June 2003


Emma Garrison

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol30/iss3/4

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z3845Z4

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
Entergy Arkansas, Inc. v. Nebraska:

Does a Radioactive Waste Compact Nuke Sovereign Immunity?

Emma Garrison*

In Entergy Arkansas, Inc. v. Nebraska, perhaps the most significant decision regarding the Low-Level Radioactive Waste Policy Act since New York v. United States, the Eighth Circuit held that Nebraska was not entitled to sovereign immunity protections from suit arising from its obligations under the Central Interstate Low-Level Radioactive Waste Compact. On remand, the district court entered a judgment against Nebraska in excess of $150 million. The regulation of low-level radioactive waste disposal has been particularly difficult due to the delicate balance of power between the states and the federal government, and also because of "Not in My Backyard" syndrome. It remains to be seen whether this financially devastating judgment against Nebraska will encourage other states to comply with the obligations in their respective regional compacts. The Entergy decisions will likely provide guidance to courts when determining sovereign immunity rights in litigation over other low-level radioactive waste compacts. Additionally, this case illustrates that the federal government has not yet achieved its goal of a national system of regional low-level radioactive waste disposal sites, and it is time for Congress to revisit the problem.

Introduction .......................................................................................... 450
I. The Low-Level Radioactive Waste Policy Act and Its Amendments ........................................................................... 452

Copyright © 2003 by the Regents of the University of California

* J.D. Candidate, University of California at Berkeley School of Law (Boalt Hall), 2004; B.A., University of Texas at Austin, 2001. I would like to thank Margo Hasselman and Professor Harry Scheiber for their guidance during the creation and development of this Note. I am also indebted to Scott Andrews, Adrianna Kripke, Jasmine Starr, Jessica Owley, and, particularly, Andrada Ruiz-Esquide for their thoughtful suggestions and assistance in preparing this Note for publication.
II. Eleventh Amendment Jurisprudence ............................................. 454
   A. History .................................................................................. 454
   B. Waiver of Sovereign Immunity ............................................... 455

III. The Compact Clause .................................................................. 456
   A. History .................................................................................. 456
   B. Sovereign Immunity in the Context of Interstate Compacts .......... 457

IV. Entergy Arkansas, Inc. v. Nebraska ............................................. 458
   A. The Central Interstate Low-Level Radioactive Waste Compact .... 458
   B. The Entergy Decisions ............................................................. 460
      1. Entergy I—Nebraska Waived its Eleventh Amendment Immunity by Entering the Compact ...... 460
      2. Entergy II—Members of Interstate Compacts May Not Possess Eleventh Amendment Rights at All ...... 461
      3. Entergy III—Membership in the Compact Allowed Nebraska to be Liable for Damages .......... 463
      4. Entergy IV—Nebraska Found Liable ......................................... 464

V. Discussion .................................................................................. 465
   A. What Constitutes Waiver of Immunity in the LLRW Regional Compacts? ...................... 465
      1. Comparison to Other Compacts ........................................... 465
      2. What Constitutes Clear Intention of Submission to Suit in Federal Court in an LLRW Compact? ........ 466
   B. Do Members of an Interstate Compact Possess Eleventh Amendment Immunity Rights? ............ 467
   C. Are Monetary Damages an Appropriate Remedy for Violations of an Interstate Compact? .......... 468
      1. Can Member States be Liable for Monetary Damages in the Context of Interstate Compacts? .... 468
      2. Is $150 Million in Liability a Good Incentive? ......................................... 469
      3. Seeking Another Solution ....................................................... 471

Conclusion .................................................................................... 471

INTRODUCTION

The states have failed to create a nationwide system of regional low-level radioactive waste (LLRW) disposal sites, despite significant incentives offered by the federal government since the 1980s. In 1980,
when only three LLRW disposal facilities existed, Congress enacted the Low-Level Radioactive Waste Policy Act (LLRWPA or Act) to encourage states to enter into interstate disposal compacts and thus distribute the burden of waste disposal throughout the country.\(^2\) The Act has not been successful in leading to a system of regional facilities, primarily due to NIMBYism, or "Not in My Backyard" syndrome.\(^3\) Nebraska's entrance into the Central Interstate Low-Level Radioactive Waste Compact (Compact) illustrates this problem.\(^4\) The Central Interstate Low-Level Radioactive Waste Commission (Commission), the governing body of the Compact, voted and selected Nebraska to host the regional LLRW disposal facility in 1987, but Nebraska has refused to grant any of the licenses necessary to build a facility.\(^5\) In response to this uncooperative behavior, the Commission sued Nebraska in federal district court alleging that Nebraska violated the Compact and acted in bad faith.\(^6\) Nebraska asserted its state sovereign immunity under the Eleventh Amendment of the United States Constitution.\(^7\) The Eighth Circuit held that Nebraska had waived its immunity by joining the Compact.\(^8\) On remand the district court found Nebraska liable for more than $150 million.\(^9\)

This case demonstrates complex issues of federalism that arise in the context of interstate compacts. Does Nebraska deserve sovereign immunity protections from the Compact's governing body, given that Nebraska voluntarily agreed to the terms of the Compact?\(^10\) Part I of this Note provides background on congressional regulation of LLRW disposal, Part II outlines relevant Eleventh Amendment jurisprudence, and Part III discusses the Compact Clause. Part IV addresses Nebraska's membership in the Compact as well as the Eighth Circuit and district court responses to Nebraska's assertion of Eleventh Amendment immunity. Part V examines whether the Eighth Circuit's decision will influence litigation over other LLRW compacts and whether LLRW compacts might supersede Eleventh Amendment immunity. This Note concludes that Congress should revisit the regulation of LLRW.

---

2. Id. at 47-49.
3. See id. at 57-59.
5. Id. at 983-84.
6. Id. at 984-86.
7. Id.
8. Id. at 988.
I. THE LOW-LEVEL RADIOACTIVE WASTE POLICY ACT AND ITS AMENDMENTS

Nuclear power plants, hospitals, universities, and manufacturers produce vast quantities of radioactive waste. Unlike high-level radioactive waste, LLRW does not pose substantial environmental hazards. The Nuclear Regulatory Commission concluded that shallow burial at closely monitored sites would safely dispose of LLRW. In 1979, there were only three LLRW disposal facilities, located in South Carolina, Nevada, and Washington. The governors of these states resented their states’ status as the nation’s radioactive waste dumping grounds and threatened to close their facilities. Nevada and Washington went so far as to close their sites temporarily, bringing LLRW to national attention. In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act in order to “more evenly distribut[e] the burden of the low-level waste disposal.”

LLRWPA established that “each State is responsible for providing for the availability of capacity...for the disposal of low-level radioactive waste generated within its borders.” The Act also concluded that “low-level radioactive waste can be most safely and efficiently managed on a regional basis” and gave states the authority to enter into regional compacts. The Act provided substantial incentives to join a compact, including a provision that allowed states with an existing disposal site to refuse access to waste from any state that had not entered into compacts by January 1, 1986.
Congress did not ratify any compacts by the deadline because most states preferred to export their waste to the three existing sites rather than make difficult political decisions about choosing a new site. But compacts that formed around the existing sites (South Carolina, Nevada, and Washington) were eager for Congress to ratify their agreements so they could exclude out-of-region waste. Congress did nothing to compel swift ratification because most members of Congress were from states without disposal sites. Thus, South Carolina, Nevada, and Washington continued to serve as the nation’s dumping grounds.

As a compromise, Congress amended the Act in early 1986 to create a seven-year transition period for states relying on existing disposal facilities. During this period, states could export their waste to the three facilities if they showed progress developing their own sites. The amendments were a compromise between states with disposal facilities and those without, and established more stringent guidelines and penalties for noncompliance, including monetary incentives, access incentives, and the “take title provision.”

The state of New York challenged the constitutionality of these amendments, particularly whether Congress had overstepped its authority by offering the states various incentives. The Supreme Court upheld the Act’s monetary incentives and access incentives, but it struck down the “take title provision.” This provision stated that states unable to provide for the disposal of their waste by 1996 must “take title to the waste... and shall be liable for all damages directly or indirectly

22. Id. at 48-49.
23. Id. at 49.
24. Id.
26. LLRWPA § 5; Peckinpaugh, supra note 1, at 50.
27. LLRWPA § 5; Peckinpaugh, supra note 1, at 50, 52-53. The major milestones included joining a compact, completing a detailed plan for a new facility, and submitting an application for a license from the NRC. LLRWPA § 5(e)(1); Peckinpaugh, supra note 1, at 53. Failure to make progress by the established deadlines meant that states would be charged a fee or denied access to the facilities altogether. LLRWPA § 5(e)(1); Peckinpaugh, supra note 1, at 52.
28. See LLRWPA § 5(e)(1).
30. The monetary incentives of the Act allowed states or compacts with plans to dispose of all their waste by January 1, 1993 to split the surcharges collected by existing waste facilities. Id. at 171-73; LLRWPA § 5(d)(2)(A).
31. The access incentives included doubling, tripling, or quadrupling surcharges for accessing waste facilities. New York, 505 U.S. at 173-74; LLRWPA § 5(e)(2)(A), (B), (D). States or compacts that had not made disposal arrangements by 1990 would be denied access to any existing facility. New York, 505 U.S. at 173; LLRWPA § 5(e)(2)(C).
32. New York, 505 U.S. at 174-75.
33. LLRWPA § 5(d)(2)(C).
incurred.\textsuperscript{34} The Court held that this provision crossed the line between encouragement and coercion, noting that the structure of the federal government is such that Congress can encourage, but not force, states to regulate their own waste.\textsuperscript{35} The invalidation of the "take title provision" has rendered the legislation virtually ineffective.\textsuperscript{36} As \textit{Entergy} demonstrates, the monetary and access incentives alone have not been entirely successful in encouraging states to take responsibility for their waste.\textsuperscript{37}

II. ELEVENTH AMENDMENT JURISPRUDENCE

A. History

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State."\textsuperscript{38} Congress adopted the Eleventh Amendment as a response to \textit{Chisholm v. Georgia}, in which the Supreme Court allowed two South Carolina citizens to sue the state of Georgia to collect a debt.\textsuperscript{39} \textit{Chisholm} alarmed the states, many of which feared being sued by individuals for their Revolutionary War debts.\textsuperscript{40} It should be noted that the Eleventh Amendment does not prevent states from suing one another. But, even though the amendment only expressly denies federal jurisdiction over suits against states by citizens of another state, the Supreme Court has interpreted it to bar suits by any private person, including citizens of the state claiming immunity.\textsuperscript{41} \textit{Hans v. Louisiana}\textsuperscript{42} established that states are immune from suit in federal court even when a claim arises from the United States Constitution or federal law.\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.}; \textit{New York}, 505 U.S. at 174-75.
  \item \textsuperscript{35} \textit{New York}, 505 U.S. at 178-181. Congress cannot force states to regulate, but can only regulate directly or preempt contrary state regulation. \textit{Id.} at 178.
  \item \textsuperscript{36} See Mostaghel, \textit{supra} note 11, at 421.
  \item \textsuperscript{37} See \textit{id.}
  \item \textsuperscript{38} \textit{U.S. CONST.} amend. XI; see also \textit{LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW}, VOL. 1 519, 521 (3rd ed. 2000); \textit{JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY} 137-152 (1987).
  \item \textsuperscript{39} 2 \textit{U.S.} 419 (1793).
  \item \textsuperscript{40} \textit{TRIBE, supra} note 38, at 521.
  \item \textsuperscript{41} \textit{Id.} at 522. Eleventh Amendment immunity applies differently if suit is brought in state court or in federal court. This discussion only pertains to the suit of states in federal court.
  \item \textsuperscript{42} 134 \textit{U.S.} 1 (1890). In \textit{Hans}, a citizen of Louisiana sued for damages, alleging the state's violation of the Contract Clause of the Constitution. \textit{Id.} at 1-2.
  \item \textsuperscript{43} \textit{TRIBE, supra} note 38, at 523. Although \textit{Hans} is longstanding precedent, the Court has questioned its legitimacy as recently as 1987. \textit{Id.} at 524. In \textit{Welch v. Texas Department of Highways and Public Transportation}, 483 \textit{U.S.} 468 (1987), the Court split on whether to overrule the decision in \textit{Hans}. \textit{Id.} Justice Scalia, the critical fifth vote, expressed his concern and
B. Waiver of Sovereign Immunity

As with other rights and immunities, a state can waive its sovereign immunity. Prior to 1964, courts did not deem a state to have waived its Eleventh Amendment right unless the state did so clearly and unambiguously, leaving "no room for any other reasonable construction." In *Parden v. Terminal Railway,* however, the Supreme Court introduced the concept of constructive waiver, which allowed implied consent to suit. At issue there was the Federal Employers' Liability Act, which provided that railroads would be liable for damages sought by injured employees. Because the state of Alabama operated a railroad, the court determined that this implied consent to suit in federal court and that Alabama had waived its sovereign immunity. In the 1970s, however, the Court began to retreat from the theory of constructive waiver. For example, in *Employees v. Department of Public Health and Welfare,* it held that because the Fair Labor Standards Act did not explicitly extend liability to state employers, there was no waiver of sovereign immunity.

When reviewing an alleged waiver of sovereign immunity, the current standard is to "indulge every reasonable presumption against waiver" and to find waiver only where indicated by the "clear declaration" of a state's intent to submit to suit in federal court. The waiver must be made "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." A general waiver, however, is not

uncertainty about the correctness of *Hans,* but voted not to overturn based on the assumption that the Constitution contains "an implicit limitation on suits brought by individuals against states." *Id.* (quoting *Welch,* 483 U.S. at 496 (Scalia, J., concurring in part and concurring in judgment)). The current trend, however, demonstrates a broad reading of *Hans,* recently reaffirmed in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). *TRIBE,* supra note 38, at 524-25.

44. *E.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 675 (1999); *TRIBE,* supra note 38, at 536. It should also be noted that the Eleventh Amendment does not automatically bar plaintiffs from suing states in federal court; the state must choose to invoke its immunity. *TRIBE,* supra note 38, at 527.


47. *Id.; TRIBE,* supra note 38, at 537.
49. *Id.* at 196.
51. *Id.* at 285; *TRIBE,* supra note 38, at 537.
53. Edelman v. Jordan, 415 U.S. 651, 673 (1974) (citing Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)). A related issue is whether Congress is allowed to abrogate a state's immunity. In recent years, the Court has allowed Congress to enact laws that abrogate the states'
ECOLOGY LAW QUARTERLY

sufficient. Consent to suit in "any court of competent jurisdiction" does not equal consent to suit in federal court. The Supreme Court has consistently held that the test for waiver is a stringent one: a state must explicitly specify its intent to waive its immunity from suits in federal court.

III. THE COMPACT CLAUSE

A. History

The Constitution provides that "[n]o State shall, without the Consent of Congress...enter into any Agreement or Compact with another State." The framers of the Constitution drafted the Compact Clause to resolve disputes between states modeling it after the methods of negotiations between colonies. Interstate compacts address issues that affect more than one state. When a compact is formed, each member state enacts a statute that defines the terms of the agreement. An interstate compact, however, is distinct from an ordinary statute in that it also operates as a binding contract between member states. Congress' power to grant or withhold consent ensures "that Congress...maintain[s] ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." The case of Virginia v. West Virginia established that Congress has the power to ensure that states comply with their interstate compacts and that the Court has the power to enforce them.

Eleventh Amendment immunity, but only in limited circumstances. The Court held in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) that Congress had the power to abrogate sovereign immunity under Section 5 of the Fourteenth Amendment because it specifically grants that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; TRIBE, supra note 38, at 540. The Court, however, has not extended Congress' ability to abrogate sovereign immunity beyond this. TRIBE, supra note 38 at 540.

57. U.S. CONST. art. I, § 10, cl. 3.
58. Frankfurter & Landis, supra note 10, at 693.
60. Id.
61. Id.; Green v. Biddle, 21 U.S. 1, 40 (1823).
63. 246 U.S. 565 (1918).
64. HARDY, supra note 60, at 22. The Eleventh Amendment was not an issue in Virginia since states have no immunity from a suit brought by another state. See Virginia, 246 U.S. at 600.
B. Sovereign Immunity in the Context of Interstate Compacts

Entergy Arkansas, Inc. v. Nebraska presents difficulties because it involves both the Eleventh Amendment and the Compact Clause. Justice Scalia has noted that such cases are "fundamentally different" from other Eleventh Amendment cases. The Supreme Court has held that governing bodies of interstate compacts can waive their immunity with less explicit statements than those required to strip states of this protection. Unless states that are members of a compact explicitly structure a governing body to enjoy Eleventh Amendment protections and Congress consents, courts do not presume governing bodies to have immunity. This is clearly distinct from the standard in other Eleventh Amendment cases, which requires courts to "indulge every reasonable presumption against waiver." The Court has found a governing body's immunity waived when its compact contained a general consent to suit in one article and a provision allowing federal jurisdiction in another article.

In Hess v. Port Authority Trans-Hudson Corporation, the Court noted that the Eleventh Amendment protects both state treasuries and the "dignity" of states in the federal system. The Hess Court emphasized that interstate compacts are the creation of at least three discrete sovereigns—at least two states and the federal government. Because compact agencies represent coalitions of one or more states, it seems logical that they should enjoy the same sovereign immunity privileges that the constituent states enjoy. In Hess, however, the Court reasoned that a state's dignity is not insulted if a compact's governing agency is sued in federal court. Because each state has "agreed to the power sharing, coordination, and unified action[s] that typify Compact Clause creations" and the federal government has granted its approval,
“the federal tribunal cannot be regarded as alien in this cooperative, trigovernmental arrangement.”

The Court also remarked that the original impetus for the Eleventh Amendment was the protection of state treasuries and noted that the lower courts have consistently held that the most important factor in determining sovereign immunity rights is the financial vulnerability of the state. Thus, because the Port Authority Trans-Hudson Corporation was a financially independent entity (and an adverse judgment would not affect a state’s treasury), the Hess Court was more willing to find that it did not enjoy Eleventh Amendment protection.

Federal courts have not addressed the question of Eleventh Amendment immunity when a compact’s governing body sues a member state, making Entergy a case of first impression.

IV. ENERTGY ARKANSAS, INC. V. NEBRASKA

A. The Central Interstate Low-Level Radioactive Waste Compact

In 1986, Nebraska, Arkansas, Kansas, Louisiana, and Oklahoma entered into the Central Interstate Low-Level Radioactive Waste Compact (Compact), which established the Central Interstate Low-Level Radioactive Waste Commission (Commission) to govern the development of waste facilities. The Compact outlines the obligations of participating states. “[E]ach state has ‘the right to rely on the good faith performance of each other party state.” Any state selected to host a disposal facility is responsible for processing permit and license applications “within a reasonable period.” The Commission can enforce each state’s performance of the “duties and obligations arising under this compact.”

In December 1987, the Commission chose Nebraska as the first state in the compact to host a low-level radioactive waste disposal facility.
Governor Kay Orr said that Nebraska would honor its obligations, although she was not happy about hosting a waste site.\textsuperscript{83} The Commission contracted with U.S. Ecology (USE) to apply for a license and to build and maintain a disposal facility.\textsuperscript{84} The Commission also contracted with a group of power companies (Generators) in order to pass on the cost of licensing.\textsuperscript{85} In July 1990, USE submitted its application to Nebraska's Department of Environmental Quality (EQ) and the Department of Health and Human Services and Licensure.\textsuperscript{86} Both agencies required USE to answer roughly seven hundred questions before they would review its license application.\textsuperscript{87}

About this time, Nebraska gubernatorial candidate E. Benjamin Nelson promised that if he were elected, "it is not likely that there will be a nuclear dump...in Nebraska."\textsuperscript{88} In 1991, Nelson was elected and he appointed a new director of EQ.\textsuperscript{89} In December of the same year, EQ informed USE that it would not accept any of its responses to the seven hundred questions.\textsuperscript{90} In January 1993, after USE completed the application, EQ denied the license "due to drainage problems and 'wetlands on the site.'"\textsuperscript{91} In December 1998, after USE amended the application, EQ again denied the license.\textsuperscript{92} By this time, the cost of the licensing process exceeded $80 million.\textsuperscript{93}

USE filed an administrative contested case proceeding under Nebraska law and challenged EQ's denial of the permit.\textsuperscript{94} The Generators then filed an action against Nebraska in federal court and USE intervened.\textsuperscript{95} The Generators and USE also sued the Commission but the district court realigned the Commission as another plaintiff.\textsuperscript{96} Plaintiffs claimed that Nebraska violated the good faith provision of the Compact by delaying the licensing process with the intent to deny the application regardless of its findings.\textsuperscript{97} They alleged that "political

\textsuperscript{83.} Entergy III, supra note 4, at 983.
\textsuperscript{84.} Id. at 982.
\textsuperscript{85.} Id. The Generators included Entergy Arkansas, Inc., Entergy Gulf State, Inc., Entergy Louisiana, Inc., Wolf Creek Nuclear Operating Corp., and Omaha Public Power District. Id.
\textsuperscript{86.} Id.
\textsuperscript{87.} Id. at 982-84.
\textsuperscript{89.} Entergy III, supra note 4, at 983.
\textsuperscript{90.} Id.
\textsuperscript{91.} Id.
\textsuperscript{92.} Id. "The reasons stated for denial were that there was insufficient depth of the water table at the site...and that USE had not shown financial ability to build and run the facility." Id.
\textsuperscript{93.} Id.
\textsuperscript{94.} Id. at 984.
\textsuperscript{95.} Id. at 983.
\textsuperscript{96.} Id. at 984.
\textsuperscript{97.} Id. at 984-85. They also claimed under 42 U.S.C § 1983 (2000) that their constitutional rights to procedural and substantive due process had been violated due to the numerous delays
influence and bad faith had tainted the license review process. Plaintiffs sought injunctive and declaratory relief, and they requested the substitution of state licensing officials by a neutral third party. All plaintiffs sought damages for the costs incurred during the licensing process, an accounting, and attorney’s fees.

**B. The Entergy Decisions**

In a series of motions and appeals, Nebraska asserted its Eleventh Amendment immunity. This Note only addresses Nebraska’s sovereign immunity as to the claims of the Commission. First, the Commission sought to enjoin the ongoing administrative contested case proceeding. On appeal, the Eighth Circuit upheld the granting of the preliminary injunction, determining that sovereign immunity did not bar injunctive relief. Second, Nebraska filed a motion to dismiss all claims brought by the Commission and asserted its Eleventh Amendment immunity. The district court denied the motion to dismiss, finding that Nebraska did not have sovereign immunity protection in this case. On appeal, the Eighth Circuit affirmed the denial of Nebraska’s motion to dismiss. On remand, the district court held Nebraska liable for $150 million.

**1. Entergy I—Nebraska Waived its Eleventh Amendment Immunity by Entering the Compact**

The district court granted the Commission’s motion for a preliminary injunction enjoining the ongoing administrative contested case proceeding. In *Entergy I*, Nebraska appealed, asserting that the Eleventh Amendment barred the order. The Eighth Circuit held, however, “that by entering into the Compact, Nebraska waived its immunity from suit in federal court by the Commission to enforce its

in the licensing process. *Id.* The court ultimately determined that it did not have jurisdiction to rule on these claims. *Id.* at 991.

98. *Id.* at 985.
99. *Id.* at 984.
100. *Id.*
103. *Id.* at 898, 901.
104. *Entergy II*, supra note 76.
105. *Id.*
109. *Id.* at 896.
contractual obligations" and pointed to the language in Article IV of the Compact. Article IV provides that "[t]he Commission shall... require all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum." The Compact also gave the Commission authority to "initiate proceedings... before any court of law... that has jurisdiction." Because the Compact is federal law, the court concluded that federal district court was a court of law that had jurisdiction. Nebraska argued that the language of the Compact was not "unequivocal" as is required for waiver of Eleventh Amendment immunity. The court held, however, that because the Compact was created by federal law, and the other language in the Compact was sufficiently clear, Nebraska had submitted to suit in federal court. The Eighth Circuit therefore affirmed the preliminary injunction ordered by the district court.

2. Entergy II—Members of Interstate Compacts May Not Possess Eleventh Amendment Rights at All

Nebraska then filed a motion to dismiss all claims made by the Commission, asserting that they were barred by the Eleventh Amendment. The district court held that sovereign immunity did not bar the claims, and that damages were an available remedy because of Nebraska's consent to the Compact. Recognizing that the Eleventh Amendment has an expansive scope in protecting state sovereignty, the district court examined Justice Scalia's assertion that cases involving both

110. Id. at 897.
111. Id. at 896.
112. Id. (quoting Central Compact, supra note 77, at Art. IV(m)(8), Art.IV(e)).
113. Id.
114. Id.
115. Id.
116. Id. at 897.
117. Id. at 900.
118. Entergy II, supra note 76, at 1103-04.
119. Id.
120. Id. at 1096; Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627 (1999) (holding that neither the Commerce Clause nor the Patent Clause gave Congress the authority to abrogate sovereign immunity); Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (stating that the test for waiver of Eleventh Amendment immunity is a stringent one); Alden v. Maine, 527 U.S. 706, 713 (1999) ("the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment... the States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today"); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (stating that consent to abrogation of sovereign immunity must be clear because of the important role played by the Eleventh Amendment).
the Eleventh Amendment and the Compact Clause are "fundamentally different" from other sovereign immunity cases.\textsuperscript{121}

The court noted that states cannot enter into compacts without the consent of Congress.\textsuperscript{122} Thus, "the granting of such consent is a gratuity" given to the states by Congress.\textsuperscript{123} After examining the history of the Compact Clause, the district court concluded that the framers of the Constitution did not intend states to have immunity from suits over compact conditions approved by Congress.\textsuperscript{124} The Compact Clause is "in a section [of the Constitution] dealing with restrictions upon the states."\textsuperscript{125} The framers "astutely created a mechanism of legal control" over the states; once a compact is approved, states "must accept the controls placed upon them by Congress" and cannot assert sovereign immunity.\textsuperscript{126}

The district court relied on Virginia v. West Virginia,\textsuperscript{127} in which the Supreme Court enforced West Virginia's debt of $12 million to Virginia as stipulated in a congressionally approved compact.\textsuperscript{128} Because the Virginia Court recognized the implications of the Eleventh Amendment and still enforced the monetary agreement, the district court concluded that states have no sovereign immunity from enforcement mechanisms selected by Congress.\textsuperscript{129} The district court also noted the decision in Texas v. New Mexico,\textsuperscript{130} which held that in cases involving an interstate compact, monetary damages may be an appropriate remedy.\textsuperscript{131}

Virginia and Texas both involved a suit between two states, which the Eleventh Amendment does not prohibit. In Entergy II, the court recognized that the Commission is not a state, but an entity created by the Compact; it nevertheless concluded that the analysis in Virginia and Texas applied.\textsuperscript{132} The district court reasoned that although compact
governing bodies “enjoy a significantly different position in our federal system than do the States themselves,” Congress approved the authority of the Commission, just as it approved the enforcement mechanism in Virginia.\textsuperscript{133} Thus, the Eleventh Amendment does not bar any Commission enforcement actions, including a suit for damages against a member state.\textsuperscript{134} The district court reasoned that “[t]he cases suggest, at least indirectly, that Compact Clause creations appropriately possess the power to sue a signatory state.”\textsuperscript{135}

Alternatively, the court reasoned that even if a compact’s member state could assert the Eleventh Amendment in a suit, Nebraska’s agreement to the Compact was sufficient to waive its sovereign immunity.\textsuperscript{136} Thus, the court concluded, “a monetary judgment may be entered against Nebraska.”\textsuperscript{137}

3. \textit{Entergy III—Membership in the Compact Allowed Nebraska to be Liable for Damages}

In response to the denial of its motion to dismiss, Nebraska made an interlocutory appeal. In this appeal (known here as \textit{Entergy III}), Nebraska argued that the district court had erred in holding that the Eleventh Amendment did not bar the Commission’s claims.\textsuperscript{138} Nebraska contended that it did not waive its immunity by joining the Compact.\textsuperscript{139} Even if there was a waiver, Nebraska maintained, it “was only from suits by party states to the Compact and the Commission is not a party to the Compact.”\textsuperscript{140} Nebraska argued that because the Commission is not a member state and the Compact did not specifically allow suits for damages, the Commission “may only seek future performance, not damages.”\textsuperscript{141}

The Eighth Circuit deferred to its previous ruling in \textit{Entergy I}, in which it upheld the Commission’s request for a preliminary injunction.

\begin{footnotesize}
\begin{enumerate}
\item[133.] \textit{Id.} (quoting \textit{Hess v. Port Authority Trans-Hudson Corp.}, 518 U.S. 30, 40 (1994)).
\item[134.] \textit{Id.}
\item[135.] \textit{Id.}
\item[136.] \textit{Id.} The court’s conclusion that waiver occurred was similar to the holding in \textit{Entergy I.}
\item[137.] \textit{Id.} After concluding that the language of the Compact was such that Nebraska had agreed to submit to suit in federal court, the district court briefly mentioned that if Nebraska were found to have acted in bad faith, it would be liable for “nearly $100 million” in damages. \textit{Id.} at 1100-03. Citing \textit{Seminole Tribe of Florida v. Florida}, 517 U.S. 44, 58 (1996), the district court recognized that one objective of the Eleventh Amendment is the protection of state treasuries. Nevertheless, it held that monetary damages were an acceptable remedy. \textit{Entergy II, supra} note 76, at 1103.
\item[138.] \textit{Entergy II, supra} note 76, at 1104.
\item[139.] \textit{Id.}
\item[140.] \textit{Id.}
\item[141.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
and did not explicitly limit the Commission to equitable relief. The court deemed the controlling law of the case to be that membership in the Compact constituted a waiver of Nebraska's Eleventh Amendment immunity. And, agreeing with the district court's interpretation of *Texas v. New Mexico*, the Eighth Circuit held that a "Compact between states is 'after all a contract... [and] [t]here is nothing in the nature of compacts generally... that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact." Because Nebraska waived its immunity, and since the Commission had authority to enforce the Compact, the court ruled that the Commission could sue Nebraska for damages in federal court.

4. *Entergy IV—Nebraska Found Liable*

After the Eighth Circuit's ruling on the interlocutory appeal, the district court ruled, in *Entergy IV*, that Nebraska was liable to the Commission for more than $150 million. The district court also issued declaratory relief, stating that Nebraska acted in bad faith and violated the Compact. The court did not, however, order Nebraska to act in good faith and honor its agreement under the Compact. Displeased by Nebraska's persistent political side-stepping and "self-serving behavior," the district judge opined that an attempt to impose equitable relief, such as court-supervised licensing, "would make a bad situation far worse." Nebraska filed an appeal and withdrew from the Compact.

142. *Id.*
143. *Id.*
146. *Id.*
147. *Entergy IV*, supra note 9. The court found that awarding "expectation damages" was appropriate and the Commission presented evidence that its "out-of-pocket" loss amounted to $97,802,211.84. *Id.* at 1151. Including prejudgment interest, the total amount awarded was $151,408,240.37. *Id.* at 1160.
148. *Id.* at 1054, 1061.
149. *Id.* at 1054-55.
150. *Id.* at 1162.
151. *Id.* at 1055.

Any party state may withdraw from this compact by enacting a statute repeating the same. Unless permitted earlier by unanimous approval of the Commission, such withdrawal shall take effect five-years after the Governor of the withdrawing state has given notice in writing of such withdrawal to each Governor of the party states. No
V. DISCUSSION

Political difficulties surrounding the decision of where to dispose of radioactive waste are not unique to Nebraska. The disposal of waste always provokes "Not in My Backyard" syndrome. And, the word "radioactive" and its associated fears make this kind of waste disposal even more difficult. Given the political difficulties involved in asking states to host disposal facilities for LLRW, Entergy probably will not be the last litigation involving the compacts created by LLRWPA. Other courts will likely look to the Eighth Circuit's holding in Entergy III for guidance as to whether member states may assert Eleventh Amendment sovereign immunity to avoid the duties and obligations that particular compacts impose.

Due to the different language of other LLRW compacts, courts may find that the Eighth Circuit's holding does not apply to other situations. It is also possible that courts will embrace the district court's assertion in Entergy II that member states of an interstate compact never have immunity from congressionally-approved enforcement mechanisms.

Section A, infra, compares the language of the Compact with other LLRW regional compacts and speculates whether the Eighth Circuit's analysis would apply. Section B then addresses the district court's assertion that a state surrenders its sovereign immunity when it joins an interstate compact. Section C examines whether damages are an appropriate remedy or an effective incentive for compact states to act in good faith.

A. What Constitutes Waiver of Immunity in the LLRW Regional Compacts?

1. Comparison to Other Compacts

Some states have written their compacts in such a way that would not allow suit against them in federal court. For example, the Northwest Interstate Low-Level Radioactive Waste Compact grants its

withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

Id.

156. See id.
158. See Entergy II, supra note 76, at 1100.
“Committee” only administrative powers and contains no enforcement provisions. 159 Although the Rocky Mountain Compact’s Board “shall have the power to sue” and “may intervene [sic] as of right in any administrative or judicial proceeding involving low-level waste,” its compact does not specify that it has the right to sue member states or otherwise enforce the obligations and duties of the compact.160

The Southeast, Central Midwest, Midwest, and Northeast Compacts, however, all establish a governing commission, and provide that it may “[a]ppear as an intervenor or party in interest before any court of law.”161 These compacts grant each of their commissions the authority to enforce the obligations of member states.162 The Northeast Compact specifically states that “district courts in the District of Columbia shall have original jurisdiction of all actions brought by or against the Commission.”163 However, the Southeast, Central Midwest, and Midwest Compacts do not specifically submit to suit in federal court. Rather, these compacts identify as a venue “any court of law...which has jurisdiction over the management of wastes.”164

2. What Constitutes Clear Intention of Submission to Suit in Federal Court in an LLRW Compact?

The Central Interstate Low-Level Radioactive Waste Compact stated “[t]he Commission may initiate proceedings or appear as an intervenor or party in interest before any court of law...that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact.”165 The Eighth Circuit held that because the Compact is federal law, suit in federal court was allowed.166 The Supreme Court, however, in Kennecott Copper Corp. v. State Tax Comm’n held that consent to suit in “any court of competent jurisdiction” is not sufficient to include federal court. So it is not obvious that Nebraska clearly consented to suit in federal court.167 Additionally, compacts that provide as a venue “any court of law...which has jurisdiction over the management of wastes” do not appear to include a

160. Id. § 226 Art. VI(x)(xiii), (xiv).
161. Id. § 226 Art. VI.
162. Id. § 223 Art. 5(E)(10); § 224 Art.III(i)(3); § 225 Art.III(h)(3); § 227 Art.IV(b)(5).
163. Id. § 224 Art.III(i)(5); § 225 Art.III(h)(5); § 227 Art.IV(i)(14).
164. Id. § 227 Art.IV(n).
165. Id. § 223 Art. 5(E)(10); § 223 Art.4(e)(10); § 224 Art.III(i)(3), § 225 Art.III(h)(3).
166. Id. § 222 art. (4)(e) (emphasis added).
169. Southeast Compact, § 223 Art.4(e)(10); Central Midwest Compact, § 224 Art.III(i)(3); Midwest Compact, § 225 Art.III(h)(3).
"clear declaration" of intent to suit in federal court. Thus, the Eighth Circuit's waiver analysis may not apply to other compacts.

B. Do Members of an Interstate Compact Possess Eleventh Amendment Immunity Rights?

The Eighth Circuit provides little guidance on the issue of whether compact clause cases hold a unique place in Eleventh Amendment jurisprudence. If other compacts lack a "clear declaration" of consent to suit in federal court, courts may embrace the District of Nebraska's theory that the Eleventh Amendment does not provide immunity in situations involving interstate compacts. The Supreme Court has demonstrated a substantial willingness to find a waiver of Eleventh Amendment immunity in interstate compact cases. Whether courts will extend this willingness to support the cooperative nature of interstate compacts and allow compact governing bodies to sue signatory states without clear consent remains to be seen.

The district court's conclusion that a compact governing body can sue member states without their consent because Congress approved the enforcement mechanism is not comprehensively supported. In Hess, the Supreme Court's most recent discussion of interstate compacts and the Eleventh Amendment, the majority held that the Port Authority Trans-Hudson Corporation, the governing body of an interstate compact, did not enjoy a presumption of sovereign immunity. This conclusion rested on two factors. First, the Court emphasized that the compact and its governing body were created as a compromise between states. Thus, a suit against the governing body did not offend the integrity of any individual state because the Port Authority Trans-Hudson Corporation represented the interests of more than one state. Second, the governing body was financially independent and therefore a suit against it in federal court did not threaten the treasuries of any member state. This reasoning suggests that courts can not as easily take Eleventh Amendment immunity away from states that are members of a compact. The suit of a signatory state would offend the "dignity" of an individual

171. Entergy III, supra note 4, at 986.
172. See Entergy II, supra note 76, at 1100.
173. William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1125 (1983); supra notes 63-74 and surrounding text.
175. Id. at 39, 53-54.
176. Id.
177. Id.
sovereign more so than would a lawsuit against a governing body, which represents the interests of multiple states.\textsuperscript{178} Moreover, the Supreme Court recognized the protection of state treasuries as “the most salient factor in Eleventh Amendment determinations.”\textsuperscript{179} Given this, it seems doubtful that courts would allow member states’ treasuries to be exposed to great amounts of liability absent their clear consent.\textsuperscript{180}

A state’s sovereign immunity in the context of an interstate compact may depend on the courts’ view of the compact’s governing body. If a court views a governing body as an agent of the member states, it might not be as willing to extend Eleventh Amendment protections to a state attempting to duck its responsibilities under a compact. Courts may not be very concerned with the dignity of the noncompliant state, given that each state willingly agreed to the terms of the compact.\textsuperscript{181} Thus, suit in federal court would not harm a state’s dignity if the state voluntarily agreed that the governing body had the authority to enforce the compact. However, because of the high risk to states’ treasuries, the courts will likely hesitate to subject states to suit in federal court and to financial liability if states did not expressly consent to federal court jurisdiction.\textsuperscript{182}

C. Are Monetary Damages an Appropriate Remedy for Violations of an Interstate Compact?

Because protecting state treasuries is a vital concern of Eleventh Amendment determinations, it seems likely that courts will have reservations about subjecting states to money damages without their specific consent to federal jurisdiction.\textsuperscript{183} However, even if a state has consented to suit in federal court, it is not clear whether a compact’s governing body is entitled to seek damages from a member state.

1. Can Member States be Liable for Monetary Damages in the Context of Interstate Compacts?

The Eighth Circuit’s determination in \textit{Entergy III} that Nebraska waived its immunity to suits for prospective and retroactive relief was not comprehensively supported.\textsuperscript{184} The court deferred to its reasoning in \textit{Entergy I} and thus determined that because it “carefully considered” the Eleventh Amendment immunity issue in the preliminary injunction appeal, the “holding that Nebraska waived its immunity from claims by

\textsuperscript{178} See id. at 39, 41-42.
\textsuperscript{179} Id. at 48.
\textsuperscript{180} Id. at 52-53.
\textsuperscript{181} See id. at 39.
\textsuperscript{182} See id.
\textsuperscript{183} See id. at 48.
\textsuperscript{184} See \textit{Entergy III}, supra note 4, at 987.
the Commission, including claims for damages, is now the law of the case.\footnote{185} This seems to overstate the holding in \textit{Entergy I}, an opinion that only addressed whether the Commission was entitled to a preliminary injunction, which is \textit{prospective} relief, and did not specifically address the issue of damages or \textit{retrospective} relief.\footnote{186}

In \textit{Entergy II} and \textit{Entergy III}, the district court and the Eighth Circuit respectively relied on \textit{Texas v. New Mexico} in concluding that the Commission can seek monetary damages.\footnote{187} The reasoning is essentially that because a compact is a contract, and since nothing in the Compact here "counsels against rectifying a failure to perform in the past," the Commission is entitled to monetary relief.\footnote{188} However, in \textit{Nebraska v. Central Interstate Low-Level Radioactive Waste Commission},\footnote{189} another case involving Nebraska's obligations under the Compact, the Nebraska District Court held that the dispute in \textit{Texas} was "far different" from a dispute between the Commission and the state of Nebraska.\footnote{190} Because the Commission is "a legal entity separate and distinct from member states ... [t]here is no contract between the State and the Commission."\footnote{191} Thus, it is unclear that the Commission's claims are sufficiently analogous to normal contract claims to assume that damages are an appropriate remedy.\footnote{192}

2. \textit{Is $150 Million in Liability a Good Incentive?}

The Eighth Circuit's ruling provides a strong incentive to act in good faith—and thus avoid risking hundreds of millions of dollars in liability. Paying these damages will be "financially devastating" to Nebraska.\footnote{193} Would Nebraska have acted differently, had it foreseen this result? Perhaps not. The immediate political gains of denying the applications may outweigh, in the decisionmakers' minds, potential future monetary

\begin{footnotesize}
\footnotetext{185}{\textit{Id.}}\footnotetext{186}{\textit{Entergy I, supra} note 101, at 890, 898. "Relief in the form of money damages could well be barred by Nebraska's sovereign immunity." \textit{Id.} at 898.} \footnotetext{187}{\textit{Entergy III, supra} note 4, at 988; \textit{Entergy II, supra} note 76, at 1103-04.} \footnotetext{188}{\textit{Entergy III, supra} note 4, at 987-88 (quoting \textit{Texas v. New Mexico}, 482 U.S. 124, 128 (1987)).} \footnotetext{189}{974 F. Supp. 762, (D. Neb. 1997). \textit{Central Interstate} was another case arising out of this Compact in which Nebraska sued the Commission for declaratory relief that its restrictions and deadlines violated state and federal law. \textit{Id.} The discussion of whether the Compact should be construed as a simple contract was in the context of Nebraska's request to trial by jury, which would occur if this were an ordinary contract suit. \textit{Id.} at 766-68. The court concluded that this was not an ordinary contract dispute and that Nebraska therefore had no right to a jury trial. \textit{Id.} at 767.} \footnotetext{190}{\textit{Id.} at 767-68.} \footnotetext{191}{\textit{Id.} at 768.} \footnotetext{192}{\textit{Id.} at 767-68.} \footnotetext{193}{Thomas O. Kelley, \textit{Note, Nebraska's $160 Million Liability?—Entergy Arkansas, Inc. v. Nebraska}, 241 F.3d 979 (8th Cir. 2001), 80 NEB. L. REV. 574, 607 (2001).}
\end{footnotesize}
judgments. Nebraska voters elected former Governor Ben Nelson to the United States Senate in November of 2000.\textsuperscript{194} During his campaign, he proudly announced, "I kept the nuclear waste out of Nebraska."\textsuperscript{195}

It is likely that states will resist becoming radioactive dumping sites no matter what incentives or punishments Congress provides. Congress' 1986 incentives have not been effective in establishing new disposal facilities. Fifteen years after Nebraska was chosen to host a site, "not a single ton of radioactive waste from the other four party states has been disposed in Nebraska."\textsuperscript{196} After Midwestern states selected Michigan as the host state for that region in 1987, Michigan was so intent on avoiding the construction of a facility that the Commission gave up and revoked Michigan's membership from the Compact four years later.\textsuperscript{197} Even Texas, whose leaders graciously recognized that "'their state, the nation's fifteenth-largest waste producer, had a sufficient volume of it to justify its own burial ground,'" ran into enormous difficulties in deciding the facility's location.\textsuperscript{198}

It is possible that the Entergy IV judgment will encourage states to honor their obligations under their compacts once chosen to host a facility. Or, it may just encourage further political side-stepping. In its appeal on the merits, Nebraska will likely contend that the delays and denial of the license application process were justified and not in bad faith.\textsuperscript{199} Thus, the threat of millions of dollars in liability may only encourage state officials to search harder for and more carefully document reasons that justify denying applications to build waste facilities.

Awarding equitable relief to commissions and creating a neutral licensing administrator seem like a more effective way to ensure that each state has access to a waste facility in its region. But it is possible that, as the District of Nebraska opined, forcing states to comply "would make a bad situation far worse."\textsuperscript{200} This also does not change the fact that states

\textsuperscript{195}. Entergy IV, supra note 9, at 1103 (quoting trial transcript).
\textsuperscript{196}. Kelley, supra note 193, at 576.
\textsuperscript{197}. See Mostaghel, supra note 11, at 399-402.
\textsuperscript{200}. Entergy IV, supra note 9, at 1055.
cannot be forced to enter into compacts and may withdraw at anytime. Thus, although monetary damages are not the most ideal incentive, they may be the only way to effectively punish states that have not complied with the provisions of the Low-Level Radioactive Waste Policy Act.

3. Seeking Another Solution

Perhaps Congress should continue to push the boundary between encouragement and coercion by imposing strict punishments and incentives on the compacts' governing bodies, rather than on states. Because the Court has held that compact-enforcing entities are not entitled to the same immunity as states, this alternative may not run afoul of the Eleventh Amendment. More stringent congressional coercion like the "take title provision" might be constitutional when applied to compact-enforcing entities, despite being forbidden when applied to states. Other incentives deemed constitutional by New York v. United States, such as monetary enticements or denial of access to other waste facilities, could encourage states to enter into compacts. The compact-enforcing entities, in turn, could be compelled to take responsibility for disposing all the waste generated by its members.

CONCLUSION

Choosing where to dispose of waste, particularly radioactive waste, has never been easy. The Eighth Circuit has determined that states in the Central Compact cannot hide behind the shield of the Eleventh Amendment but must take responsibility for their obligations under the Compact. However, the Eighth Circuit's determination was not so far-reaching that it precludes other states from asserting their Eleventh Amendment immunity in litigation over their respective regional compacts. And even within the Central Compact, it is unclear whether the goal of regional disposal of Low-Level Radioactive Waste will be realized.

Ensuring safe regional disposal would be a difficult task even if member states of LLRW compacts clearly had no sovereign immunity. Although Congress has the authority to encourage states to dispose of waste on a regional basis, it does not have the authority to force states to place anything in their "backyard," as demonstrated by the invalidation

---

201. E.g. Central Compact, supra note 77, at Art.VII(d).
204. See Traband, supra note 202, at 290-91.
205. New York, 505 U.S. at 188.
206. See Entergy III, supra note 4, at 988.
of the "take title provision."\textsuperscript{207} The threat of millions of dollars in damages may prove to be an adequate incentive for states to comply with the obligations of their respective LLRW compacts and thus escape Nebraska's fate. Thus far, however, the deadlines and incentives provided by the 1986 amendments to LLRWPA have not compelled states to establish a nationwide system of regional disposal facilities. It may be time for Congress to propose another solution that would avoid "Not in My Backyard" syndrome and ensure safe disposal of LLRW.

\footnote{207. \textit{See New York}, 505 U.S. at 188.}