



Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

905 Plum Street Bldg 3 • PO Box 40109 • Olympia WA 98504-0109

March 8, 2001

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OSP

Paul Lohaus
Office of State and Tribal Programs
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

Dear Mr. Lohaus:

I am writing to you in my capacity as general counsel to the Northwest Interstate Compact on Low-Level Radioactive Waste Management. Counsel for the Army Corps of Engineers has written to me asserting that certain Army nuclear reactor material at the Ft. Greely Army installation is not subject to compact authorities and can, therefore, be disposed at the commercial disposal facility of the Army's choosing. According to the letter, the reactor in question, the SM-1A, has been used to power the installation and has not been used for atomic weapons purposes.

At the last meeting of the Northwest Interstate Compact, the issue was presented to the Committee. Before taking action on the issue, the Committee requested that I provide them with a written legal opinion and, without taking any position on the Corps' assertions, that certain factual questions arising from the Corps' letter be addressed. The purpose of this letter is to request information regarding NRC regulatory authority. This request is preliminary to a final response to the Corps and is not meant to be in any way indicative of our final conclusion.

One of the assertions made by counsel for the Corps is that the Ft. Greely reactor has never been subject to the jurisdiction of the Nuclear Regulatory Commission ("NRC") or, apparently, to that of the NRC's predecessor agency, the Atomic Energy Commission ("AEC"). Specifically, counsel for the Corps argues that Department of Defense military reactors are excluded from regulation under 42 U.S.C. §§2121(b) and 2140(b). Therefore, she concludes that "....the SM-1A Army reactor, the special nuclear material that fueled it, and the facilities and materials that were or became radioactive by exposure to the reactor are not subject to regulation under the Atomic Energy Act of 1954." Please see enclosed copy of letter from Ann Wright to Lilia Lopez dated November 6, 2000.

The question, then, is whether or not NRC, or AEC before it, does or has asserted regulatory authority over this particular military reactor or any other military reactor. If some military reactors are or have been subject to NRC or AEC regulatory authority, while others have not, the question is what distinguishes one type from the other. If military reactors and related



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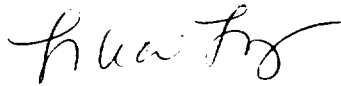
Page 2

materials are not and have not been subject to regulation, the question is why not. We would also very much appreciate copies of any written documentation relevant to your response.

The next Compact meeting is scheduled for April 24, 2001. If you could provide answers to these questions before then, it would assist the Compact in addressing the Ft. Greely issue.

Thank you for your trouble. If you have any questions, please do not hesitate to contact me.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Lilia Lopez", with a stylized flourish at the end.

LILIA LOPEZ
Assistant Attorney General
(360) 586-6474

Enc.

Cc: Compact Committee

Mike Garner, Compact Executive Director

REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
HTRW CENTER OF EXPERTISE
12665 WEST CENTER ROAD
OMAHA, NEBRASKA 68144-3869

HTRW CX Counsel

November 6, 2000

Lilia Lopez, Esq.
Washington State Attorney General's Office
P.O. Box 40109
Olympia, WA 98504-0109

Dear Ms. Lopez:

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ATTORNEY GENERAL'S OFFICE
AGRICULTURE & HEALTH DIVISION

This concerns the decommissioned Army nuclear reactor at the Ft. Greely Army installation in Alaska. This letter is in follow-up to our telephone call of July 27, 2000, which included members of the staff and representatives of the Northwest Interstate Compact on Low-Level Radioactive Waste Management (Northwest LLRW Compact) and the United States Army Corps of Engineers (USACE). I am writing to you as the designated counsel for the Northwest LLRW Compact.

There are three decommissioned Army nuclear reactors currently under permit by the U.S. Army Nuclear and Chemical Agency to the USACE. Two of them are located in Virginia and one is located in Alaska on Ft. Greely. The Ft. Greely reactor is known as the SM-1A reactor. All three reactors have had their fuel cores removed and disposed of off-site, and they are now in a safe store status. The USACE is evaluating the best approach to eventual close-out of these reactor sites.

The waste water pipeline and dilution station for the reactor at Ft. Greely was located on property designated to be excised as part of the Army Base Realignment and Closure (BRAC) Program. The pipeline on the BRAC property has been excavated, as well as some surrounding soil with low levels of Cesium-137 and Strontium-90, as part of the BRAC site environmental remediation work. These materials have been temporarily containerized and stored in anticipation of removal from the site and off site disposal. We have looked at the alternatives for disposal of these materials and believe that the best alternative in terms of protection of public health and the environment, cost effectiveness and compliance with legal requirements is to dispose of them at a facility licensed under 10 CFR Part 61, or an Agreement State equivalent. Envirocare of Utah operates such a facility, licensed by the State of Utah under their Atomic Energy Act Agreement State authority, and we have proposed to dispose of these Ft. Greely reactor water pipeline excavated materials at the Envirocare facility.

Army nuclear reactors operated for military purposes are not, and never have been, licensed by the Nuclear Regulatory Commission (NRC) nor by its predecessor, the Atomic Energy Commission. Beginning with the passage of the Atomic Energy Act of 1954, 42 U.S.C. 2011 et seq. (the Atomic Energy Act), which first authorized non-federal possession and licensing of nuclear energy utilization facilities and certain radioactive materials defined in the Act, the Department of Defense has been exempted from the

requirement to license atomic weapon or utilization facilities that are used for military purposes, as well as the special nuclear materials related to those facilities. 42 U.S.C. 2121(b), enacted as Section 91(b) of the Atomic Energy Act of 1954, and 42 U.S.C. 2140(b), enacted as Section 110(b) of the Atomic Energy Act of 1954. A nuclear reactor is a utilization facility because it uses special nuclear material for the production of atomic energy in such quantity as to be of significance to the common defense and security. 42 U.S.C. 2014(cc). The special nuclear material used in the Ft. Greely SM-1A nuclear reactor would be subject to regulation and licensing requirements under the Atomic Energy Act, but for the authority granted to the President and the Department of Defense in Section 91(b) and the regulatory exclusion provided in Section 110(b). Title 42 U.S.C. 2073 provides for licensing the possession, use and transfer of special nuclear material, and 42 U.S.C. 2131 prohibits the transfer, possession, or use of a utilization or production facility except under a license issued by the NRC, subject to the legislative exclusions in the Atomic Energy Act for facilities and special nuclear materials provided in Sections 91(b) and 110(b), and other statutory exclusions. Thus, the SM-1A Army reactor, the special nuclear material that fueled it, and the facilities and materials that were or became radioactive by exposure to the reactor are not subject to regulation under the Atomic Energy Act of 1954.

The legislative history of the Atomic Energy Act of 1954 indicates an unequivocal Congressional intent that the nuclear materials and facilities possessed and operated by the Department of Defense for military purposes would be excluded from any of the licensing and related regulatory requirements established in the Atomic Energy Act. Senate Rpt. 1699, 83rd Congress, 2d Session, 1954 U.S. Code Cong. & Ad. News, 3456, at 3474 and 3476. Although the Atomic Energy Act has been amended numerous times since 1954, these particular provisions have never been revised or altered. Thus, as a matter of basic authority, Congress provided that reactors used for military purposes, such as the SM-1A at Ft. Greely, as well as the special nuclear materials used in these reactors or byproduct materials made radioactive as a result of exposure to the special nuclear materials, would not be subject to regulation by any entity other than DoD. This DoD authority over utilization facilities and the associated nuclear materials has never been challenged in court.

The SM-1A and the other Army nuclear reactors have been operated under an internal Army administrative approval process which the Army refers to as a permit. Army Regulation 50-7 establishes the Army reactor permitting process. It provides that the U.S. Army Nuclear and Chemical Agency (USANCA), in coordination with the Director of Army Safety (DASAF) and the Army Reactor Office (ARO), issues permits to Army commands in possession of nuclear reactors for Army purposes. Pursuant to AR 50-7, the U.S. Army Corps of Engineers (USACE) is the Army permit holder for the SM-1A decommissioned nuclear reactor, and is subject to an approved decommissioning plan. The current version of the permit is issued to the USACE Chief, Environmental Division, Military Programs Directorate, effective on 30 October 1999, and allows the possession of byproduct materials produced as a result of the operation of the SM-1A, and radioactive materials at the SM-1A site, including the equipment and facilities used in the reactor operation. AR 50-7 provides that the standards and requirements of NRC

regulations for commercial nuclear reactors will be applied by the Army to its permitted nuclear reactors for purposes of operation and decommissioning and final permit termination, to the maximum extent possible. Section 1-5, AR 50-7. Pursuant to the Army reactor permitting program, in the 1970's, after the SM-1A at Ft. Greely was no longer operational, a decommissioning plan was developed and the fuel core was removed and shipped off site to a Department of Energy facility. The remaining radioactive materials and reactor structures have been maintained on Army property. The radioactivity present is a result of utilization of the special nuclear material in the reactor.

The question has been raised whether the off site disposal of the residual radioactive materials from the operation of the SM-1A at Ft. Greely is regulated under the Atomic Energy Act. The special nuclear materials, source materials, and byproduct materials regulated under the Atomic Energy Act are controlled by licenses issued by the NRC, and must be disposed at locations authorized by the NRC. The NRC controls the disposal of materials subject to their licenses in categories known as high level radioactive waste, low level radioactive waste, and byproduct materials under Section 11(e)(2) of the Atomic Energy Act. Unless subject to exemptions under the Atomic Energy Act, or as specifically exempted by the NRC, materials licensed by the NRC must be disposed at facilities licensed by the NRC for their disposal. 10 CFR 61.3. High level radioactive waste from commercial facilities licensed by the NRC must be disposed at a facility licensed under 10 CFR Part 60, and low level radioactive waste from licensed activities must be disposed at a facility licensed under 10 CFR Part 61. Low level radioactive waste ("LLRW") is defined in the Atomic Energy Act as radioactive material regulated under the Atomic Energy Act which is not high level radioactive waste, spent nuclear fuel, or byproduct material under Section 11(e)(2) of the Atomic Energy Act, and is classified as LLRW by the NRC. 42 U.S.C. 2021b(9). This definition was established in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99-240, Section 1.

Congress imposed duties on the federal government to provide disposal capacity for high level radioactive wastes and to study with the states the problem of disposal of commercial regulated low level radioactive wastes under the Low-Level Radioactive Waste Policy Act of 1980, Public Law 96-573. The LLRW of concern was described as originating at "hospitals, universities, industrial manufacturing plants, and nuclear powerplants" in the legislative history. 1980 U.S. Code Cong. & Ad. News 6938. This law was ineffective in resolving either the high level radioactive waste or the low level radioactive waste disposal issues. After recommendations were received from federal agencies and the States, the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99-240, was passed, almost completely replacing the 1980 provisions. The States are required to provide facilities for disposal of certain LLRW generated within their State, either by establishing their own disposal facility or preferably by entering into regional compacts with other States to provide for disposal of the affected wastes within those States. 42 U.S.C. 2021c. The States are required to provide disposal capacity for all Atomic Energy Act LLRW generated within their State, except for a number of federally generated LLRW categories, including DOE waste, Navy waste related to decommissioning of Navy vessels, wastes related to atomic weapons, wastes

from sites under the Formerly Utilized Sites Remedial Action Program (FUSRAP), and wastes that are not defined in the waste classifications established by the NRC for LLRW as Class A, B or C or are above Class C. 42 U.S.C. 2021c(a) and (b). Implicit in these limitations of State responsibility for federally generated LLRW is the fact that a State is not responsible for materials not under the jurisdiction of the Atomic Energy Act. These provisions establish a mandate for the States to provide disposal capacity. These statutes do not include language imposing new duties not otherwise established under the Atomic Energy Act upon generators regarding where materials must be disposed.

The legislative history for the LLRW Policy Amendments Act of 1985 indicates a Congressional intent that States and the compacts not be held responsible for defense related LLRW. House Report 99-314(I), dated 22 October 1985, provides that for federal activities, the definitions provided in federal law and regulations govern, and the federal definitions govern the LLRW for which the States are responsible. 1985 U.S. Code Cong. & Ad. News 2974, Section "Definitions of Low-Level Waste." Congress only intended to make the States responsible for federal LLRW, such as that from Veterans' Administration Hospitals, which was previously being disposed at commercial facilities. *Id.*, Section "Federal Responsibility." Defense related waste that had been disposed at DOE facilities would not become a responsibility of the States. The law encourages the development of regional compacts by the States to satisfy their responsibilities for providing disposal capacity. 42 U.S.C. 2021d. These compacts are encouraged to establish regional disposal facilities, and are given the authority to exclude certain out of compact LLRW from disposal at the compact facility if a facility capacity limitation is exceeded, and authority to assess fees for disposal at the compact facility, including surcharges for LLRW from States that do not provide a disposal facility through a compact or on their own within a specified schedule. If federal agencies send LLRW to a compact facility, they are subject to the terms, conditions and fees for use of that facility the same as other parties. 42 U.S.C. 2021d(b)(1). This Act expressly does not expand existing State authority, or limit the authority or jurisdiction of any federal agency. 42 U.S.C. 2021d(b)(4) and (5). Constitutional protections for interstate commerce also prohibit States from interfering with interstate commerce by restricting access to otherwise legally operating commercial disposal facilities or from restricting the interstate transport of LLRW for lawful purposes such as disposal. H.R. 99-314(I), 1985 U.S. Code Cong. & Ad. News 2974, "Section-by-Section" Analysis for Section 4(C)(1). Under these laws, the LLRW Compacts and Agreement States have certain responsibilities and authorities regarding disposal of a portion of the Atomic Energy Act regulated LLRW. The authorities do not include the regulation of federal activities, or responsibility for LLRW related to defense utilization facilities exempted from Atomic Energy Act regulation by Sections 91(b) and 110(b).

Title II of the LLRW Policy Amendments Act of 1985 includes Congressional consent to the Northwest Interstate Compact on Low-Level Radioactive Waste Management as of January 1986, which includes the States of Alaska, Hawaii, Idaho, Montana, Oregon, Utah, Washington, and Wyoming. P.L. 99-240, Sec. 221 (1986). This consent is subject to the provisions of the LLRW Policy Act, and is effective only if the Compact complies with all the provisions of the Act. P.L. 99-240, Sec. 211 (1986). In

this Compact, the States agree to exercise their existing regulatory authority to ensure that LLRW sent to a Compact disposal facility complies with the requirements of the host state, to inspect and take responsibility for any LLRW within their State that requires disposal, and to allow disposal at a disposal facility of any LLRW from a party State to the Compact. A LLRW disposal facility may accept out of compact LLRW for disposal only if it is accompanied by a certificate from the State of origin that includes certain information, plus a binding agreement that the state of origin will accept liability for any costs incurred as a result of a release during shipment or at the disposal facility, and the agreement of the Compact Committee to allow access to the facility for the originating state, generator or other compact. The host State for a disposal facility is allowed to establish disposal fees and other requirements for the operation of the disposal facility. Although the Northwest LLRW Compact to which Congress gave its consent recognizes that a LLRW facility exists in the State of Washington, it does not specifically designate that facility as an exclusive compact LLRW disposal facility for the Northwest LLRW Compact member States. Neither the federal statute, nor the Compact, grants any direct regulatory authority to the Northwest LLRW Compact Management Committee over LLRW materials, or expands existing State authority over LLRW or generators or disposal facilities.

It has been suggested that the passage of the LLRW Policy Amendments Act of 1985, P.L. 99-240, somehow supersedes the exclusions from regulatory control for DoD utilization facilities and special nuclear materials established in the 1954 Act. Normal rules of statutory interpretation, as well as the terms of these laws, however, do not support such a view. As a basic premise, Congress is presumed to have adopted a new statute with awareness and understanding of earlier enacted provisions. *St. Louis, Iron Mtn. & S. Ry. Co. v. United States*, 251 US 198 (1920). *Owner-Operators Independent Drivers Assoc. of America, Inc. v. Skinner*, 931 F. 2d 582, at 586 (9th Cir. 1991). If the earlier enacted provisions were not changed or substantively addressed in the later enactment, they remain intact and subject to the existing accepted interpretation. The interpretation adopted by an agency responsible for implementing a law is entitled to deference and will not be disturbed by a reviewing court unless it is arbitrary, capricious, or contrary to law. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984). With regard to the 91(b) and 110(b) utilization facilities and associated nuclear materials, the DoD is granted the authority to regulate and control those materials and has always done so outside the regulatory apparatus of the Atomic Energy Act. The Nuclear Regulatory Commission, and the Atomic Energy Commission before them, as the regulatory authority for commercial and other regulated federal facilities and radioactive materials has not challenged the 91(b) and 110(b) exclusion from their regulatory jurisdiction as applied by DoD. Moreover, as noted above, the LLRW Policy Amendments Act of 1985 did not amend or even address the question of regulatory jurisdiction over the excluded DoD facilities and even provides that its terms do not "impair the jurisdiction of any Federal agency." 42 U.S.C. 2021d(b)(4). The 1985 Act simply had no effect on the exclusion from Atomic Energy Act regulation established in the 1954 Act for DoD utilization facilities and the nuclear materials related to them.

This question of whether the 1985 amendment supersedes the regulatory exclusion of the 1954 Act assumes authority to regulate all federal agency LLRW is established for the States or the Compacts through some part of these laws. That assumption is incorrect. The Atomic Energy Act of 1954 included no general waiver of sovereign immunity, and recognized no State regulatory authority regarding the radioactive materials subject to the Act. To the contrary, it created federal preemption over regulation of the categories of materials and facilities that were included in its provisions. As described above, Sections 91(b) and 110(b) also excluded from regulation DoD utilization facilities operated for military purposes and the special nuclear materials used or created in their operation. In 1959, the Atomic Energy Commission was authorized to enter into agreements with States to allow the States to exercise regulatory control over certain source material, byproduct material (later to include 11(e)(2) byproduct material), and special nuclear material in a quantity below a critical mass. 42 U.S.C. 2021, P.L. 86-373, Sec. 274 (1959). This new "Agreement State" authority did not include any new provisions waiving sovereign immunity, or limiting the exclusions of Sections 91(b) and 110(b). Agreement State authority delegated by the NRC does not extend to the regulation of federal activities and materials, as that is reserved to the NRC. See 10 CFR Part 150, and particular State Agreements with the NRC. Furthermore, Alaska has no Agreement State authority delegated by the NRC. The LLRW Policy Amendments Act of 1985 included no expansion of State regulatory authority, and even explicitly preserved existing federal and State jurisdiction. 42 U.S.C. 2021d(b)(4) and (5). The Supreme Court has established the law clearly regarding interpretation of waivers of federal sovereign immunity. Only a properly passed federal statute is effective to waive the sovereign immunity of the federal government, and statutes including any sort of a waiver will be strictly construed and will not be expanded beyond the limits of the precise language used in the statute. *Department of Energy v. Ohio*, 503 U.S. 607 (1992). Since the earliest federal laws regulating nuclear reactors and the radioactive materials related to them, and through all the amendments including that recognizing the Northwest Compact, no waiver of sovereign immunity has ever been enacted that establishes any regulatory authority over the SM-1A Army reactor and its associated radioactive materials in any federal agency other than the DoD, or in any of the states or the Interstate LLRW Compacts.

It should be understood that, notwithstanding the seemingly broad definition of LLRW provided in the Atomic Energy Act, there are far greater quantities of materials with similar levels of radioactivity not regulated under the provisions of the Atomic Energy Act than the quantities that are regulated as LLRW. Disposal capacity for these other materials is not made the responsibility of the States under the LLRW Policy Amendments Act of 1985, and they are generally not disposed at Compact LLRW disposal facilities, or indeed at facilities licensed by the NRC or Agreement States. There is no explicit statutory exclusion in 42 USC 2021b for these materials; however, it is commonly understood that the jurisdiction of the Interstate LLRW Compacts does not extend or apply to them. These are the naturally occurring radioactive materials (NORM) and technologically enhanced NORM (or TE-NORM) that are generated in vast quantities by the petroleum, mining, construction, waste treatment and other industries. A recent article presented at the Waste Management Conference in late February 2000,

states that the estimated annual quantity of TE-NORM wastes in the United States is over 1 Billion tons, as compared to an estimated annual quantity of commercial LLRW of less than 30,000 tons (these quantities are not specified, but are based on a graphic depiction for comparison). "Disposal of Waste Containing Technologically Enhanced Concentrations of Naturally Occurring Radioactive Materials – When Is It a Concern?", by Roger Seitz, Waste Technology Section, International Atomic Energy Agency, March 2000, p. 3 (attached). This is not referenced to suggest that the Ft. Greely materials may be considered as NORM under some State laws. Rather, this illustrates that the Atomic Energy Act, and particularly the LLRW Policy Amendments Act of 1985, does not establish new regulatory jurisdiction over all low activity radioactive materials not previously regulated under the Atomic Energy Act. It instead imposes on the States a requirement to assist the nation in providing disposal capacity for those low level radioactive wastes that were regulated under the Atomic Energy Act as of the LLRW Policy Amendments Act of 1985 and for which disposal capacity at Atomic Energy Act licensed disposal facilities was found by the States and the Congress to be inadequate. It also illustrates that the definition of LLRW provided in 42 U.S.C. 2021b(9) does not literally apply to all radioactive materials that are not high level radioactive waste, spent nuclear fuel or 11(e)(2) byproduct materials, but actually only applies to those materials regulated under the Atomic Energy Act and meeting this definition.

The representatives of the Northwest LLRW Compact have asked about the significance of two previous actions by or for the Army related to some of the materials from the Ft. Greely decommissioned reactor. In 1993 some waste from Ft. Greely was disposed at the U.S. Ecology LLRW facility in Washington, and in 1997 a contractor initiated correspondence regarding the Ft. Greely reactor water pipeline waste that purported to describe the materials as LLRW. The following information has been located regarding these two events.

In 1992, the USACE determined that cracks in a wall at the Ft. Greely reactor site required repair. The wall was exterior to a stairwell used to contain debris from the decommissioned reactor that was encased in grout. The wall apparently was inadequate to hold its structural load and was repaired in 1992. The repair consisted of placement of a new wall structure without removing the existing wall, but did require excavation of a part of a concrete slab and some slightly contaminated soil and debris below the slab in order to place footings for the new wall. This excavated material was sampled and found to contain either very low levels or no detectable levels of Cesium-137, and a single sample of a very low detection of Cobalt-60. At that time, the U.S. Army Materiel Command, Radioactive Waste Disposal Division at Rock Island, Illinois had the only Army waste disposal contract for low activity radioactive materials, so the USACE requested that they arrange through their contractor to dispose of the approximately 25 cubic yards of contaminated material. The records from the Army at Rock Island indicate that 447 cubic feet of material with Cesium-137 and Cobalt-60 were taken to the disposal facility operated by U.S. Ecology in Washington. The available contemporaneous documents variously describe the materials as low activity or low-level or contaminated radioactive waste or debris or materials. They clearly recognized that the decommissioned reactor was subject to an Army permit and not an NRC license.

There is no available record indicating that a determination was made by any authorized Army official that the material was required to be disposed of at the Northwest LLRW Compact facility as LLRW subject to any regulatory authority outside of DoD.

In 1997, the Ft. Greely reactor wastewater pipeline project was the subject of a request for proposal to a contractor, Jacobs Engineering, to perform the excavation, removal and off site disposal of the pipeline excavation wastes. These are the same materials that are currently containerized and under consideration for disposal. Jacobs Engineering wrote to the Northwest LLRW Compact in a letter dated March 20, 1997, for the "position" of the Compact regarding disposal of the "low-level radioactive waste soil" from the pipeline at the Envirocare disposal facility in Utah. Jacobs Engineering did not then and does not now act as an agent for the Army or USACE, and the letter did not claim any such authority. In a letter dated April 4, 1997, the Chair of the Northwest LLRW Compact indicated that the matter would be presented to the Northwest LLRW Compact Committee at their meeting on May 20, 1997. In a letter dated April 11, 1997, Envirocare of Utah, Inc., stated to both the Army and the Northwest LLRW Compact that they would refuse to take the material, even if the Northwest LLRW Compact agreed it could be disposed at their facility. Available records do not indicate if the Northwest LLRW Compact Committee considered the issue at their May 20, 1997 meeting, and, if they did, what their recommendation was. That information may be available to you from the Committee meeting minutes.

These two events do not reflect a determination that materials from the three decommissioned Army nuclear reactors used to support military purposes must be disposed at facilities approved by a Compact under the LLRW Policy Amendments Act of 1985, or at any other specific facility. In both cases, the documents suggest that persons with a job to complete, who were neither legal representatives nor command officials, made contacts to arrange for disposal of some waste from the Ft. Greely reactor site. None of the available documents state that they reached a legal or policy conclusion that the Northwest Compact disposal facility at U.S. Ecology must be used to the exclusion of all others. To the contrary, Jacobs Engineering, in its 1997 letter, acting on its own behalf, asked only for the Northwest LLRW Compact position on the matter and made no suggestion of the Jacobs Engineering position, if it had one. These events are not dispositive of the matter now at hand.

While this current quantity of low activity materials to be disposed is important, and financially significant to both the Army and to the Northwest LLRW Compact, we must consider the much larger policy issues involved with all three of the decommissioned reactors now permitted by the Army to USACE. If it should be decided to dismantle and demolish all three reactor facilities in the near future, a much larger quantity of materials will require disposal away from the reactor sites. These materials range from uncontaminated construction debris, to very low activity radioactive materials, to equipment and structural materials from the center of the fuel cells with levels of radioactivity that may exceed Class C level, and varying degrees in between. There may also be small quantities of hazardous waste that would require disposal at a RCRA Subtitle C facility. We expect that a portion of the radioactive equipment and

debris may be considered for disposal at a licensed LLRW facility such as the U.S. Ecology facility in Washington because U.S. Ecology is licensed to receive materials with those activity levels. Two of the decommissioned reactors are located in Virginia. Virginia is part of the Southeast Interstate LLRW Compact, which has no disposal facility for LLRW at this time, and is not expected to have one soon. The public interest may require that disposal be arranged for all the radioactive materials, and the best place for a significant portion of them may be the U.S. Ecology facility in Washington. The total cost of the program to close these decommissioned reactors will range into the hundreds of millions of dollars, with disposal costs amounting to a large share of the total. We must consider all the factors that affect the public interest as we proceed, including public health and safety at both the reactor sites and the potential disposal sites, worker health and safety at both reactor and disposal sites, legal requirements and alternatives, fiscal impacts, and federal procurement competition requirements. We trust that as public officials, the Northwest LLRW Compact staff and Committee members can also appreciate all of these factors.

For the reasons described above, the USACE and the Army have determined that the Ft. Greely decommissioned reactor radioactive materials are not regulated except by the Army permit issued under AR 50-7. The radioactive materials from the BRAC pipeline remediation project are not regulated under the Atomic Energy Act and thus are not legally required to be disposed at a Compact designated LLRW disposal facility. We will comply to the maximum extent practicable with the NRC regulatory requirement that licensed reactor byproduct materials be disposed at a disposal facility licensed under 10 CFR Part 61, or an Agreement State equivalent. The Northwest Compact and its member States have no regulatory authority over the Ft. Greely reactor or the radioactive materials related to the reactor operation. These materials may legally be sent for disposal to any 10 CFR Part 61 or State equivalent LLRW disposal facility that is licensed to receive the specific radionuclides at the identified concentrations of the materials to be disposed. For the reactor pipeline materials from Ft. Greely, the Envirocare of Utah facility is licensed to receive these materials. It appears to be in the overall public interest for these materials to be disposed at the Envirocare LLRW facility. There is no legal basis for the Northwest LLRW Compact to assert an objection to Envirocare's receipt for disposal of these materials.

As the three decommissioned reactors are evaluated for closure, it is likely that factors affecting disposal decisions will militate toward disposal at the U.S. Ecology facility for some of the material. Full, fair and open consideration of the factors affecting each disposal decision is our goal. It is our hope that you and the staff at the Northwest LLRW Compact agree with this goal and will decline to object to our proceeding at this time under the materials disposal plan that has been established.

If you would like to discuss this further, we would be willing to do so by telephone or in person. If there is any additional information that would assist your consideration of this matter, let me know and I will try to respond if possible. Please direct your response to my attention as counsel for the USACE on this matter. I may be

contacted at 402-697-2466, by fax at 402-697-2415, or by e-mail at
ann.l.wright@usacc.army.mil.

Sincerely,



Ann L. Wright
Counsel for the Hazardous, Toxic and
Radioactive Waste Center of Expertise
U.S. Army Corps of Engineers

Enclosure

"Disposal of Waste Containing Technologically Enhanced Concentrations of Naturally
Occurring Radioactive Materials - When Is It a Concern??", by Roger Seitz, Waste
Technology Section, International Atomic Energy Agency, March 2000