁵ Forty-two U.S.C. § 2021(b)(13) defines "sited compact region" as "a compact region in which there is located one of the regional disposal facilities at...Beatty, in the State of Nevada." Section 2021(b)(3) was contained in Title I (Low-Level Radioactive Waste Policy Amendments Act of 1985) of Public Law 99-240. Consent to the RMC Compact was granted in Title II (Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act) of the same law.

Slosky stated, at 20, that “export of waste from the [Rocky Mountain] region would seriously jeopardize the economic viability of the Rocky Mountain facility. To guard against this eventuality, the Rocky Mountain states agreed that an export prohibition was necessary.”

At the time Congress was considering the provisions of RMC’s Compact, the US Nuclear Regulatory Commission (“NRC”) expressed concerns to Congress to the effect that “the Compact’s restriction on export of waste from the region could be viewed as a burden on interstate commerce,” Resolution Number 2 of the Rocky Mountain Low-Level Radioactive Waste Board, Attachment D to Testimony to the Committee on the Judiciary, United States Senate, January 12, 1984. (A copy of Resolution Number 2 is attached to this memorandum.) To address the concerns NRC raised to Congress, RMC resolved to “not establish any regional health, safety, or environmental regulatory functions.” *Id.* RMC also resolved to “not seek to restrict the export of waste from the region unless and until the [Rocky Mountain LLRW] Board is authorized to do so by the United States Congress.” *Id.*

Despite RMC’s promise “not to seek to restrict the export of waste from the region unless and until the [Rocky Mountain LLRW] Board is authorized to do so by the United States Congress,” RMC today conditions export approval on the payment of a tax on such export which has not been authorized by the United States Congress (or, for that matter, by the States of Nevada, Colorado, and New Mexico) in RMC’s Compact. This tax, which is denominated an “Export Application Fee” in RMC’s rules, is imposed on a sliding scale depending on the amount of LLRW to be disposed of outside the RMC compact region. *See, e.g.* Rule 6.2 of the Rules of the Rocky Mountain Low-Level Radioactive Waste Board, wherein a charge of up to \$100,000 is levied for the privilege of moving LLRW outside of the compact region for disposal.

Today, RMC operates no regional disposal facility and there is no LLRW disposal facility within the three-state RMC compact region. Thus, RMC’s justification for export permits no longer exists. Moreover, RMC could not refuse to grant an export permit application without *de facto* exercising health, safety, or environmental regulatory functions. Thus, approval of the exportation of LLRW can be nothing more than a ministerial act--one which could be dispensed with by blanket approval of all exports from the region. But RMC somehow views its role as regulatory rather than ministerial because approval requires compliance with conditions, such as the payment of a tax, and the payment of penalties for failure to comply with RMC’s rules.

In the enforcement proceeding RMC brought against USAF, RMC asserted the authority to impose fines against USAF of up to approximately \$180,000 for USAF’s failure to obtain permission to move USAF’s LLRW out of the compact region to facilitate proper disposal. And, given RMC’s representations to Congress that the authority to restrict exportation was necessary to support RMC’s avowed efforts to maintain a viable disposal facility within the compact region, we cannot believe Congress intended or anticipated that any monetary restriction would be placed on the privilege of exporting waste from a compact region without a disposal facility. If, as RMC argues in

its Petition to Intervene, RMC has a legal interest in having the State of Utah enforce RMC's authority to require export permits, we do not see how, consistent with the interests of justice, this Board could do so without questioning whether RMC's requirements for granting export permits are consistent with Congressional intent, and whether RMC is implementing its export permit controls consistent with its Compact.

USAF does not believe that the Utah Radiation Control Board is the proper forum to interpret whether the Rocky Mountain Low-Level Radioactive Waste Compact is being implemented in accordance with the intent of the United States Congress, or with the intent of the legislatures of the States of Colorado, New Mexico, and Nevada, which approved the RMC's Compact before submitting it to Congress. And we believe RMC admits this when it states, in para 22, that "it is not legally feasible to join the Rocky Mountain Board as a party to this proceeding." But if the Radiation Control Board is, in fact, willing to allow RMC to enforce its compact in a manner contrary to representations RMC made to Congress in response to concerns expressed by NRC, then NRC must be joined in this proceeding. Finally, because broadening the scope of the Board's inquiry to address RMC's interests introduces a host of new issues to the proceeding--all those issues surrounding the propriety of restrictions RMC has placed on the granting of export permits--allowing RMC's intervention cannot but materially impair the orderly and prompt conduct of this adjudicative proceeding.

RMC Has not Provided an Appropriate Basis for the Relief it Requests.

UT Admin Code Rule 313-17-7(2)(b)(iii) requires that petitions to intervene include a statement of relief sought from the Board, including the basis thereof. For this reason, we view the attached RMC Motion to Dismiss not as a motion, which could only be made by a party to this proceeding, but rather as a required proffer by a prospective intervenor of the motion it would submit if and when it were allowed to intervene, presumably so that the Board can consider whether the remedy the intervenor seeks is even appropriate. We now address why allowing RMC to intervene for the purpose of pursuing the relief it requests would not be appropriate.

In Counts I and II of RMC's pleading, RMC argues, in effect, that the State of Utah has a duty to enforce requirements RMC imposes on the export of LLRW from its non-sited compact region. In Count III ("Motion to Dismiss"), RMC takes that argument one step further when it argues that RMC is "a necessary and indispensable party to this proceeding," para 22, while simultaneously arguing that "it is not legally feasible to join the Rocky Mountain Board as a party to this proceeding," *id.* In Count III, RMC is telling the Board that the State of Utah is without authority to review a petition challenging a Utah LLRW disposal facility license petition if such review could affect Utah's "duty" to enforce RMC's requirements. As license provisions must be challenged before the Radiation Control Board, this would mean, as a practical matter, that while RMC has fora (such as the US District Court in suits against the United States) to adjudicate issues relating to compliance with the RMC Compact, there is no forum in which anyone else could challenge license provisions which could theoretically affect RMC. In essence, RMC is arguing that license provisions relating to export permits are

nonreviewable, and that the Board cannot even consider the bases of USAF's challenge to the license provision in question.

Aside from the obvious unfairness of this position, we note that the Board has a statutory duty under the Radiation Control Act to hear appeals of final decisions made by the executive secretary. Utah Code Ann. § 19-3-103.5(2)(a). We cannot reconcile RMC's position with the Radiation Control Act. Further, we believe that restrictions on the Board's ability to consider challenges to radioactive waste licenses would necessarily impair the Board's ability to oversee radiation control matters in Utah. And if RMC can require the State of Utah to impose requirements on LLRW generators through disposal facility licenses, RMC is exercising a regulatory function. As RMC has no regional disposal facility with economic interests to protect, we do not understand what the nature of RMC's regulatory function can be other than a health, safety or environmental regulatory function. Given that Utah's authority to regulate radiation safety is subject to NRC oversight under the NRC Agreement State Program, and given that RMC is prohibited from exercising a health, safety, or environmental function, accepting RMC's assertion of absolute authority over Utah's disposal facility license provisions would make NRC a necessary party to this proceeding.

The reason RMC seeks to intervene in this proceeding rather than to take its dispute with USAF to the U.S. District Court is that this tribunal, unlike the U.S. District Court, is not set up to address many of the underlying issues which form the dispute between USAF and RMC. Thus, while RMC accuses USAF of an "attempt to circumvent the Rocky Mountain Compact export requirement and ship LL[R]W to the Envirocare Facility in violation of the Rocky Mountain Compact," it is, in fact RMC which seeks to circumvent the proper procedure for resolving its dispute with USAF because following such procedure would require it to justify its position. As we have shown, however, RMC's legal interests are not affected by this proceeding. Rather than focusing on how the license provision could impact RMC, the Board should be considering whether the provision as it stands is consistent with state and federal law. USAF therefore respectfully requests that the Board deny RMC's petition to intervene.



Dale Murad
Attorney for Petitioner U.S. Air Force

August 29, 2001

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Attachment D
Testimony to the Senate Committee on the Judiciary
Leonard C. Slosky
January 12, 1984

**RESOLUTION NUMBER 2 OF THE ROCKY MOUNTAIN
LOW-LEVEL RADIOACTIVE WASTE BOARD**

WHEREAS, the United States Nuclear Regulatory Commission ("NRC") is concerned that the use of the term "management" in the Rocky Mountain Low Level Radioactive Waste Compact ("Compact") may permit the Rocky Mountain Low Level Radioactive Waste Board ("Board") to establish regional health, safety or environmental regulatory functions; and

WHEREAS, the Low-Level Radioactive Waste Policy Act, Public Law 96-573 states that "low-level radioactive waste can be most safely managed on a regional basis"; and

WHEREAS, the only regional regulatory authority contained in the Compact concerns the Board's approval of regional facilities solely on economic criteria which are outside the purview of the Atomic Energy Act and the NRC (under the Compact, all health and safety authorities continue to be vested in the individual states and/or the NRC); and

WHEREAS, the NRC is concerned that the Compact's restriction on export of waste from the region could be viewed as a burden on interstate commerce; and

WHEREAS, the Compact contains a provision allowing the Board to authorize the export of waste from the region; and

WHEREAS, the Board finds that the restriction on export of waste from the region is necessary to assure the economic viability of the region's facilities and can be constitutionally authorized by the United States Congress in consenting to the Compact; and

WHEREAS, the NRC is concerned that the Board or states party to the Compact may be authorized by the Compact to inspect NRC licensees or

promulgate packaging and transportation standards which may be inconsistent with federal law; and

WHEREAS, the Compact does not provide the Board or the states party to the Compact with any regulatory authority over the packaging or transportation of low-level radioactive wastes not already authorized under state or federal laws.

IT IS HEREBY RESOLVED THAT:

1. The Board will not establish any regional health, safety or environmental regulatory functions.
 2. The Board will not seek to restrict the export of waste from the region unless and until the Board is authorized to do so by the United States Congress.
 3. The Atomic Energy Act of 1954 prevents both the Board and the states party to the Compact from inspecting NRC licensees except as may be provided under section 274i of the Act. The Board will not adopt packaging or transportation requirements which would be inconsistent with federal provisions.
-

This resolution is unanimously adopted by the representatives of the States of Colorado, Nevada, New Mexico and Wyoming on August 5, 1983.

For the State of Colorado:

William Hendee
William Hendee

For the State of Nevada:

S. Barton Jaska
S. Barton Jaska

For the State of New Mexico:

Robert McNeill
Robert McNeill

For the State of Wyoming:

John Doerges
John Doerges

CERTIFICATE OF SERVICE

I hereby certify that on this thirtieth day of August 2001, a true copy of the foregoing **Response to Rocky Mountain Compact's Petition to Intervene** and the **Memorandum of Points and Authorities** in support thereof were sent by certified U.S. mail, return receipt requested, to the following:

Executive Secretary
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Division of Radiation Control
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