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

JUL 23 1982

Mr. J. William Bennett
Acting Deputy Director
Division of Waste Repository Deployment
Office of Terminal Waste Disposal
and Remedial Action
Office of Nuclear Energy
U.S. Department of Energy
Washington, DC 20545

Dear Mr. Bennett:

We welcome the opportunity provided in your letter dated June 29, 1982, to assist in helping the Department update the responses to the questions described in Senator McClure's letter dated January 26, 1982. Our first effort resulted in the Department of Energy's draft "Status Report: Low-Level Radioactive Waste Compacts," dated May 1982. First we believe that your report demonstrates that the States should be commended for the significant effort they have applied to resolve nationwide a major policy issue through the interstate compact process. We have supported the States in their endeavors to realize workable compacts. Whenever possible our NRC Regional State Liaison Officers attended as observers and as resource persons all compact negotiating meetings. Further, we have provided invitational travel to the seven compact groups and the unaffiliated States of California and Texas to the joint NRC/Oak Ridge National Laboratory symposia on low-level waste disposal which focuses on the proposed rule 10 CFR Part 61. Finally, we have offered the compact groups our comments and reviewed their compact language when requested.

In particular, this letter responds to Senator McClure's question 5(c) which states:

With respect to each compact or draft compact . . . , please provide your Department's analysis as to whether such compact or draft compact is consistent with existing Federal-State relationships concerning the regulation (including licensing and inspection) of waste generators and concerning the regulation of packaging and transportation of waste.

Also, as you requested in your letter, we have analyzed whether the compacts are consistent with Nuclear Regulatory Commission regulations governing the licensing and inspection of low-level radioactive waste.

Our enclosed comments refer to the Southeast, Midwest, Central, Rocky Mountain, Northwest and Mid-Atlantic Low-Level Radioactive Waste Compacts that we reviewed formally in response to specific requests of the compact groups and have forwarded to your office pursuant to DOE's earlier letters of February 16, 1982 and May 6, 1982. As they were completed, the comment letters were also widely circulated to the seven compact groups and the two unaffiliated States of California and Texas. The purpose of this distribution was to provide NRC's perspective as soon as possible to assist the compact groups.

We have not prepared an analysis of the Northeast Low-Level Radioactive Waste Interstate Compact because we have not been asked by the negotiating States to provide any review and comment. Your office provided us on July 13th, by messenger, a copy of an incomplete draft of the Compact dated July 7, 1982; this was too late for inclusion of an analysis in this letter. We are preparing an analysis however, and will transmit it to you and to CONEG by August 16.

Our letter highlights two major areas -- the scope of the compact and the appropriateness of State inspection of NRC licensees. Our earlier letters to DOE and the compact groups raised other concerns, such as the definition of low-level radioactive waste, the definition of transuranic waste, the restriction on export of waste, the exclusion of other federal government activities beyond those described in Public Law 96-573, the 1986 import exclusion date, and a number of other points. We have summarized the more important of these at the end of Enclosure I.

Scope of the Compact

Our first area of concern is the scope of the compact. There are two issues associated with this concern: (1) management versus disposal, and (2) regulatory regime.

1. Management versus disposal

All of the Compact Commissions (Committees or Boards) as written, appear to take on management functions to varying degrees that extend to the generation of wastes, transportation, volume reduction activities at non-disposal sites, and similar activities that do not constitute disposal. In our view the Low-Level Radioactive Waste Policy Act (Public Law 96-573) (Act) only provides authority to enter into regional interstate compacts limited to regional disposal facilities for low-level waste, as stated in Section 4(a)(2)(A). This section is the operative grant of authority to the States, and establishes the scope of the authority granted to the States under the Act. The States' authority is further limited

by the Act's definition of disposal as the "isolation of low-level radioactive waste pursuant to requirements established by the Nuclear Regulatory Commission under applicable laws," as stated in Section 2(1). Thus, we believe the better view of the Act is that its scope is limited to disposal. Consistency with the Act can be achieved by the Compact Commissions narrowing their focus to disposal.

To the degree that Compact Commissions desire to assume management functions related to the disposal of low-level radioactive waste address the economic issues and the institutional questions of balancing of benefits, burdens and responsibilities among the party States, the NRC's concerns in this area would be eliminated. In this way, in contrast to the Act's providing an operative grant of authority to enter into regional interstate compacts for regional disposal facilities, the Compact Commissions would be carrying out the broad policy of the Federal Government as expressed in the Act, i.e., "low-level radioactive waste can be most safely and efficiently managed on a regional basis," as stated in Section 4(a)(1)(B). Any extension into the areas of economic and institutional matters that would go beyond the authority for disposal already provided in the Act should be clearly spelled out in each compact.

2. Regulatory regime

The provisions of the compacts could be read to the effect that each of the Compact Commissions (Committees or Boards) could take on to varying degrees the functions of regional health, safety and environmental regulatory authorities regarding all aspects of low-level radioactive waste management and thereby duplicate the authority of the party States that are Agreement States and/or the Nuclear Regulatory Commission. There is no provision under Section 274b of the Atomic Energy Act for NRC's entering into an agreement with an interstate commission, committee or board, but only with a State. We do not believe regulatory frameworks beyond those currently provided for in the Atomic Energy Act need be established. Furthermore, we do not believe the Low-Level Radioactive Waste Policy Act (Public Law 96-573) provides additional regulatory authority to the States or compact groups with respect to generation, transportation and any other activities, but, as stated above, is limited to disposal. Potential duplication of authority could be precluded by the insertion of a provision in the compacts as described below. NRC would encourage those Compact Commissions that desire to assume regulatory functions related to the disposal of low-level radioactive waste to limit them to economic issues and to institutional questions relating to balancing benefits, burdens and responsibilities among party States.

Four compacts have included a provision that purports to ensure that existing federal law is not affected by any of the provisions of the compact. In particular, the provision reads:

"Nothing in this compact shall be construed to:

abrogate or limit the applicability of any act of Congress or diminish or otherwise impair the jurisdiction of any Federal agency expressly conferred thereon by Congress;"

The compacts that have this provision are the Southeast (Article VI.a.1.), Midwest (Article VII.a.1), Central (Article VI.a.1) and Mid-Atlantic (Article VIII (a)(1)).

Because after consent by Congress the compacts become Federal law, we question whether this provision is specific enough to avoid duplication of health and safety regulatory authority of the Agreement States and/or the Nuclear Regulatory Commission as explained above. We would have more confidence in an explicit statement that would avoid the duplication of authority of the Agreement States and/or the Nuclear Regulatory Commission to regulate source, byproduct or special nuclear material. Accordingly, such a provision could read:

Nothing in this compact shall be construed to:

abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an Agreement State under Section 274 of the Atomic Energy Act of 1954, as amended.

Appropriateness of State Inspection of NRC Licensees

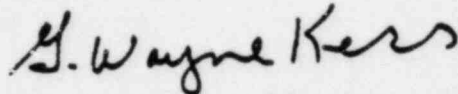
Our concern that is generic to all the compacts respecting the appropriateness of State inspection of NRC licensees can be accommodated by an agreement between NRC and each of the States in the various compacts. We have drafted a proposed agreement pursuant to Section 274i of the Atomic Energy Act which would authorize a State to inspect waste packaging on the premises of NRC licensees. A copy of the proposed 274i agreement which has been included in all our comment letters to compact groups is enclosed (Enclosure II).

As some of the commenters have correctly pointed out, it is Congress, not the NRC that must ultimately be satisfied with the compacts. We believe that changes such as we have outlined above, when consented to by Congress, will accommodate the States' needs while avoiding jurisdictional problems.

We would like this letter appended to your report to Senator McClure along with our review and comment letters to the various compact groups. Our revised version of Table D is enclosed (Enclosure III).

If we can be of any further assistance to you in explaining our analysis, please contact Dr. Stephen N. Salomon of our office at 492-9881.

Sincerely,



G. Wayne Kerr, Director
Office of State Programs

Enclosures:

- I. Response to Question 5(c)
- II. Proposed 274i Agreement
- III. Revised Table D

Enclosure I.
Response to Question 5(c)

A. Southeast Interstate Low-Level Radioactive Waste Management Compact
(Reference: Letter to Raymond Peery dated April 6, 1982)

Our comments apply to the negotiated draft version of the Southeast Compact dated January 20, 1982.

1. The Issue of Scope of the Compact

Low-level radioactive waste management is described as policy in Article I and is supported by definitions in Article II. Article III describes the central concept as one of management not just disposal of all wastes generated in the region. The policy of waste management is carried out by the Compact Commission in Article IV. This management may extend to the generation of wastes, transportation, volume reduction activities at non-disposal sites, and similar activities that do not constitute disposal. Also, the Compact Commission may take on functions that appear to be those of a regional health, safety and environmental regulatory authority.

Note that South Carolina enacted on June 9, 1982 a somewhat different version of the Southeast Interstate Low-Level Radioactive Waste Management Compact (H-3590). The South Carolina version reduces NRC's concern with regard to the issue of scope of the compact. With regard to management versus disposal, this compact focuses more on disposal than management and places more limitations on the management activities of the Compact Commission. As a consequence, it conforms more closely to what NRC believes is the intent of the Low-Level Radioactive Waste Policy Act. With regard to regulatory regime, the South Carolina version includes a provision that avoids duplication of regulatory authority with NRC and/or an Agreement State by means of the following provision:

Nothing in this compact shall be construed to abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an Agreement State under Section 274 of the Atomic Energy Act of 1954 in which a regional facility is located. (Article 11, Section 48-47-180, Item 2.)

2. The Issue of Packaging and Transportation

Article III, Section d reads:

Each party State shall establish the capability to enforce any applicable Federal or State laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders.

We are not certain that the provision is capable of implementation in either the January 20, 1982 or the South Carolina version. A State should not be required to make a commitment to enforce Federal law or regulations dealing with packaging and transportation of radioactive materials regulated under the Atomic Energy Act unless it is an Agreement State or willing to become one. While we recognize that all of the present eligible States to the Southeast Compact are Agreement States, this may not always be the case (e.g., some States that wish to join the Compact in the future may not be Agreement States). In addition, if the Congress wishes to extend State jurisdiction to provide for State enforcement of U.S. Department of Transportation (DOT) regulations without the use of State/DOT enforcement contracts, which is an administrative action, then the Congress would presumably need to authorize or establish a DOT/State program similar to the NRC's Agreement State program in Section 274b of the Atomic Energy Act of 1954, as amended.

In prior drafts of this compact, this provision was prefaced with the phrase "To the extent authorized by federal law," which made the paragraph acceptable. A drafting solution would be to write the paragraph as follows:

"To the extent authorized by Federal law, each party State shall enforce any applicable Federal laws and regulations, as well as enforce applicable State laws and regulations, pertaining to the packaging and transportation of waste generated within or passing through its borders."

This section also raises questions of the appropriateness of State inspection of NRC licensees which can, however, be accommodated by means of the proposed 274i agreement.

B. Midwest Interstate Low-Level Radioactive Waste Compact
(Reference: letter to William Taylor dated March 12, 1982)

The NRC officially commented on the January 11, 1982 working draft. The February 18, 1982 working draft differs little from the one that NRC commented on. Therefore, our original comments to Professor Taylor in our letter dated March 12, 1982 apply to both.

1. The Issue of Scope of the Compact

The articles in the Midwest Compact are similar to those in the Southeast Compact. Our comments are similar in that management may extend to the generation of wastes, transportation, volume reduction activities at non-disposal sites, and similar activities that do not constitute disposal. There is the possibility of duplication of regulatory authority.

2. The Issue of Packaging and Transportation

Article V, Section d, raises questions of the appropriateness of State inspection of NRC licensees as described for other compacts. This concern can be accommodated by means of the proposed 274i agreement.

C. Central Interstate Low-Level Radioactive Waste Compact
(Reference: Letter to E. Frank Wilson dated January 28, 1982)

The NRC officially commented on the December 22, 1981 working draft. The April 1982 Kansas law version of the Central Compact differs somewhat from the December 22, 1981 version. Our comments on the issues of scope of the compact and packaging and transportation apply to both.

1. The Issue of Scope of the Compact

Many of the articles in the Central Compact are similar to those in the Southeast and Midwest Compacts. In addition, the compact appears to give the Compact Commission and its facilities, or a party authorized by it, a potential monopoly on all low-level radioactive waste storage and treatment once the waste leaves the generator's site. Our comments are similar to those of the Southeast and Midwest Compacts.

2. The Issue of Packaging and Transportation

As in the other compacts, the question of the appropriateness of State inspection of NRC licensees is raised in the Central Compact in Article III, Section E. This concern can be accommodated by means of the proposed 274i agreement.

D. Rocky Mountain Low-Level Radioactive Waste Compact
(Reference: 3 letters to Leonard Slosky dated May 6, February 1, and January 5, 1982)

The May 1982 Colorado law version of the Rocky Mountain Compact is the same one that we commented on in our letter of May 6, 1982.

1. The Issue of Scope of the Compact

Our concern with the issue of scope of the compact in the Rocky Mountain Compact is similar to that of the other compacts. However, we note that the Board's approval of regional facilities is based solely on the two factors specified in Article 4.B, i.e., economic feasibility and sufficient capacity.

2. The Issue of Packaging and Transportation

Article 3, Sections F(1) and F(2) raise the same questions of the appropriateness of State inspection of NRC licensees as described for the other compacts. This concern can be accommodated by means of the proposed 274i agreement.

E. Northwest Interstate Compact on Low-Level Radioactive Waste Management
(Reference: Letter to Patrick Costello dated October 14, 1981)

Our comments apply to the April 1981 Idaho law.

1. The Issue of Scope of the Compact

Although not specifically stated in the letter to Mr. Costello, our concern with the issue of scope of the compact in the Northwest Compact is similar to that of the other compacts. This concern has been communicated orally to representatives of the Northwest Compact and they have been provided copies of our subsequent comments on other compacts with similar provisions.

2. The Issue of Packaging and Transportation

Article III raises the same questions of the appropriateness of State inspection of NRC licensees as described for the other compacts. This concern can be accommodated by means of the proposed 274i agreement.

The provisions in Article IV, Section 3 of the Compact under which low-level radioactive waste generated outside the region may be accepted for disposal prior to July 1, 1983 appear on their face to be discriminatory and an impediment to interstate commerce. Such discrimination is permitted under the Low-Level Radioactive Waste Policy Act only after January 1, 1986. These provisions deal with requirements for 100 percent inspection for out-of-region wastes (see IV.3.(C)) and liability of other States for accidental release of wastes (see IV.3.(D)).

F. Mid-Atlantic Interstate Low-Level Radioactive Waste Compact
(Reference: Letter to Raymond Peery dated May 27, 1982)

The April 1982 Virginia law version of the Mid-Atlantic Compact is very similar to the February 12, 1982 version that NRC commented on in our letter to Raymond Peery dated May 27, 1982. Our comments apply to both.

1. The Issue of Scope of the Compact

Our concern with the issue of scope of the compact in the Mid-Atlantic Compact is similar to that of most of the other compacts.

2. The Issue of Packaging and Transportation

Article III(d) raises questions of the appropriateness of State inspection of NRC licensees as described in other compacts. This concern can be accommodated by means of the proposed 274i agreement.

G. Other important issues.

1. Definition of low-level radioactive waste

We believe that the prospects for uniform consent by Congress of all low-level radioactive waste interstate compacts would be enhanced to the degree that the definitions in the compacts conform to the definition of the Low-Level Radioactive Waste Policy Act (Public Law 96-573).

Those compacts that have definitions of low-level radioactive waste that do not conform are:

1. Rocky Mountain Low-Level Radioactive Waste Compact (May 1982 Colorado Law) See Article 2.G.
2. Northwest Interstate Compact on Low-Level Radioactive Waste Management (April 1981 Idaho Law) See Article II.2.

2. Definition of transuranic waste

Some compacts give a definition of transuranic wastes that incorporates a technical requirement of 10 nanocuries per gram of waste that is derived from a physical detection limit that is under review by the U.S. Nuclear Regulatory Commission in connection with the proposed rule 10 CFR Part 61. We believe such technical standards should not be codified in legislation because changes would require action by the States and the Congress. A more appropriate place for the discussion of the technical cutoff requirement for transuranic wastes is in regulations. Accordingly, we suggest that the compacts be altered to the definition as follows:

"Transuranic wastes" means waste material containing transuranic elements with contamination levels as determined by the regulations of: (1) the U.S. Nuclear Regulatory Commission, or (2) the host State, if it is an Agreement State, for equal or more stringent levels.

Where State constitutions require specific citations, it should read: ". . . by the regulations of: (1) the U.S. Nuclear Regulatory Commission at 10 CFR 61.55 dated _____, or . . ." These regulations are expected to be approved this year.

The compacts that have the technical requirement are:

1. Southeast Interstate Low-Level Radioactive Waste Management Compact (January 20, 1982) See Article II.1. The South Carolina version (H-3590) enacted June 9, 1982 has incorporated the suggested definition.
 2. Midwest Interstate Low-Level Radioactive Waste Compact (February 18, 1982) See Article II.s.
 3. Rocky Mountain Low-Level Radioactive Waste Compact (May 1982 Colorado Law) See Article II.G.3.
 4. Northwest Interstate Compact on Low-Level Radioactive Waste Management (April 1981 Idaho Law) See Article II(2).
3. The restriction on export of waste

The Low-Level Radioactive Waste Policy Act allows State restriction only on the import of out-of-region waste for disposal in a regional site. The restriction on export goes beyond the terms of the Act, and unless consented to by Congress could be viewed as an unauthorized and unconstitutional burden on interstate commerce.

The compacts that have the provision to restrict export of waste are:

1. Midwest Interstate Low-Level Radioactive Waste Compact (February 18, 1982). See especially, Articles III.h.1, V.c, VIII.g, and IX.b.3.
 2. Central Interstate Low-Level Radioactive Waste Compact (April 1982 Kansas Law). See Article III.q.3.
 3. Rocky Mountain Low-Level Radioactive Waste Compact (May 1982 Colorado Law). See Article VII.b.
 4. Mid-Atlantic Interstate Low-Level Radioactive Waste Compact (April 1982 Virginia Law). See especially, Articles IV(g)(1)(A), IV(g)(5), III(c), IX(g), and X(b).
4. Exclusion of other Federal government activities beyond those described in Public Law 96-573

In the Low-Level Radioactive Waste Policy Act, the only kinds of low-level radioactive waste excluded from consideration in low-level radioactive waste disposal facilities are those wastes that originate as a result of defense activities of the U.S. Department of Energy or Federal research and development activities. The Rocky Mountain, Midwest, Southeast and Mid-Atlantic Compacts extend this exclusion to waste generated resulting from defense activities

of the U.S. Department of Defense (DOD). Therefore, the policy of exclusion in these compacts is broader than that in the Act. On the other hand, for the Northwest Compact, the exclusion of Public Law 96-573 is not stated. For the Central Compact, all Federal government or Federal research and development activities are excluded as stated in Article VI.a.6.

There are many Federal government entities, such as Veterans Administration hospitals and military bases, that have NRC licenses and currently dispose of their low-level radioactive waste in commercial disposal facilities. We believe that these licensees should be able to continue to dispose of their wastes in commercial burial facilities.

5. The 1986 import exclusion date

In our letter to the Northwest Compact group we pointed out the difference in the January 1, 1986 effective date for exclusion of out-of-region waste authorized in the Low Level Radioactive Waste Policy Act and the July 1, 1983 date provided in the Compact. We believe it will be difficult for other States to have compacts in place and associated sites open, licensed and ready to receive waste by July 1, 1983. If the Hanford site becomes unavailable to NRC licensees located outside of the Compact region after July 1, 1983 they may have difficulty in disposing of their wastes.



Enclosure II
UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

PROPOSED 2741 AGREEMENT

The State of _____ (State) is a member of the _____ Compact which was ratified by Congress on _____ pursuant to the Low-Level Radioactive Waste Policy Act, (Waste Policy Act) P.L. 96-573. The Waste Policy Act was enacted by Congress to provide for and encourage states to manage low-level radioactive waste on a regional basis, and to this end authorizes states to enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste. The _____ Compact contemplates that the State will make periodic unannounced inspections of the premises of low-level radioactive waste packaging and transport activities and areas of generators located within its borders if shipments of such waste are destined for a low-level waste facility located in a Compact state.

The United States Nuclear Regulatory Commission (NRC or Commission) has the statutory responsibility to inspect its licensees to determine compliance with NRC requirements, including requirements pertaining to the shipment, packaging and transportation of low-level radioactive waste. In the exercise of this responsibility, the Commission regularly conducts a review of the transportation programs of its licensees including the licensees' procedures for quality assurance, packaging, marking, labeling and loading of vehicles. This transportation program review usually has been found adequate to ensure licensee compliance with the Commission's regulations regarding low-level radioactive waste packaging and transportation without the need for Commission inspection of each individual shipment.

low-level waste destined for disposal at a commercial low-level radioactive waste disposal site, and

- b) Notification of Commission licensees and the Commission in writing of any violation of Commission regulations disclosed by such inspections, and to request the licensees concerned to advise the State and the Commission of corrective action taken or to be taken.

The Commission will not evaluate the State's ability to perform such functions. Such functions as are performed by the State pursuant hereto shall be performed without cost or expense to the Commission.

2. The authority to inspect NRC licensees pursuant to the preceding paragraph is limited to the licensee's low-level waste packaging, packaging procedures, and transport vehicles.
3. In taking any action authorized hereunder, the State shall not undertake to amend or revoke Commission licenses. This agreement, however, shall not be construed to preclude the State from exercising any authority lawfully available to it under its own laws.
4. Efforts will be made by both parties to avoid duplicative enforcement action against an NRC licensee for the same violation. However, this is not meant to preclude appropriate complementary actions for the same

10. This Agreement shall become effective upon signing by the _____, State of _____ and _____, Nuclear Regulatory Commission and shall remain in effect so long as the State remains a member of the _____ Compact unless sooner terminated by either party on thirty days prior written notice.

For the Nuclear Regulatory Commission

For the State of _____

Enclosure III
Revised Table D
The NRC response applies to the Northwest, Rocky Mountain,
Midwest, Southeast, Central and Mid-Atlantic Compacts

Scope of the Compact

1. Management versus disposal

All of the Compact Commissions (Committees or Boards) as written, appear to take on management functions to varying degrees that extend to the generation of wastes, transportation, volume reduction activities at non-disposal sites, and similar activities that do not constitute disposal. The Low-Level Radioactive Waste Policy Act (P.L. 96-573) provides authority only for disposal. Consistency with the Act can be achieved by the Compact Commissions narrowing their focus to disposal.

To the degree that Compact Commissions desire to assume management functions related to the disposal of low-level radioactive waste limit those functions to addressing the economic issues and the institutional questions of balancing of benefits, burdens and responsibilities among the party States, the NRC's concerns would be eliminated. Any extension into the areas of economic and institutional matters that go beyond the authority for disposal already provided in P.L. 96-573 should be clearly spelled out in each compact. (See Appendix for details.)

2. Regulatory regime

The provisions of the compacts could be read to the effect that each of the Compact Commissions (Committees or Boards) could take on to varying degrees the functions of regional health, safety and environmental regulatory authorities regarding all aspects of low-level radioactive waste management and thereby duplicate the authority of the party States that are Agreement States and/or the Nuclear Regulatory Commission. Potential duplication of authority could be precluded by the insertion of a provision in the compacts recognizing that regulatory responsibility and authority of Agreement States and NRC would not be abrogated or limited by the compact. (See Appendix for details.)

Appropriateness of State inspection of NRC licensees

All Compact provisions for State inspection of NRC licensees can be accommodated by agreement between NRC and each of the States under Section 274i of the Atomic Energy Act for the States to inspect waste packaging. (See Appendix for details.)

Other important issues

- o definitions of low-level radioactive waste and of transuranic waste
- o restriction on export of waste
- o exclusion of other Federal Government activities beyond those described in Public Law 96-573
- o the 1986 import exclusion date (See Appendix for details.)