

STATEMENT OF L. D. SANTMAN, DIRECTOR, MATERIALS TRANSPORTATION
BUREAU, DEPARTMENT OF TRANSPORTATION, BEFORE THE COMMITTEE ON
THE JUDICIARY, UNITED STATES SENATE

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I am pleased to appear before the Judiciary Committee today to discuss the Department of Transportation's views regarding the proposed interstate compacts on low-level radioactive waste management. The Committee's letter of invitation to Secretary Dole requested that the Department's testimony address three issues. First, the extent to which provisions of the compacts are compatible with the existing Federal-State framework for the transportation and disposal of low-level radioactive waste; second, the extent to which provisions of the compacts are compatible with the language and intent of the Low-Level Radioactive Waste Policy Act of 1980; and, third, the effect of a national system on current patterns of transportation.

DOT's Regulatory Program

At the outset, I would like to provide a brief description of the Department's existing regulatory program as it relates to the transportation of low-level wastes. The Hazardous Materials Transportation Act (HMTA), enacted in 1975, establishes the broad regulatory authority under which the Department regulates the transportation safety of all hazardous materials in commerce, including radioactive materials. Under that authority, the Department has adopted a comprehensive body of regulations affecting all aspects of the transportation of hazardous materials, including packaging, shipping papers, marking, labeling, placarding, and handling.

As it relates to the transportation of radioactive materials, the Department's authority overlaps the regulatory authority granted the Nuclear Regulatory Commission under the Atomic Energy Act. In order to avoid duplication or conflicts between the two regulatory programs, in 1979 the Department and the NRC entered into a Memorandum of Understanding allocating regulatory responsibilities between

themselves (Attachment A). Generally, under this agreement, the NRC is responsible for the development of safety standards for packaging of higher level radioactive materials (those exceeding Type A limits) and for the development of shipment security requirements, and the Department is responsible for developing safety standards for other packaging and all other aspects of transportation. In addition, each agency agreed to adopt and enforce, within the scope of their respective jurisdictions, the regulations developed by the other. As intended, the agreement assured that the pre-existing comprehensive body of regulations applicable to the transportation of radioactive materials would not be duplicated.

Pursuant to this agreement and the authority established in the HMTA, in 1981 the Department issued additional regulations, known as HM-164, relating primarily to the highway routing of radioactive materials. While the primary focus of the rule is the routing of spent fuel and other large quantity radioactive materials, the rule also includes a general requirement that shipments of materials containing lower levels of radioactivity, including most shipments of low-level waste, be transported along the safest and most expeditious routes.

Preemption Under the HMTA

Section 112(a) of the HMTA provides that any state or local requirement that is "inconsistent" with that Act or the regulations issued under it is preempted. To assist in the interpretation and application of this provision, the Materials Transportation Bureau (MTB), which is the agency within the Department that administers the HMTA, has issued regulations establishing procedures for the issuance of advisory "inconsistency rulings." To date, the MTB has issued six such rulings. These rulings set forth the Department's views with regard to the validity of various state and local requirements under the preemptive scheme of the HMTA and establish the policy framework in which we have examined the Northwest and other interstate compacts on the management of low-level wastes. Attachment B,

which is an excerpt from one of these rulings, describes the Department's general approach to the issue of preemption and the factors that are considered in issuing inconsistency rulings.

In short, in issuing inconsistency rulings, MTB applies two tests that have been borrowed from judicial precedents: first, whether it is possible to comply with both the Federal regulations and the nonfederal requirement (the "dual compliance" test); and, second, whether the nonfederal requirement presents an obstacle to the accomplishment of the purposes of the HMTA and the regulations issued under it (the "obstacle" test). In applying the "obstacle" test, which in almost all cases is the critical test, the MTB looks to two primary purposes of the HMTA, as expressed in the statute and its legislative history. First, Congress' overriding purpose in adopting the Act was to enhance overall public safety. Thus, if the effect of a nonfederal requirement is to reduce overall safety, it is inconsistent with the HMTA. Second, in adopting the preemption provision of the HMTA, Congress expressed a purpose to promote uniformity in the area of hazardous materials transportation. Thus, if the effect of a nonfederal requirement is to interfere substantially with the uniform regulatory system established by the Federal regulations, then it is inconsistent with the HMTA.

Compatibility With Existing Federal-State Framework

At the request of the Department of Energy, and in response to an inquiry by Senator McClure, the Department has examined the proposed compacts in the context described above. Attachment C is the Department's detailed response to that inquiry. In short, most of the proposed compacts contain provisions expressly recognizing and preserving the existing Federal-State framework for the transportation of low-level radioactive waste. However, some of the compacts do contain provisions that either might be construed as altering that framework or that, as implemented by the states, might result in inconsistencies with the Federal

requirements. These provisions can be divided into three categories:

- o Those that authorize party states to adopt more stringent transportation requirements;
- o Those that require additional shipment documentation; and
- o Those that require mandatory inspections.

First, the Northwest and Rocky Mountain Compacts both contain provisions that authorize party states to adopt more stringent packaging and other transportation requirements than those required by the compacts. Therefore, the compacts would appear to permit party states to adopt packaging standards and other requirements for transportation that differ from those contained in the Federal Hazardous Materials Regulations. With regard particularly to packaging standards, the MTB has taken the position in its inconsistency rulings that its standards are exclusive for transportation, and that any deviations from them are inconsistent under the HMTA. This position is based on the conclusion that to permit state and local governments to adopt differing container standards could result in incompatible requirements and would not be conducive to safe transportation. This potential for inconsistency could be eliminated by the inclusion of a limitation provision, such as, "To the extent authorized by Federal law," in the provisions authorizing additional or more stringent standards.

Second, the Northwest Compact requires shipments generated by non-party states to be accompanied by a certificate containing certain information. The MTB has taken the position in its inconsistency rulings that its shipping paper requirements are exclusive for transportation. The basis for this position is that, since the primary function of shipping papers is to provide a warning, particularly to emergency response personnel, of the hazardous nature of the cargo, any deviation from or addition to the Federal shipping paper requirements would tend to increase confusion and the possibility of errors in interpretation. Therefore, if the compact is

construed as requiring the certificates for transportation, that requirement would be inconsistent under the HMTA. If, on the other hand, that provision is construed as requiring the certificates only at the disposal site, it would not be inconsistent.

Finally, the Northwest Compact requires that a shipment originating in a non-party state be inspected by an official of that state and that the official must certify that the shipment complies with all applicable requirements. Similarly, while not explicitly requiring mandatory inspections for each shipment, the Central and Rocky Mountain Compacts require each party state to adopt procedures to ensure that shipments originating in each state comply with all applicable transportation requirements. As implemented by the party states, these requirements may result in imposition of mandatory inspection requirements.

The Department strongly endorses the policy of increasing state enforcement of requirements that are consistent with the Federal regulations, and that appears to be the effect of these provisions. However, the possibility exists that, as implemented by the states, these requirements may result in unnecessary delays in transportation. The MTB has taken the position in its inconsistency rulings that unnecessary delay is incompatible with public safety because it results in an increase in public exposure to risk, and that requirements may be inconsistent under the HMTA if they result in such delay. Therefore, while the requirements for inspections, themselves, are entirely consistent, the states should take precautions to ensure that, in implementing the requirements, they do not cause unnecessary delays.

As described above, some of the compacts may result in various inconsistencies as implemented. To assure that this result does not occur, low-level waste compacts drafted in other regions contain disclaimer provisions such as the following:

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 by Congress.

Inclusion of such a provision in all of the compacts would reduce the potential for interpretations that could lead to the adoption of requirements that are inconsistent under the HMTA.

Compatibility With Low-Level Radioactive Waste Policy Act

It is our understanding that the the Low-Level Radioactive Waste Policy Act was intended not to alter existing law with regard to the transportation of low-level waste. Thus, the comments above with regard to the compatibility of the compacts with the existing Federal-State framework apply equally to their compatibility with the intent of that Act as it relates to transportation. With regard to the compatibility of the compacts with other aspects of that Act, the Department would defer to the other Federal agency representatives.

Effect of Compacts on Transportation

The Committee's invitation also requested that the Department discuss the effect of a national system of low-level waste compacts on the current pattern of transportation of such wastes. Quite simply, the compacts will have the effect of substantially reducing the amount of such transportation. The general result of the compacts will be that it will be possible to dispose of low-level wastes much closer to their points of origin. For example, according to data developed by the State of Washington, well over half of the low-level waste delivered to the commercial disposal facility at Richland, Washington, originates in either the Northeast or the Southeast. Once disposal facilities are developed in those regions, those wastes will be disposed of within the region of origin rather than across the country at Richland.

With regard to transportation safety, there will be a corresponding reduction in risk to the public because a primary component of risk in transportation is

distance travelled. Therefore, apart from the minor sources of potential inconsistency discussed above, the Department is very encouraged by the progress made to date in the development of the compacts, and we look forward to working closely with the compact states in the future as they implement the compacts.

This completes my prepared remarks. I will be pleased to respond to any questions you may have.