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DEPARTMENT OF NUCLEAR SAFETY
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SPRINGFIELD, ILLINOIS 62704

Jim Edgar
Governor

217-782-6133 (TDD)

Thomas W. Ortziger
Director

March 25, 1994

Dennis K. Rathbun, Director
Office of Congressional Affairs
United States Nuclear Regulatory Commission
Washington, D.C.

Re: Congressional Ratification of Amendments to Central Midwest Interstate
Low-Level Radioactive Waste Compact

Dear Mr. Rathbun:

I am writing with regard to your letter of November 9, 1993, to Senator Paul Simon, which my staff discussed with Nuclear Regulatory Commission (NRC) Legal Counsel Susan Fonner on November 18, 1993. Ms. Fonner agreed to review a draft response and provided comments to us on February 22, 1994. We appreciate Ms. Fonner's assistance and believe that most of the issues raised in your letter have been resolved. We agree that the remaining issue, the authority of a compact commission with regard to treatment and storage of low-level radioactive waste (LLW), is for Congress to assess. We do not believe that the Compact revisions with regard to this issue in any way endanger the national scheme under which the states are responsible for providing disposal capacity for LLW generated within their borders. To the contrary, we believe the revisions are consistent with existing law and promote achievement of the goal of providing new disposal capacity.

A major issue of discussion with Ms. Fonner was inclusion of language used in Public Law 99-240, and subsequent compact ratification laws, stating that the consent of Congress is granted subject to the provisions of the Low-Level Radioactive Waste Policy Act and is granted only for so long as the Compact commission complies with all of the provision of that Act. The State of Illinois has no objection to inclusion of this language.

NRC has indicated that it is concerned that language in the amendments regarding treatment and storage could cause the Central Midwest Interstate Low-Level Radioactive Waste Compact (Compact) to be inconsistent with federal law and other compacts. I presume that the underlying concern is that Congressional ratification of the amendments could allow Illinois and Kentucky, by virtue of the Compact, to burden national commerce in low-level radioactive waste (LLW) being shipped for treatment and storage. While this

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concern should be resolved by addition of the requested ratification language, I hope I can eliminate any remaining concerns by discussing the reasons for this language.

As I am sure you know, Illinois has acted very diligently, and at great expense, to fulfil its responsibility as a host state for a LLW disposal facility for the Central Midwest Compact region. Approximately \$90 million dollars were expended in the process that led to the rejection of the Martinsville site. Following rejection of that site, the legislature and the Governor approved new legislation creating a modified process to find another site. Generators in Illinois produce a significant amount of LLW and the State has recognized its responsibility to its citizens to provide a disposal facility for that waste. There should be no doubt as to the will of the State of Illinois to develop disposal capacity for waste generated within its borders, as provided in the Low-Level Radioactive Waste Policy Act.

Illinois has several LLW treatment and storage facilities. A significant percentage of the LLW managed at these facilities is generated outside the Compact region. Illinois law and the Compact both recognize the benefits of treatment and storage of LLW. The Compact amendments should not be interpreted as discouraging the use of treatment and storage facilities in the Compact region. The concern that led to the amendments regarding treatment and storage, and I can assure you it was a serious concern, was that out-of-region waste from states not as committed as Illinois to developing a disposal facility, would be "orphaned" at treatment and storage facilities in Illinois.

The Compact amendments authorize the Compact commission to enter into agreements to allow waste from outside the region to be treated and stored at facilities in the region. These agreements would ensure that the compact region or unaffiliated state from which the waste originates would be responsible for disposal of the waste. The Compact has entered into such agreements with two other compacts and is engaged in discussions with several other compacts. The agreements promote responsible management of LLW and are in no way inconsistent with the national interest. We support the approach of entering into such agreements and will continue to work with other compacts and states to finalize the agreements.

We do believe, however, that it is important for the Compact commission to have the authority, as provided in the Compact amendments, to approve (or disapprove) imports of LLW to treatment and storage facilities in the Compact region to ensure that appropriate arrangements (preferably in agreements such as have been entered) are made to protect against the potentiality of Illinois being left with the disposal responsibility for "orphaned" waste that should be the responsibility of another state or compact. We do not believe that this is an expansion of the Compact beyond the purview of the federal LLW legislation, or, even if it is assumed to be, that it is inconsistent with the federal legislation. Congress expressly allowed compact states that develop

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disposal facilities to discriminate against waste from outside the compact. This was a significant incentive for the states to form compacts. The reality is that this authorization from Congress could be rendered meaningless if a compact has no control over waste that is shipped into the region for storage and treatment. If a compact must accept waste for storage and treatment without any guarantee that the waste can be returned, the compact will become the de facto disposal site for that waste, regardless of the authorization under federal law to exclude non-compact waste from the regional disposal facility, if for one reason or another the state or compact where the waste was generated refuses to receive the waste back.

Additionally, I believe there may have been some misunderstanding about the scope of the changes regarding LLW imports into the Compact region for treatment and storage. It is incorrect that Compact as ratified by Congress applied only to imports for disposal. It is also incorrect that the changes with regard to state legislative disapprovals of agreements serve to restrict the movement of waste for treatment and storage. The changes were intended to, and do, facilitate entry of the agreements.

Article III i) of the Compact as ratified by Congress authorized the Compact commission to enter into agreements with other states and compacts for the use of regional facilities. It provided further that use of a regional facility for waste from outside the region was not allowed unless approved by a majority of the members of the Commission and all members from the host state of the regional facility. Finally, no agreement for the use of a regional facility was valid unless specifically approved by a law enacted by the legislature of the host state. Under the definitions of "regional facility" and "facility," storage and treatment facilities as well as disposal facilities could be regional facilities. Thus, Congress has already ratified the Compact commission having the authority to approve imports to regional storage and treatment facilities.

The revisions to Article III i) modify the Compact commission's approval authority over imports for treatment and storage to extend that authority to facilities that do not fit the definition of "regional facilities." While the revisions do expand the scope of the Compact commission's authority, they do not create entirely new authority from that previously ratified by Congress. The Department must, therefore, disagree with the statement in the attachment to your letter that, "With respect to treatment and storage, the permissibility of discriminating against generators from outside the region seems, at best, to be an open question." As shown above, Congress has already consented to the permissibility of discriminating against generators outside the region with respect to treatment and storage at regional facilities. The effect of the change is to authorize the Compact commission to exercise the same authority with regard to facilities that are not regional facilities.

It should be clearly understood that the revision with regard to agreements for imports of LLW to treatment and storage facilities in the region was not a protectionist measure to prevent all LLW from outside the

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Compact region from being treated or stored within the region. The Compact and the State of Illinois have a clear record supporting storage and treatment of LLW to reduce the amount of waste that must be disposed of. The revisions were made to ensure that the protection against being effectively forced to dispose of waste from outside the region, a protection expressly approved by Congress, would not be eroded or even destroyed. I would like to point out that the Compact commission has acted very responsibly in entering into agreements with other compacts and approving both imports to the region as well as exports from the region. In light of the significant percentage of out-of-region waste managed at treatment and storage facilities in Illinois, a prohibition against receipt of all, or even a large portion, of the imported waste would jeopardize the financial viability of those facilities. Such a result would not be in the interest of the State of Illinois. There is no reason to believe that the revisions to the Compact will burden interstate commerce, except as may be necessary to ensure that the regional disposal facility will not be effectively required to dispose of waste from outside the Compact region absent approval of the Compact commission. This potential burden has already been approved by Congress.

The revisions with regard to state legislative action are also worth noting. As recognized in the attachment to your letter, the revisions do provide that an agreement to allow waste from outside the region to be treated or stored within the region shall be revoked if, within one year of the agreement's effective date, the party state where the waste would be sent enacts a law ordering revocation of the agreement. This provision must be contrasted, however, with the currently effective provision that no such agreement can even become effective without specific legislative approval. The effect of the change is to facilitate, not hinder, the entry of such agreements. Obtaining case by case legislative approvals of a multitude of agreements between the Compact and other compacts or states is quite burdensome. Facilitating entry of such agreements was the precise reason for the change allowing the Compact commission to enter such agreements subject only to legislative disapprovals within one year of the effective date of the agreements.

In addition, I note that the requirement in the original Compact that an agreement allowing imports to regional and storage facilities must be approved by all Compact commission members from the host state has been deleted. This change could also serve to facilitate entry of such agreements.

Another issue raised in the attachment to your letter and discussed with Ms. Fonner was the amendment to the definition of low-level radioactive waste, which provides that the definition applies regardless of a determination by the NRC or a state that waste is below regulatory concern (BRC). As was explained to Ms. Fonner, there was a serious concern in light of NRC's proposed (but now withdrawn) BRC policy that waste considered radioactive and subject to licensing controls in Illinois and Kentucky could be "deregulated" under the BRC policy and sent, for instance, from outside Illinois to a sanitary landfill in Illinois without any oversight by the Compact Commission

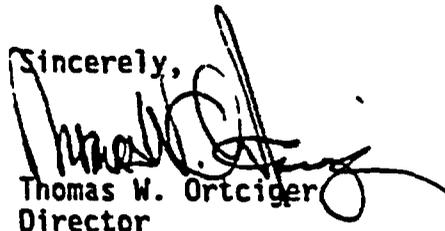
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and the Department's licensing section. Although the Compact amendments were proposed before Congress adopted the Energy Policy Act of 1992, which required NRC to withdraw the BRC policy, there is no material inconsistency between the two.

In her discussion with Department staff and in her letter of February 22, Ms. Fonner indicated that NRC was also concerned about the removal of language in the policy and purpose section of the Compact in which Illinois and Kentucky acknowledged that Congress declared each state responsible for providing disposal capacity for low-level radioactive waste generated within its borders. As explained to Ms. Fonner, this amendment was proposed to allow the Compact to survive a potential declaration by the United State Supreme Court in the New York v. U.S. case that the Policy Amendments Act was unconstitutional. The amendment was intended to allow Illinois and Kentucky to provide for disposal of waste generated within their borders even if Congress could not constitutionally force them to do so. We have no objection to Ms. Fonner's suggestion that the legislative history to be developed for Congressional approval of the Compact amendments clarify that this was the reason for the revision and not because the states did not wish to acknowledge that Congress declared that each is responsible for providing for disposal of LLW generated within its borders.

I believe that we have addressed all of NRC's significant concerns. We will proceed to work with appropriate Congressional members and staff to develop necessary legislative history and obtain Congressional ratification of the amendments to the Compact.

Sincerely,



Thomas W. Ortciger
Director

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

November 9, 1993

The Honorable Paul Simon, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

Thank you for the opportunity to comment on the draft bill to grant Congressional consent to a revision of the Central Midwest Interstate Compact on Low-Level Radioactive Waste, which was one of several compacts approved by the Congress in January 1986 in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act (Title II, Public Law 99-240). States entered into these compacts to implement the Low-Level Radioactive Waste Policy Act, enacted in 1980 (Public Law 96-573), and their approval was part of the same statute that enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Title I, Public Law 99-240).

Our review indicates that a large portion of the revised Compact replicates the language of the current Compact. The revision does, however, make more explicit the authority of the Central Midwest Compact Commission to enter into agreements not only with respect to disposal of low-level radioactive waste, but also with respect to treatment and storage of such waste. In this respect, the revision goes beyond the purview of Public Law 96-573 and Public Law 99-240, which we believe to be limited to disposal. This raises significant policy questions that we have not had an opportunity to explore fully. Before supporting such an expansion of authority, we would wish to know more about the relationship between the broader approach reflected by the bill and the goals of the 1980 and 1985 Acts.

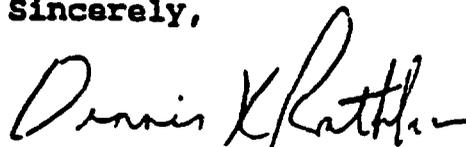
We also note that the bill does not include the language used in Public Law 99-240, and subsequent compact ratification, to condition Congress's consent to low-level radioactive waste compacts. This language expressly states that the consent of the Congress is granted subject to the provisions of the Low-Level Radioactive Waste Policy Act and is granted only for so long as the regional commission established in the compact complies with all of the provisions of the Act. Since the bill presents the revised compact as a stand-alone document, if the revised compact is adopted by the Congress without an express statement of these conditions in the ratifying legislation, the omission could raise

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questions regarding the applicability of the conditions to the Central Midwest Compact. Making the Congressional consent for the Central Midwest Compact different from that for the other eight compacts will create an asymmetrical system, and could lead to conflicts between regions. In the past, Congress has set a high priority on establishing a consistent set of rules under which the interstate compact system for low-level waste disposal would operate.

Other comments of NRC staff regarding the proposed revision are provided in an attachment to this letter.

Sincerely,



Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure:
Analysis of Bill

ENCLOSURE

**ANALYSIS OF BILL TO GRANT CONSENT OF CONGRESS
TO REVISED CENTRAL MIDWEST COMPACT**

ANALYSIS OF BILL TO GRANT CONSENT OF CONGRESS
TO REVISED CENTRAL MIDWEST COMPACT

1. In defining the term "low-level radioactive waste," the revised compact would add a caveat (Article II (k)) not previously found in the compact definition, stating--

This definition shall apply notwithstanding any declaration by the Federal Government, a State or any regulatory agency that any radioactive material is exempt from any regulatory control.

This language seems to go considerably beyond the Energy Policy Act of 1992, which provides that the Atomic Energy Act and the Low-Level Radioactive Waste Policy Act may not be "construed to prohibit or otherwise restrict the authority of any State to regulate, on the basis of radiological hazard, the disposal or off-site incineration of low-level radioactive waste, if the Nuclear Regulatory Commission, after the date of enactment of the Energy Policy Act of 1992 exempts such waste from regulation." This statement enhances state authority to regulate only where (1) state regulation is on the basis of radiological hazard, and (2) the NRC after the date of enactment of the Energy Policy Act exempts the waste from regulation. The caveat could be interpreted as an attempt to provide a greater range of authority to the Central Midwest Compact Commission than now inheres in any other compact commission or in any state, and any attempt to implement it could raise some significant issues of legal authority.

In addition, the new caveat would exacerbate a problem relating to differences in compacts' definitions of "low-level radioactive waste." Adding the caveat could obviate the need for the Central Midwest Compact to conform to a uniform definition applicable to all states and compacts. See, the definition contained in section 2 of the Low-Level Radioactive Act Policy Amendments Act of 1985. This has the potential for creating unnecessary uncertainties and conflicts as the various states and compacts attempt to address low-level radioactive waste.

2. The proposed compact would permit the Compact Commission to enter into agreements to allow waste from outside the region to be treated or stored at facilities in the region,¹ but provides

¹ The proposed compact revision seems intended to move away from the concept that the compact is in implementation of the Low-Level Radioactive Waste Policy Act and the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Title I, Public Law 99-240). For example, in Article I the following language that appears in the current Central Midwest Interstate Low-Level Radioactive Waste Compact has been eliminated:

that the agreement shall be revoked if, within one year of the effective date of the agreement, the party state where the waste would be sent enacts a law ordering revocation of the agreement. (Article III, § (i)(3))² This provision could raise some complex issues of Constitutional law and statutory interpretation. For example, it is true that the Low-Level Radioactive Waste Policy Act authorizes compacts to exclude radioactive wastes generated outside the region, but this authority appears to be limited to restriction of use of regional disposal facilities. With respect to treatment and storage, the permissibility of discriminating against generators from outside the region seems, at best, to be an open question. While there are provisions in other compacts that imply the authority to exclude out-of-compact waste from treatment and storage facilities located in the compact region, there does not seem to have been any court test of this authority.

A somewhat related question is raised by disparate treatment of regional generators and out-of-region parties by Article VI § (q), which would require imposition of liability for the cost of extended care and long-term liability on persons who send waste to the region for treatment or storage. Albeit the immediately preceding section permits party states to meet their liability for costs of extended care and long-term liability by levying surcharges upon generators located in the party state, there does not appear to be a requirement for imposing such liability on such generators.

3. The Congressional consent language used for all prior compacts not enacted in the same legislation as the Low-Level

The party states acknowledge that Congress declared that each state is responsible for providing for the availability of capacity either within or outside the state providing for the disposal of low-level radioactive waste generated within its borders, except for waste generated as a result of certain defense activities of the federal government or federal research and development activities.

Deletion of this language enhances the impression that the compact is a vehicle for general management of low-level radioactive waste, rather than for implementation of Congressional enactments concerned with disposal of such waste. Concerns about the outcome of New York v. NRC may have generated this change in language, but in light of the Supreme Court's 1992 decision that, except for the "take-title" provision, the Low-Level Radioactive Waste Policy Amendments Act of 1985 is constitutional, such concerns should no longer serve as a rationale for the change in language.

²A similar right to revocation is provided in § (i)(2) with respect to agreements for treatment, storage, or disposal of Federally-owned or generated radioactive waste.

Radioactive Waste Amendments Act of 1985 made reference to section 4(a)(2) of the Low-Level Radioactive Wastes Policy Amendments Act of 1985, which provides:

- (1) It is the policy of the federal government that the responsibility of the States under section 3 for the disposal of low-level radioactive waste can be most safely and effectively managed on a regional basis.
- (2) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

In addition, the Congressional consent in all prior compacts has expressly stated that the consent of the Congress is granted subject to the provisions of the Low-Level Radioactive Waste Policy Act and is granted only for so long as the regional commission established in the compact complies with all of the provisions of the Act. Making the Congressional consent for the Central Midwest Compact different from that for the other eight compacts will create an asymmetrical system, and could lead to conflicts between regions. In the past, Congress has set a high priority on establishing a consistent set of rules under which the interstate compact system for low-level waste disposal would operate. See, for example, Sen. Rep. 100-285, page 17 (February 16, 1988), on the Appalachian States Low-Level Radioactive Waste Compact, and H. Rep. 99-320, page 3 (October 22, 1985), on the Rocky Mountain Low-Level Radioactive Waste Compact.

The failure to condition the Central Midwest Compact in the same way as the other compacts could have other significant consequences. For example, section 6 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 authorizes the Nuclear Regulatory Commission to grant emergency access to a regional disposal facility if necessary to eliminate an immediate and serious threat to the public health and safety or the common defense and security. Failure to reference the 1980 and 1985 Acts could raise the question whether these emergency access provisions are applicable to a compact that was ratified without the consent conditions.