Draft — This paper is a draft in progress. To view this article in its final form, please see the IMLA conference web site, www.imla.org

MUNICIPALITIES' EFFORTS TO BAN OR OTHERWISE REGULATE THE TRANSPORTATION OF HAZARDOUS MATERIALS

*Barry S. Neuman,**
Carter Ledyard & Milburn LLP

*Theodore Y. McDonough,**
Carter Ledyard & Milburn LLP

I. Introduction

In June 2008, the United States Department of Energy ("DOE") filed a license application with the Nuclear Regulatory Commission ("NRC") seeking permission to construct and operate a repository for the permanent storage of spent nuclear fuel and other high level radioactive waste (collectively, "HLNW") at Yucca Mountain, Nevada. If approved, the repository would store more than 70,000 metric tons of highly radioactive waste that is now located at more than 100 commercial and government sites around the country.

As part of the proposed project, the DOE would ship most of this waste from its current locations to Yucca Mountain primarily by rail, although waste would also be shipped by legal weight truck and, where necessary, by barge from its current locations to the nearest rail lines. In all, DOE's proposal would entail more than 3,000 shipments (more than 10,000 rail cars) of HLNW over a 24-year period (more than 135 shipments per year) and about 1,000 truck shipments (or about 45 shipments per year).

Although the precise routes have not yet been determined, the DOE has identified on a preliminary basis potential rail, truck and barge routes, which are depicted on the maps that are attached to this paper and have been reprinted by the web site maintained

* *Barry S. Neuman is Counsel in the Washington, D.C. office of Carter Ledyard & Milburn LLP. Theodore Y. McDonough is an associate in the firm's Manhattan office.*

by the State of Nevada's Nuclear Waste Project Office, www.state.nv.us/nucwaste.

The DOE has stated that it intends to comply with all applicable state and local regulations pertaining to the shipment of such materials to the extent that such requirements are not preempted by federal law. The Yucca Mountain proposal therefore raises the question of whether local efforts to ban shipments of HLNW through their jurisdictions would be permissible, and to what extent states and localities may permissibly regulate such shipments short of outright transportation bans. These subjects will be explored in this paper.

II. Federal Regulation of the Transportation of Hazardous Materials

Several federal agencies have the responsibility to regulate various aspects of shipments of HLNW and other hazardous materials, and in some cases their respective statutory authorities overlap.

In addition, the transportation of hazardous materials generally (which include HLNW) are regulated by a host of other agencies. The federal government closely regulates the transportation of hazardous materials ("hazmats") through the Hazardous Materials Transportation Act ("HMTA").[1] Applicable to the transportation of hazmats in intrastate, interstate, and foreign commerce, the HMTA provides the Secretary of Transportation with authority to designate material as hazardous and prescribe regulations for the safe transportation of such material.[2] The U.S. Department of Transportation's ("DOT") Pipeline and Hazardous Materials Safety Administration ("PHMSA") is responsible for issuing the hazardous materials regulations ("HMR")

[1] 49 U.C.C. §§ 5101-5127.
[2] 49 U.S.C. § 5103.

pursuant to this authority.[3] The HMR appear in 49 C.F.R. Parts 171-180 and cover the following areas:

- Hazardous materials classification (Parts 171 and 173);
- Hazard communication (Part 172(A)-(G));
- Packaging requirements (Parts 173, 178, 179 and 180);
- Operational rules (Parts 171, 173, 174, 175, 176 and 177);
- Training and Security (Parts 172(H)-(I)); and
- Registration (Part 171).[4]

When transported via railroad, two other federal statutes also regulate hazmat shipments. The Interstate Commerce Commission Termination Act[5] ("ICCTA") vests the Surface Transportation Board ("STB") with jurisdiction over transportation by rail carriers and the national rail network. Under the Federal Railroad Safety Act[6] ("FRSA"), the DOT's Federal Railroad Administration enforces Rail Safety Regulations covering "all areas of rail safety," including the HMR.[7]

In addition, the Department of Transportation, through the PHMSA is authorized to provide funds and other assistance to states and local jurisdictions for planning, training and response to spent fuel incidents. Spent fuel and certain other hazardous material carriers must be registered with PHMSA.

Under the Atomic Energy Act of 1964, as amended, the NRC is required to establish design and performance standards for the packaging, preparation and transfer of commercial radioactive waste shipments. The specific casks that will be used to transport HLNW to Yucca Mountain have not yet been approved.[8] The NRC will also be the

---

[3] See 49 C.F.R. § 1.53(b). PHMSA also has issued procedural regulations, including provisions on registration and public sector training and planning grants. See 49 C.F.R. Parts 105, 106, 107 and 110.
[4] NEED CITE.
[5] 49 U.S.C. §§ 10101-11908.
[6] 49 U.S.C. §§ 20101-20153.
[7] See 49 C.F.R. Parts 171-174 & 200-268.
[8] 42 U.S.C. §§ 2011 *et seq.* See also 10 CFR parts 20 and 71-73.

primary enforcer of the DOT requirements discussed above with respect to HLNW shipments.

The DOE is responsible for managing the transport of HLNW I compliance with all NRC DOT regulations.

Despite the seemingly broad nature of these laws and regulations, they have historically focused on "operational" risks, such as those associated with accidental release of hazmats.[9] Following 9/11, however, these laws and regulations were amended and updated to address railroad safety and hazmat transportation in relation to terrorist attacks and similar threats.[10] While the federal government has made significant improvements in this area, it is understood that much more must be done.[11] Prompted by what is seen as the federal government's failure to adequately respond to this vulnerability, some municipalities have attempted to legislate in an effort to reduce the risk posed by the transportation of hazmats through their jurisdictions.

Such regulations, however, often face significant legal challenges. When local legislation attempts to regulate in a way that affects interstate commerce, it might be found to violate the Commerce Clause of the U.S. Constitution. Additionally, local legislation often attempts to regulate in areas that are already the subject of federal regulation, and such laws are thus vulnerable to challenges on preemption grounds. In

---

[9] CSX Transp., Inc. v. Williams, 2005 WL 902130, at *3 (D.C.C. 2005), rev'd, 406 F.3d 667 (D.C. Cir. 2005).

[10] CSX Transp., Inc. v. Williams, 2005 WL 902130, at *3 (D.C.C. 2005), rev'd, 406 F.3d 667 (D.C. Cir. 2005).

[11] In his testimony before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Dr. Richard A Falkenrath, former Deputy Homeland Security Advisor and Deputy Assistant to the President, stated that "since 9/11 we have essentially done nothing" to reduce the inherent risk to the chemical sector. CSX Transp., Inc. v. Williams, 2005 WL 902130, at *3 (D.C.C. 2005), rev'd, 406 F.3d 667 (D.C. Cir. 2005) (quoting Testimony of Richard A Falkenrath, before the United States Senate Committee on Homeland Security and Governmental Affairs (Jan. 26, 2005)).

2005, CSX Transportation, Inc. challenged, on both of these grounds, a District of Columbia regulation attempting to ban shipments of hazmats near the U.S. Capitol.

III. The District of Columbia's Terrorism Prevention Act and CXS Transportation's Legal Challenge

Prompted by what the Washington, D.C., City Council saw as the Federal Government's failure to address the terrorist threat resulting from the transportation of hazmats in and around D.C.,[12] the City Council passed the Terrorism Prevention in Hazardous Materials Transportation Emergency Act ("Terrorism Prevention Act" or the "D.C. Act") on February 1, 2005.[13] Signed by Mayor Anthony Williams two weeks later, the D.C. Act sought to prohibit large shipments of certain hazmats within the "Capital Exclusion Zone," defined as the area within a 2.2 mile radius of the U.S. Capitol.[14]

A. CSX Transportation's Challenge in the U.S. District Court for the District of Columbia

CSX Transportation, Inc. ("CSXT"), which owns and operates the major freight line that runs through the city and estimated that it would cost $2 to $3 million annually to comply with the D.C. Act,[15] sought to overturn the ban. CSXT began its challenge by petitioning the Surface Transportation Board ("STB") for an order declaring the D.C. Act preempted by the ICCTA.[16] Shortly thereafter CSXT filed suit in the U.S. District Court for the District of Columbia against the District and Mayor Williams, seeking a declaration that the D.C. Act was invalid, or in the alternative a preliminary injunction

[12] See Statement of City Councilmember Paterson on the Terrorism Prevention in Hazardous Materials Transportation Act (Jan. 28, 2005).
[13] Eric M. Weiss & Spencer S. Hu, *90-Day Hazmat Ban is Passed*, WASH. POST, Feb. 2, 2005, at B1.
[14] Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, No. 16-43, 52 D.C. Reg. 3048 (Feb. 15, 2005).
[15] CSX Transp., Inc. v. Williams, 406 F.3d 667, 669, 674 n.7 (D.C. Cir. 2005).
[16] CSX Transportation, Inc. - Petition for Declaratory Order (STB Fin. Docket No. 34662, Mar. 14, 2005).

against its implementation.[17] CSXT contended that the D.C. Act: 1) "violated the Commerce Clause of the United States Constitution"; 2) was preempted by the FRSA, the HMTA, and the ICCTA; and 3) "was an *ultra vires* act by the D.C. Council contrary to the limited delegation of legislative authority given to the District under the Home Rule Act."[18]

District Court (Judge Sullivan) recognized the case as involving "longstanding principles of federalism applied to one of the government's newest and most important roles - protecting our Nation from the threat of terrorism."[19] Acknowledging that while "the federal government has the *ultimate* authority . . . to provide a safe, secure and efficient rail transportation system," Judge Sullivan stated the issue as "whether the District of Columbia, pursuant to its police powers . . . may prohibit the rail carriage of certain hazardous materials through the District *until* the federal government has more thoroughly addressed the threat of a terrorist attack."[20]

CSXT also sought to enforce the STB order, issued on March 14, 2005 after CXST filed suit.[21] The STB, while noting that it did not have the power to invalidate the D.C. Act, nonetheless exercised its authority to issue the requested order, concluding that the D.C. Act was preempted by the ICCTA.[22] CSXT argued that the STB order "conclusively [bound] the judgment of [the District Court] and require[d] the Court to mechanically apply the Board's reasoning to 'enforce' its decision against the District of

---

[17] CSX Transp., Inc. v. Williams, 2005 WL 902130, at *1, *5 (D.D.C. Apr. 18, 2005), rev'd, 406 F.3d 667 (D.C. Cir. 2005).
[18] Id. at *5.
[19] Id. at *1.
[20] Id. at *2.
[21] Id. at *14.
[22] CSX Transportation, Inc. - Petition for Declaratory Order (STB Fin. Docket No. 34662, Mar. 14, 2005).

Columbia."[23] Judge Sullivan disagreed, reasoning that while the STB had jurisdiction over "transportation by 'rail carriers,'" it lacked jurisdiction over legislation enacted by municipal governments.[24]

On April 18, 2005, Judge Sullivan denied CSXT's motion for an injunction, in large part because CSXT offered only "vague predictions of increased costs and logistical burdens," which "pale[d] in comparison to the potential devastation predicted to occur in the even of a terrorist attach on a railcar transporting hazmats in the Nation's Capital."[25] The balancing of equities led, Judge Sullivan concluded, "clearly favors the District of Columbia and its residents," and the grant of a preliminary injunction was not appropriate when, as here, it "could expose the District of Columbia, its citizens, and visitors to an unknown and potentially catastrophic risk."[26] CSXT immediately filed an emergency motion in the Court of Appeals for the District of Columbia, seeking reversal of the district court's order.[27]

B. CSXT's Appeal to the Court of Appeals for the District of Columbia

On April 27, 2005, a three-judge panel held a hearing on the emergency motion and in a per curiam opinion reversed the district court's decision.[28] The panel concluded that CSXT had "a strong likelihood of success on the merits of its argument that the D.C. Act is preempted by the FRSA"[29] and had sufficiently demonstrated irreparable injury[30]

---

[23] CSX Transp., Inc. v. Williams, 2005 WL 902130, at *14 (D.D.C. Apr. 18, 2005), rev'd, 406 F.3d 667 (D.C. Cir. 2005).
[24] Id. at *15.
[25] Id. at *29.
[26] Id. at *29.
[27] CSX Transp., Inc. v. Williams, 406 F.3d 667, 670 (D.C. Cir. 2005).
[28] Id.
[29] Id. at 673.
[30] Id.

such that a preliminary injunction against implementation of the D.C. Act was warranted.[31]

The Court of Appeals began its preemption analysis by noting that the purpose of the FRSA[32] is to "promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents."[33] The Court also noted that the FRSA permits a state to enact laws "related to railroad safety or security" until the DOT or Department of Homeland Security ("DHS") issues a regulation "covering the subject matter of the state requirement."[34] Even after the DOT or DHS issues such a regulation, "a State may adopt a more stringent law when 'necessary to eliminate or reduce an essentially local safety or security hazard' if it 'is not incompatible' with the federal regulation and 'does not unreasonably burden interstate commerce."[35]

CSXT argued that DOT had "covered the subject matter" of the D.C. Act by issuing HM-232, a rule addressing "Security Requirements for Offerors and Transporters of Hazardous Materials."[36] To "cover the subject matter" addressed in the D.C. Act, the Court explained that HM-232 must "substantially subsume" the D.C. Act's subject matter, "not merely 'touch upon' or 'relate to' it."[37] CSXT argued that, in enacting HM-232, DOT "specifically considered and rejected imposing particular security requirements," instead deciding that security would "best be achieved by . . . giving

---

[31] Id. at 674.
[32] As the Court of Appeals concluded that CSXT had a substantial likelihood of success on the merits of its argument that the D.C. Act was preempted by the FSRA, the Court's opinion did not address CSXT's challenges to the D.C. Act under the HMTA, the ICCTA or the Commerce Clause. CSX Transp., Inc. v. Williams, 406 F.3d 667, 670 n.3 (D.C. Cir. 2005).
[33] CSX Transp., Inc. v. Williams, 406 F.3d 667, 670 (D.C. Cir. 2005) (quoting 49 U.S.C. § 20101).
[34] Id. at 670 (quoting 49 U.S.C. § 20106).
[35] Id. at 670-71.
[36] Id. at 671.
[37] Id. at 671.

railroads the flexibility to adjust their security plans to their individual circumstances."[38] Whereas the D.C. Act completely banned hazmat shipments in the Capital Exclusion Zone, HM-232 required an "individually-tailored security plan for each hazardous material transporter," leading the Court of Appeals to conclude that CSXT was "substantially likely to succeed on its claim that HM-232 covers the subject matter of the D.C. Act."[39] Nevertheless, the Court of Appeals recognized that the FSRA permitted a state to adopt a more stringent law if the state law 1) was "necessary to eliminate or reduce an essentially local safety or security hazard", 2) "is not incompatible" with the federal regulation, and 3) "did not unreasonably burden interstate commerce."[40]

In deciding that the D.C. Act did not meet these requirements, the Court of Appeals first concluded that the Congress intended for the "essentially local" exception to apply only "when local situations are 'not capable of being adequately encompassed within uniform national standards.'"[41] As the District argued not that its concerns *could not* be adequately addressed by national standards, but rather that HM-232 *did not* adequately address its concerns, the "essentially local" requirement was not met.[42]

The Court next decided that the D.C. Act appeared to be incompatible with HM-232. Whereas HM-232 established a "flexible regime" enabling a carrier to "tailor its security plan to its specific circumstances and operations," the D.C. Act restrictions prohibited a carrier from exercising this discretion.[43] The Court then determined that the

---

[38] Id. at 671.
[39] CSX Transp., Inc. v. Williams, 406 F.3d 667, 672 (D.C. Cir. 2005).
[40] Id.
[41] Id. (quoting Norfolk & Western Ry. Co. v. Pub. Utils. Comm'n of Ohio, 926 F.2d 567, 571 (6th Cir. 1991).
[42] CSX Transp., Inc. v. Williams, 406 F.3d 667, 672 (D.C. Cir. 2005).
[43] Id. at 673.

D.C. Act "unreasonably burden[ed] interstate commerce"[44] by simply noting that merely a few bans similar to the D.C. Act would "wreak havoc with the national system of hazardous materials shipment."[45] As the D.C. Act failed to meet the exception to FSRA, the Court of Appeals concluded that CSXT had a "strong likelihood of success on the merits of its argument that" FRSA preempted the D.C. Act.[46]

Judge Henderson joined in the majority opinion but also wrote a concurring opinion in which she concluded that the D.C. Act was preempted by not only the FRSA, but by the HMTA as well.[47] She noted that a state law is preempted by HMTA when the state law "is an obstacle to accomplishing and carrying out [the requirements of the HMTA], a regulation prescribed under [the HMTA] or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security."[48]

Judge Henderson saw the D.C. Act as "an obstacle to accomplishing and carrying out" HM-232 for the same reason that the majority saw the D.C. Act as "incompatible with" HM-232.[49] By banning hazmat transport through the Capitol Exclusion Zone, "the D.C. Act circumscribes the discretion that the regulation expressly confers on CSXT to develop its own individualized security plan," and was thus an obstacle to implementation of HM-232 and therefore preempted by the HMTA.[50]

---

[44] Id.
[45] Id.
[46] Id.
[47] CSX Transp., Inc. v. Williams, 406 F.3d 667, 674 (D.C. Cir. 2005) (Henderson, J., concurring).
[48] Id. (quoting 49 U.S.C. § 5125(a)).
[49] CSX Transp., Inc. v. Williams, 406 F.3d 667, 675 (D.C. Cir. 2005) (Henderson, J., concurring).
[50] Id.

IV. Municipalities' Efforts to Regulate the Transportation of Hazardous Materials

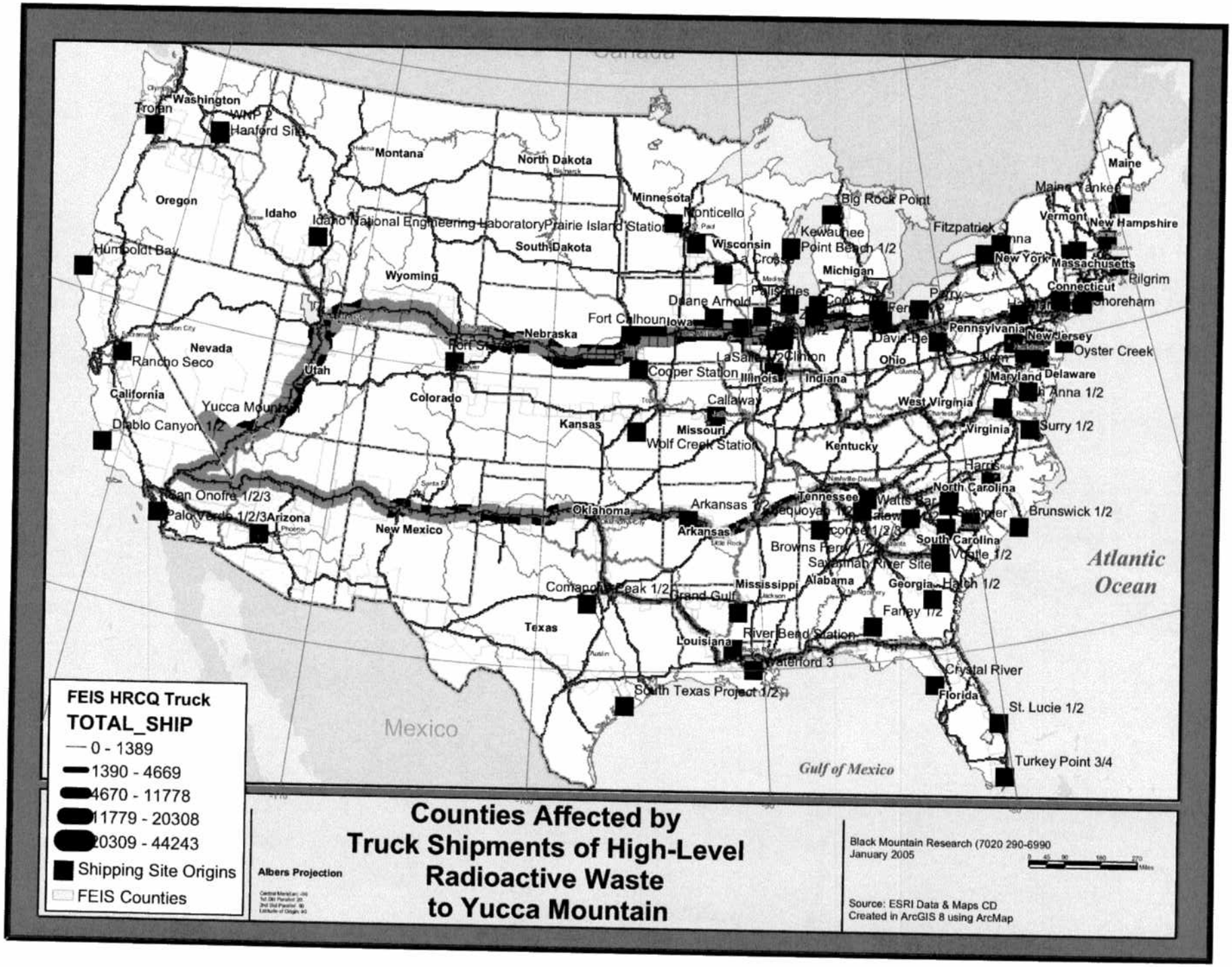
[Note: A discussion of municipal efforts to regulate hazmat transportation and related constitutional issues will be included in the final version of this paper, which will be accessible to conference participants on the IMLA conference web site, www.imla.org]

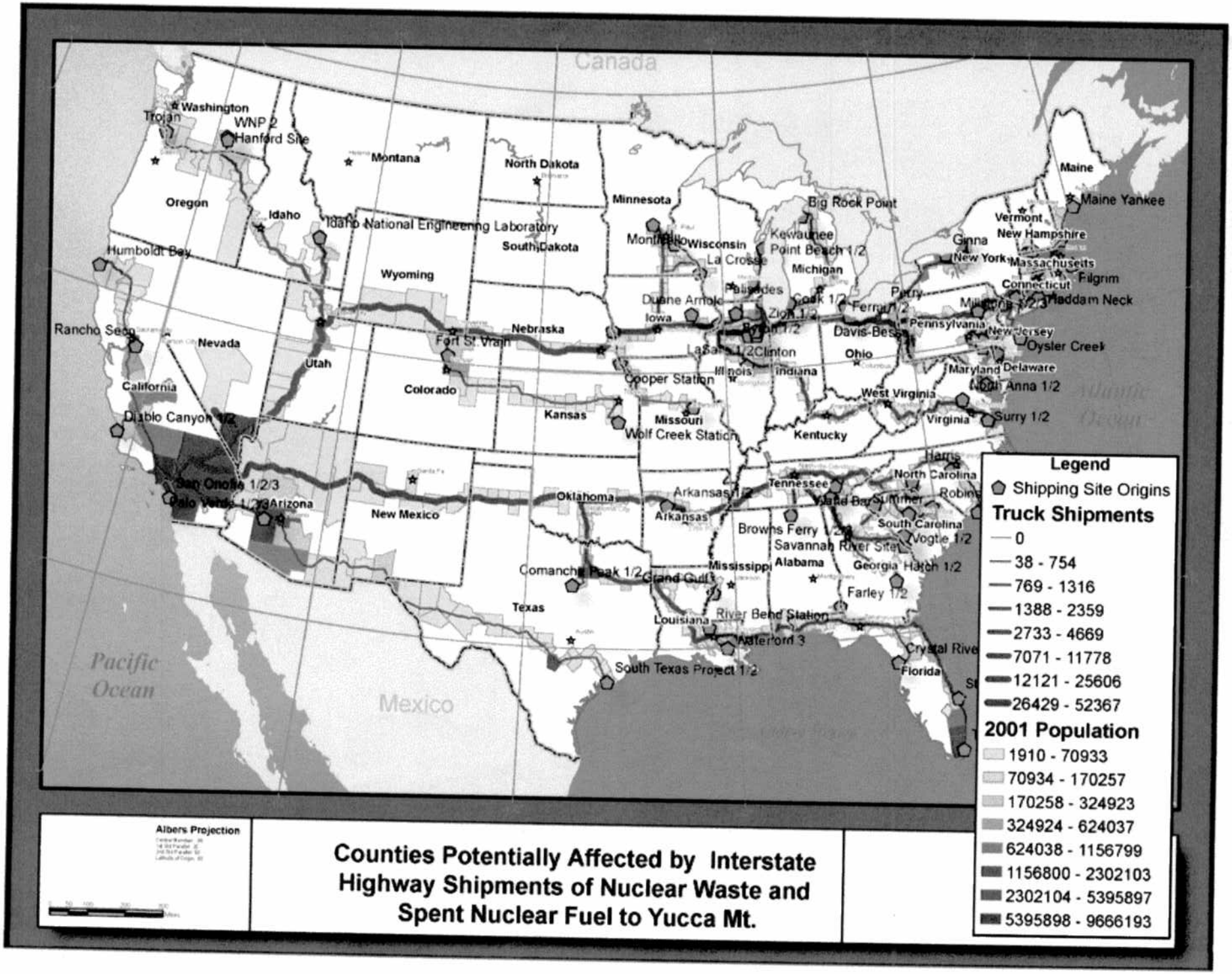
[

ATTACHMENTS:

POTENTIAL TRANSPORTATION ROUTES TO YUCCA MOUNTAIN

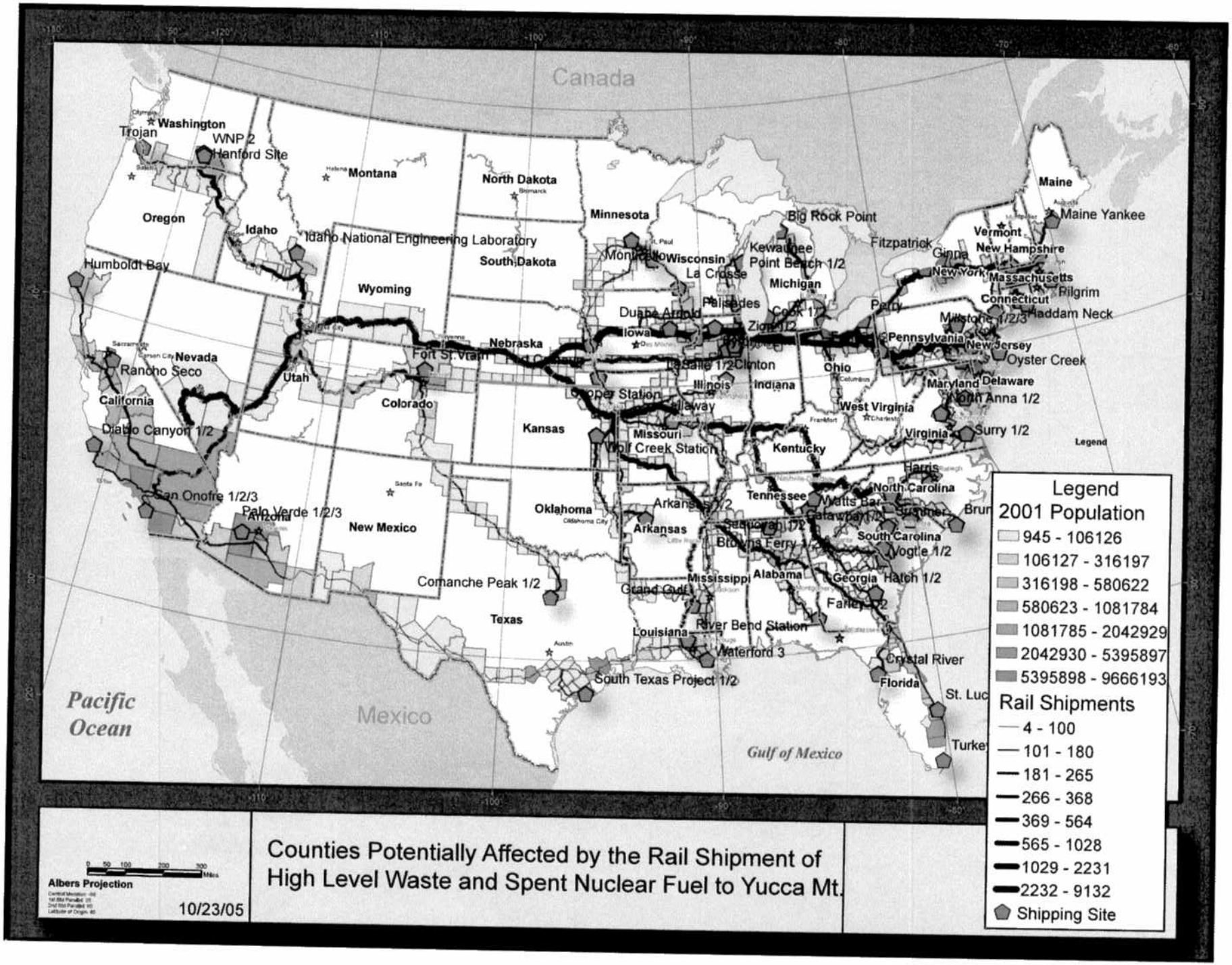
www.state.nv.us





Counties Potentially Affected by Interstate Highway Shipments of Nuclear Waste and Spent Nuclear Fuel to Yucca Mt.

www.state.nv.us



Click on Your State for a Closer Look

Alabama | Arizona | Arkansas | California | Colorado | Connecticut | Delaware | Florida | Georgia | Idaho | Illinois | Indiana | Iowa | Kansas | Kentucky | Louisiana | Maine | Maryland | Massachusetts | Michigan | Minnesota | Mississippi | Missouri | Nebraska | Nevada | New Hampshire | New Jersey | New Mexico | New York | North Carolina | Ohio | Oklahoma | Oregon | Pennsylvania | South Carolina | Tennessee | Texas | Utah | Vermont | Virginia | Washington | West Virginia | Wisconsin | Wyoming |

State of Nevada Agency for Nuclear Projects
March 2002
Updated - October 25, 2005





www.state.nv.us

