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Office of State Programs
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Proposed Memorandum of Understanding (MOU)
For States Participating in Low-Level Waste Compacts
(48 Fed. Reg. 49,562)

Dear Sir:

On October 26, 1983, the NRC published for comment a proposed Memorandum of Understanding (MOU) intended to govern State inspection of low-level radioactive waste packaging at the premises of certain Commission licensees (48 Fed. Reg. 49,562). These comments are submitted on behalf of the Edison Electric Institute (EEI) and the Utility Nuclear Waste Management Group (UNWMG), and can be divided into essentially two parts. The first part considers what we believe to be a general lack of NRC authority to enter into the type of agreements contemplated. The second part addresses what we view as specific problems with the MOU as proposed, putting aside the more fundamental question considered in part one.

To begin with, we dispute the Commission's authority under Section 274i of the Atomic Energy Act of 1954 to enter into MOU's of the type proposed. The language of section 274i is, itself, undeniably broad, providing that:

> "...The Commission in carrying out its licensing and regulatory responsibilities under this Act is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State's entering into an agreement with the Commission pursuant to subsection b."

That section 274i must be read and interpreted within the broader context of all of section 274 and its legislative history is clear, however, from the fact that -- standing alone -- the first sentence of the above quoted language would seem to allow the Commission to provide States with essentially any type of regulatory power; including authority over and responsibility with respect to reactors. This, however, would be clearly inconsistent with section 274c.

Read in proper context, 274i is seen to provide a mechanism for establishing interim, training-type arrangements to enable States to prepare themselves for later assumption of broader responsibility under more comprehensive agreements. For example, in that portion of the relevant Senate report pertinent to section 274 (the House report is identical), the detailed section-by-section analysis discusses 274i only in terms of providing training and related assistance to States. See S. Rep. No. 870, 86th Congress, 1st Sess. 12. No mention, whatever, is made of any kind of permanent agreement. Further, the general comments on section 274 indicate that 274i was intended only to provide authority for interim training arrangements:

> The bill authorizes the Commission to provide training and other services to State officials and employees and enter into agreements with the State under which the latter may perform inspections and other functions cooperatively with the Commission. By these means, it is intended to assist the States to prepare themselves for assuming independent regulatory jurisdiction.

Id. at 9 (emphasis added).

Based on the foregoing, we believe that section 274i does not constitute authority for entering into MOU's of the type proposed. However, even putting aside the question of Commission authority, the MOU, as proposed, presents a number of other problems.

First, the second sentence of the proposed MOU states that:

> 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.

(Emphasis added.) The word "manage," however, is susceptible of a number of meanings and, thus, could lead to confusion. Accordingly, reference to management should be deleted.

Second, under numbered ¶1 of the proposed MOU, States are to inspect NRC licensees for violations of NRC regulations and to notify the Commission (as well as affected licensees) of any violations. However, the Commission "will not evaluate the State's ability to perform such functions."

We urge that, prior to authorizing States to perform inspections of packaging and transportation on its behalf, the NRC carefully evaluate State capability to assume such responsibility. Since an inadequate State program could be detrimental to the safe and efficient disposal of low-level waste, an evaluation of State capability is necessary to insure that proper waste transportation and disposal is not jeopardized by unqualified personnel or other State program deficiencies.

Third, ¶4 should be modified to leave no doubt that any State enforcement action based on inspection findings is to be taken under the provisions of State -- not Federal--law. That this is intended is clear from the Summary statement accompanying the proposed rule (48 Fed. Reg. 49,562). However, the MOU itself should be modified to avoid any misunderstanding.

In addition, as proposed, ¶4 provides that, "Efforts will be made by both parties to avoid duplicative enforcement action against an NRC licensee for the same violation." This provision should be strengthened, however, to reflect a policy that duplicative enforcement action against an NRC licensee -- by a State under State law and the NRC under Federal law -- would be appropriate only in unusual circumstances. We believe that, in general, licensees have adequately demonstrated their dedication to the safe, effective packaging, transportation and disposal of low-level waste. As a result, dual enforcement action should be undertaken only in special situations.

Fourth, we are concerned that State assumption of regulatory responsibility could interfere with the efficient and expeditious disposal of low-level waste because of inadequately planned and coordinated inspection procedures. Accordingly, the MOU should specifically provide that, in assuming inspection responsibility, States must not establish programs disruptive of plant operations and the normal flow of material for disposal. For example, programs should not provide for a system of inspection under which waste shipments must be detained until an inspector can be summoned to the site to inspect waste packaging.

In concluding, we would note that -- in addition to the points discussed above -- it would be premature for the Commission to develop an agreement of the type proposed prior to Congressional action on low-level waste interstate compacts. As the Commission is aware, a number of compacts have been presented to Congress for approval. The form Congressional consent will ultimately take, however, is unknown, and could be pertinent. Accordingly, the Commission should defer any action it might take in this area until it has the benefit of Congressional views in the form of consent legislation.

We hope that these comments will aid the NRC in further evaluating the adequacy of the proposed MOU and would be pleased to discuss any of the points mentioned above in further detail should you so desire.

Sincerely yours,

John J. Kearney
Senior Vice President

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