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DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DIVISION OF ENVIRONMENTAL QUALITY

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Jill Lipoti, Ph.D., Assistant Director  
Radiation Protection Programs

January 30, 1991

Mr. James Kennedy  
Office of Nuclear Materials Safety and Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. Kennedy:

I would like to take this opportunity to offer our views regarding the Nuclear Regulatory Commission (NRC) Policy Issue SECY-90-318 dated September 12, 1990 and the eight questions posed by the NRC in the December 4, 1990 Federal Register.

Item 1.

The issue that appears most important involves the specific administrative, technical and legal ramifications of the states taking title to and being obligated to take possession of LLRW as required in Section 5 d 2(C) of the Low-Level Radioactive Waste Policy Amendments Act (LLRWPA) (Question #4). In our opinion these ramifications are not adequately addressed by the NRC in the aforementioned policy document.

SECY 90-318 provided clear evidence of the NRC's legal authority to issue license amendments to licensees and licenses to states for temporary storage of Low-Level Radioactive Waste (LLRW) after 1993 or 1996. It is also clear that such extended storage may become necessary in those states which have not developed or acquired disposal capacity by that time. However, the NRC's proposal to issue guidance documents to the states and enforce pertinent parts of 10 CFR regarding storage requirements falls far short of addressing the major concerns. For example, having the authority to issue licenses to states for temporary storage is virtually useless if the states cannot take possession of LLRW because they do not have adequate facilities as required by 10 CFR parts 30.33 and 40.32. It is unlikely that states can develop adequate facilities, such as temporary storage sites, because siting and developing these facilities in a timely fashion would present similar obstacles as are being encountered with the permanent disposal facilities currently under consideration. Even in the event a state is successful in establishing a temporary storage facility, once in place there will be a strong inclination to keep it in operation indefinitely. If this scenario occurs, what avenues

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can the NRC pursue against the states should they continue to store beyond what the NRC considers to be an acceptable time limit? Merely denying a license extension will be ineffectual if there is no place available to permanently dispose of the LLRW. Will emergency access become routine?

In light of the above, we would like for the NRC to respond to the following questions and comments:

- a. Because it is likely that states will not develop temporary storage sites and therefore be unable to take "possession" as they are "obligated" to do, the majority of "temporary" storage will take place at the sites of generation. This inability by the states to take possession requires that the terms "direct" and "indirect" damages for which states are liable be clarified and the impacts explored. What are the limits of "direct" and "indirect" damages? We suggest that the states' liability be limited to direct waste management tasks and be exempt from any damages attributed to less tenable areas such as poor housekeeping or a loss of business caused by a lack of LLRW storage capacity. Without defining damages, both the state and the generators will be unable to determine exactly what the costs will be for complying with this provision of the LLRWPA.
- b. Could fees be charged to generators to offset the monetary impacts these damages will have on the states? Depending on the associated costs, many states may have to eliminate other important environmental initiatives in order to pay the damages incurred by LLRW generators. Such a scenario will subvert the environmental protection and public safety goals of the LLRWPA.
- c. When title (ownership) is transferred to the state, but the state does not take possession, how will NRC license a facility for radioactive materials the facility no longer owns nor is responsible for? When is title to the waste transferred? Who will be responsible for assuring the provisions in the license are being met? Will the state be required to have personnel assigned to each generator site to ensure compliance with 10 CFR requirements? A rule which requires the states to take title to the waste, but leaves possession and daily management responsibilities with the generator is preferred. Such a rule would simplify adherence to license requirements and ensure that the most knowledgeable personnel are closely monitoring the storage activities.
- d. If temporary storage is established at a third party facility not owned by the state, how would this be licensed and who is primarily responsible for the safe keeping of these materials?
- e. Many generators have expressed concern that waste forms which were appropriate for disposal at the time the materials were placed in storage, may not be acceptable for disposal

in the planned facilities if such facilities establish waste form requirements which are more strict than those that had been in effect.

The impacts of the title and possession provisions in the LLRWPA present potentially severe financial and programmatic consequences to the states and deserve further analysis by the NRC. If the NRC wants to provide guidance documents to the states regarding LLRW issues, this is one area that such efforts would be worthwhile.

#### Item 2

We suggest that the factors the NRC should consider in deciding whether to authorize on-site storage of LLRW beyond 1996 are:

- a. Disposal capacity availability
- b. Facility capabilities of meeting 10 CFR requirements
- c. Economic impacts on both the states and industry
- d. Radionuclides and waste forms involved
- e. Alternative strategies available
- f. Public/employee health and safety

#### Item 3

The potential health, safety and environmental impacts of increased reliance on on-site storage of LLRW are many. Firstly, the longer the LLRW is in storage at individual generator facilities, the greater the risk of spillage at each facility. Such losses could take place at multiple locations and force costly cleanups on the states. Secondly, in New Jersey many pharmaceutical and biological research industries generate considerable volumes of laboratory animal carcasses which are used in radioactive tracer studies involving Carbon-14 and Tritium. These carcasses tend to decompose over time with a concurrent generation of gases containing significant amounts of radioactivity. Intensive treatment of these materials will be required prior to storage. Thirdly, additional handling of materials due to treatment, e.g. shipment to a treatment facility then return for storage, increases the risk of exposure. Waste forms for the storage period might also be different from those required for permanent disposal thus leading to additional handling and increased exposure.

#### Item 4

LLRW storage for other than operational needs beyond 1996 will have an adverse impact on incentives to site and develop permanent disposal facilities in a timely fashion. The possibility of storage beyond 1996 allows states and compacts to further delay the disposal facility development process. Extending the storage

deadlines from 1996 to 1998 will create the impression that other deadline extensions are possible. However, if disposal availability is not forthcoming to the states, placing limits on storage timeframes is a moot point. If there is no place for the LLRW to go, what will states be forced to do with it? Shutting down all industries which use radionuclides and produce LLRW will likely prove to be an unsatisfactory response.

#### Item 5

For reasons described in Issue 1 c, there appears to be a strong case for addressing title and possession provisions separately. Because the development of a centralized, temporary storage facility is unlikely, LLRW will be stored at the site of generation until such time a disposal facility becomes available. This probable scenario will result in the state being unable to take possession of LLRW as it is obligated. Therefore, in our opinion, it is far more worthwhile and realistic for the NRC to develop rules which deal with states taking title and generators retaining possession. Under the title provisions, the state would remain liable for all LLRW management and storage related damages incurred by the generators. The generators would retain possession and be responsible for the proper management, storage and adherence to all license and regulatory requirements related to LLRW. This would result in less confusing and more efficient management of LLRW during the temporary storage period.

#### Item 6

The New Jersey Constitution of 1947 provides that the functions, powers and duties of all executive instrumentalities of State government are to be allocated by the legislature. See Const. 1947, Art. 5, Sec. 4, Par. 1 and Art. 4, Sec. 1, Par. 1. See also Association of New Jersey State Colleges v. Board of Higher Education, 112 N.J. Super. 237 (L.D. 1970). Hence, no instrumentality of the State has any function, power or duty unless the legislature has granted or imposed it. The legislature has not granted to any State instrumentality either the power to acquire, possess or take title to LLRW, or the power to incur liabilities with respect to LLRW. Accordingly, the State of New Jersey does not possess a mechanism to legally take title to or possess LLRW, or to incur liabilities to generators or owners for its failure to possess same.

In addition to the foregoing, the recent State of New York v. United States of America court decision notwithstanding, the State of New Jersey may interpose a constitutional objection to the title and possession requirements imposed by the LLRWPA, and reserves the right to pursue any other issue pertaining to the title provisions of the LLRWPA at a later date.

#### Item 7

The LLRWPA requires that states/compacts develop disposal



capacity. What would further assurances from the state/compacts do to alleviate impending problems brought about by extended storage? If the states/compacts could make dependable assurances that sufficient disposal capacity exists there would be no reason to explore extended storage. What would the NRC response be if states/compacts could not make such assurances?

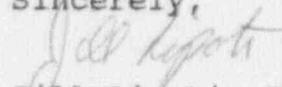
Item 8

This item has been adequately addressed in the Item 1 section.

The issues for which the NRC sought comments are complex and substantially impact both the states and their LLRW generators. These issues are so significant that we believe they should be addressed by the NRC through the formal rulemaking process. Attempts to establish the "rules of the game" through policy statements will lack the legal impact that rules provide.

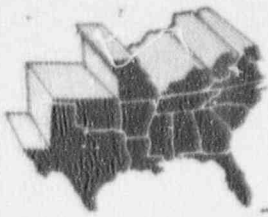
Hopefully we will find solutions to these significant problems. If you have any questions regarding our comments, please contact Mr. Fred Sickels at (609) 987-6367.

Sincerely,



Jill Lipoti, Ph.D., Assistant Director  
Radiation Protection Programs

c: Robert Stern, Ph.D., Chief, BER



# SOUTHERN STATES ENERGY BOARD

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January 30, 1991

Mr. James Kennedy  
Mail Stop 5E2  
Office of Nuclear Materials Safety and Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Re: Request for comments on SECY 90-318

Dear Mr. Kennedy:

The Southern States Energy Board is pleased to provide comments on the title transfer and possession provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA) and on the Nuclear Regulatory Commission's staff analysis of those provisions. While the Board's member states possess differing and sometimes opposing viewpoints on handling and disposing low-level radioactive waste, the NRC's staff analysis touches on several concerns common to all southern states.

SSEB wholeheartedly agrees with NRC's position that allowing long-term low-level waste storage onsite for other than operational reasons runs contrary to the intent of the LLRWPA. Efforts to site permanent low-level radioactive waste disposal facilities have been frustrated since passage of the LLRWPA. Any action that might lessen the necessity for new capacity, even if such action is deemed to be of a temporary nature, could delay the process even further and hence work against the best interests of the public at large.

The NRC staff outlined four possible approaches that could be used in implementing the title transfer and possession provisions of the LLRWPA. SSEB feels the first option, the amending of 10 CFR Parts 30, 40, and 70 by the NRC, could result in the delay of siting and building new disposal capacity. Imposing a rigid rulemaking process may not be an effective approach to take. A more flexible option would be the issuance of guidance to the governors (approach 2), guidance that could be amended and altered as conditions dictate. While this approach would not result in the formal codification of NRC's position, the relative ease and speed with which the needed actions could be taken outweigh the possible drawbacks such a mechanism could produce.

SSEB has received comments from member states in reference to the specific questions outlined in the notice appearing in the December 4, 1990 issue of the Federal Register. Specifically, states expressed concern about providing input on administrative, technical and legal issues pertaining to title transfer provisions. Some states believe that they have not had the opportunity to examine specific issues in detail. Many complex issues, such as those pertaining to liability, require close attention. Consequently, state and federal regulations may need to be amended. Agreement states and other affected parties must be

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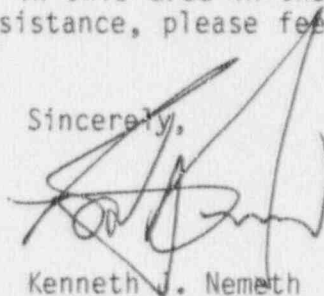
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brought together to discuss these and other issues as they arise. Historically, this Board has brought together representatives of its member states and other entities in an effort to resolve conflicts on a regionwide basis in several areas ranging from high-level radioactive waste handling to coastal resources protection. We have found that such an approach can be extremely fruitful in bringing about substantive discussions. We encourage the NRC to use a regional entity to bring together various parties for further discussion.

SSEB appreciates the opportunity to provide comments and we applaud the NRC's efforts thus far in the resolution of these important issues. The Board will continue to follow developments in this area in the future. If I or anyone on the SSEB staff can be of assistance, please feel free to call on us.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenneth J. Nemeth', written over a large, light-colored scribble or stamp.

Kenneth J. Nemeth  
Executive Director

KJN:awt

cc: Governor Carroll A. Campbell, Jr., South Carolina, SSEB Chairman