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Wendy Hickey

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The Midwest Interstate Low-Level Radioactive Waste Compact: Its Status in Light of *New York v. United States* and the Low-Level Radioactive Waste Policy Amendments Act of 1985

by Wendy Hickey

I. The Framework

A. Introduction

In 1962, the first site for low-level radioactive waste disposal opened in Beatty, Nevada.¹ One year later, disposal sites in Maxey Flats, Kentucky and West Valley, New York were opened.² In 1965, a facility in Hanford, Washington opened, with Sheffield, Illinois and Barnwell, South Carolina following in 1967 and 1971, respectively.³ Complications or maximum capacity forced all but three of these sites to close by 1979. The remaining three primary disposal sites are located in Nevada, Washington, and South Carolina.

Because these sites, as well, will eventually reach capacity, Congress intervened. In 1980, Congress passed the Low-Level Radioactive Waste Policy Act (hereinafter the "Act").⁴ The purpose of the Act was to ensure that waste

generators would have adequate disposal facilities.⁵ Congress intended to achieve this goal through the formation of state compacts.⁶ Compacts are defined as a legal agreement among states to join together to build regional disposal facilities for commercially-generated low-level radioactive waste.⁷ Each regional compact designates a host state.⁸ The host state incurs the responsibility for building a disposal facility to store its and the other compact members' low-level radioactive waste.⁹

B. Midwest Compact

1. Formation

To meet their obligations under the 1980 Act, Indiana, Iowa, Minnesota, Missouri, Ohio and Wisconsin formed the Midwest Interstate Low-Level Radioactive Waste Compact (hereinafter "Midwest

Compact").¹⁰ In 1985, Congress approved the formation of the Midwest Compact.¹¹ The Midwest Compact provides that each member must be host to a facility.¹² The hosting order is determined by the volume of radioactive waste a state produces.¹³

In 1987, Michigan, the highest generator of low-level radioactive waste in the Midwest Compact, was slated as the first host state.¹⁴ When the prospect of building a nuclear waste disposal site for six other states made its way in front of Michigan voters, the state's governor stalled and the state was abandoned as a compact member.¹⁵

Ohio was determined to be the next host state of the Midwest Compact. An Ohio facility is scheduled to begin operation by 2005.¹⁶ This facility is expected to operate for 20 years or until capacity is reached.¹⁷ The process of hiring contractors to begin siting work, together with designing, building and testing, could require ten years.¹⁸

Current data shows that Minnesota and Wisconsin tie in the next highest volume, followed by

¹ *New York v. United States*, 505 U.S. 144, 150 (1992).

² *Id.*

³ *Id.*

⁴ Pub. L. No. 96-573, 94 Stat. 3347 (repealed).

⁵ ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE AND POLICY 171 (Supp. 1994).

⁶ *Id.*

⁷ Interview with Pat Strader, Governmental Representative for Union Electric, in Jefferson City, Mo. (March, 1996).

⁸ *Id.*

⁹ *Id.*

¹⁰ Midwest Interstate Low-Level Radioactive Waste Compact Commission, 1995 Annual Report: A Report to the Citizens of the Midwest Compact Region on the Activities of the Midwest Interstate Low-Level Radioactive Waste Compact Commission, at 1 (August, 1995). Currently, there are nine compacts that consist of 42 states. A tenth compact amongst some of the eight unaffiliated states is in tentative formation.

¹¹ *Id.*

¹² Senate Bill No. 854, 88th General Assembly, 2nd Regular Session, 1996 Missouri Laws.

¹³ Interview with Thomas Lange, Policy Research Program in the Missouri Department of Natural Resources, Jefferson City, MO (March 1996).

¹⁴ Interview with Pat Strader, *supra* note 7.

¹⁵ Interview with Thomas Lange, *supra* note 13.

¹⁶ Midwest Compact Report, *supra* note 10, at 6.

¹⁷ *Id.*

¹⁸ *Id.*

Missouri.¹⁹ Speculation on the siting plans for Missouri's turn as host has not begun, but given Missouri topology, the northern half of the state is most suitable for waste installments of any type.²⁰ Current leaders have not been able to forecast the political fallout from an effort to bring a nuclear waste storage facility to this state, but now that Missouri has entered the compact agreement, the state could incur serious liability for withdrawal or refusal to take its turn.

2. The Midwest Compact agreement and Amendments

At the same time as Congress approved the formation of the Midwest Compact, it amended the Act.²¹ Each member of the Compact was required to adopt these amendments and pass a revised compact agreement.²² The Midwest Compact revised agreement was adopted in each members' state legislature, and was signed by each state governor.²³ Moreover, each member, according to the federal mandates, elected a representative to serve on the Compact's administrative commission.²⁴ The Missouri legislature voted the Compact amendments into law this May.²⁵ The

state could have faced the prospect of having to build its own disposal facility at six times the cost under the federal Act if the bill had not passed.

The Compact agreement amendments, contained in Missouri Senate Bill 854, passed the Senate with six dissenting votes and passed the House with only two members opposed.²⁶

The bill was supported by waste generators, including Union Electric, the University of Missouri and the Missouri Hospital Association, and was endorsed by the Missouri Chamber of Commerce.²⁷ Opposition was voiced by St. Louis resident Kay Drey, who spoke on behalf of the Missouri Coalition for the Environment.²⁸ Drey's opposition of the bill was prompted by views against nuclear power, as well as, concerns with waste disposal methods.²⁹ She garnered some support among St. Louis legislators; seven of the eight dissenting voters were from St. Louis.³⁰ However, the bill's sponsor, Senator Joe Moseley D-Columbia, had no significant resistance from the General Assembly, nor from Missouri Governor Mel Carnahan.³¹

Though the Missouri Association of Trial Attorneys did not

fight the Missouri bill, it did question the liability repercussions of accidental contamination or other dangers that might erupt on the disposal facility site.³² The concern was that Missouri may be liable for damage and subject to clean-up expenses.³³ However, the Compact agreement amendments provide that the generators of the waste bear responsibility for these liability concerns, not the state which is host of the facility.³⁴ But as opponents suggest, the costs could bankrupt a generator, such as a utility company, leaving taxpayers with the burden of clean-up.

The entire process has become embroiled in political controversy because state political leaders are reluctant to accept the responsibilities of a compact host state during their political term. In light of the Supreme Court ruling in *New York v. United States*, which forbids the federal government from compelling states to administer a federal regulatory program such as this, the question remains as to what role Congress can play in arriving at a solution.³⁵

According to the Midwest Compact agreement amendments, the

¹⁹Midwest Compact Low-Level Radioactive Waste Generators and Potential Generators Summarized by State and Generator Type, Missouri Department of Natural Resources (Dec. 1995).

²⁰Interview with David Shorr, Director of the Missouri Department of Natural Resources, Jefferson City, Mo. (August, 1996).

²¹*Id.*

²²Midwest Compact Report, *supra* note 10, at 1.

²³Search of Lexis Legis Library, Strck File, (April 8, 1996). Missouri's current representative is David Shorr, Director of the Department of Natural Resources. *Id.*

²⁴*Id.*

²⁵Missouri General Assembly Law Library Computerized Bill Tracking System, 88th General Assembly, 1996 Legislative Session.

²⁶Search of Lexis Legis Library, Strck File, (April 8, 1996). A House version of the Senate bill, House Bill 22, sponsored by Representative Gracia Backer, House Majority Floor Leader, D-Fulton remained in a House Committee in favor of the passage of the Senate version since too short a period remained in the session for the House Bill to pass through both chambers. *Id.*

²⁷Interview with Pat Strader, *supra* note 14.

²⁸Testimony of Kay Drey was presented to the Senate Committee on Interstate Cooperation on February 15, 1996.

²⁹Interview with Pat Strader, *supra* note 14.

³⁰*Id.*

³¹Interview with Senator Joe Moseley, Missouri State Senator, District , Jefferson City, Mo. (March, 1996).

³²Interview with Pat Strader, *supra* note 14.

³³*Id.*

³⁴Senate Bill No. 854, *supra* note 26.

³⁵*New York v. United States*, 505 U.S. 144.

capacity of a disposal facility cannot be changed, once established by the procedure specified, without the host state's concurrence.³⁶ The compact agreement contains several provisions that were designed to create assurance that once the host state builds a facility and opens it to members, other states will hold up their end of the bargain and take their turn as a host.³⁷ Member states wanted to create a new record for review when contesting decisions of the Midwest Compact Commission.³⁸ The commission, however, contended that review of the pre-existing record was sufficient.³⁹ The two sides compromised and the amendments provide that trial de novo of the facts is required for certain legal issues that the host state claims are disputed. Specifically, Article III of the Compact agreement amendments creates a new mechanism for the judicial review of any final decisions made by commission when disputes erupt between member states.⁴⁰ All other administrative reviews of the commission decisions will make use of the pre-existing record.⁴¹

C. *New York v. United States*

In 1985, Congress amended

the Act to encourage states to begin forming alliances in a more timely manner.⁴² The amendments included three categories of incentives to achieve this purpose.⁴³ The three categories of incentives were monetary incentives, access to disposal facilities, and the take title provisions.⁴⁴ However, in *New York v. United States*, the Supreme Court found the take title incentives unconstitutional.⁴⁵

The State of New York filed suit against the United States for two reasons: (1) the Commerce Clause mandate that New York accept radioactive waste from other states, and (2) the take title provision of the 1985 Amendments.⁴⁶ In 1986, the New York legislature enacted legislation to initiate the process of building its own radioactive facility.⁴⁷ New York had not joined a compact, but instead chose to be responsible for building its own disposal facility.⁴⁸ Unfortunately, this action required New York to accept radioactive waste from other states. Under the Commerce Clause, a state that has a disposal facility cannot refuse another state's waste.⁴⁹ The Commerce Clause provides that any restrictive regulation imposed on the interstate

market of waste disposal is within Congressional authority and only Congress can restrict such commerce.⁵⁰ Congress, with the passage of the 1980 Act, lifted the requirement and allowed each compact that was formed to exclude waste generated outside its membership. Since New York did not form a compact, it was still under the requirements of the Commerce Clause.

The other reason for the suit was the take title provision of the 1985 amendments.⁵¹ The take title provision, strict in its specifications, require a state, unable to provide for disposal of its low-level radioactive waste by January 1996, to take title of the waste at the request of the waste generator.⁵² The provision provides that the state "shall be liable for all damages incurred by the generators as a consequence of the failure of the state to take possession."⁵³

On writs of certiorari, the Supreme Court decided whether the 1985 amendments were inconsistent with the Tenth Amendment and the Guarantee Clause.⁵⁴ In its opinion written by Justice O'Connor, the Court held that the take title provision was beyond Congressional power and in violation of the Tenth

³⁶Senate Bill No. 854, *supra* note 26.

³⁷Interview with Thomas Lange, *supra* note 13.

³⁸Interview with Greg Larson, Executive Director of the Midwest Compact Commission, St. Paul, Minn. (April 17, 1996).

³⁹*Id.*

⁴⁰Senate Bill No. 854, *supra* note 26.

⁴¹*Id.*

⁴²PERCIVAL, *supra* note 5, at 172.

⁴³*Id.*

⁴⁴*Id.* at 172-173.

⁴⁵*New York v. United States*, 505 U.S. 144.

⁴⁶*State of New York v. United States*, 757 F.Supp. 10 (N.D.N.Y. 1990).

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Philadelphia v. New Jersey*, 437 U.S. 617, 621-623 (1978).

⁵⁰*Id.*

⁵¹In addition, the petitioners focused their constitutional challenge on the other categories of incentives contained within the 1985 amendments: monetary incentives and access to disposal facilities. *State of New York v. United States*, 757 F.Supp. at 10.

⁵²PERCIVAL, *supra* note 5, at 173.

⁵³*Id.*

⁵⁴PERCIVAL, *supra* note 5, at 173.

Amendment.⁵⁵ The Court concluded that it was a question of federalism, and although Congress has the power to encourage states to provide for their own radioactive waste disposal, it cannot compel states to do so.⁵⁶

The impact of the *New York* decision, as stated by one New York official after the decision was handed down, is that if states do not have to take title to their own waste, they may not be motivated to build their own waste disposal facilities.⁵⁷ Since the decision, activity has indicated this statement may be true. Traditionally, Missouri's generators have shipped their waste to South Carolina's disposal facility at Barnwell.⁵⁸ However, in June 1994, South Carolina's Barnwell facility closed its doors to states outside the Southeast Compact causing 37 states to shift to alternative sites, and yet none of these states had commenced building their own facilities at the time.⁵⁹ Missouri generators were forced to store waste on-site.⁶⁰ In July 1995, after South Carolina withdrew from the Southeast Compact, Barnwell again began accepting waste from Missouri generators.⁶¹

In addition, the *New York* decision has resulted in criticism of the entire compact scheme. With no way for the federal government to enforce timely compliance, host states can and have been dragging their heels in an effort to dodge the responsibility of

building a nuclear waste storage facility on home turf. This is mounting to a dangerous situation as the remaining open sites fill. The Barnwell facility, where current Missouri generators ship waste, will close permanently once it reaches capacity in approximately seven to ten years, while a facility for the Compact is not scheduled to be running until 2005. On-site storage, particularly in a metropolitan area, could lead to catastrophe.

D. Midwest Compact Litigation

The monetary incentives outlined in the 1985 Act, although ruled constitutional by the Supreme Court, have not been unchallenged by states. The Midwest Compact filed suit in a Minnesota District Court over the distribution of surcharges in the Midwest Compact by the United States Department of Energy. In May, the court ruled in favor of the Department of Energy.⁶²

The dispute arose when the Midwest Compact Commission requested that the Department of Energy hold up the return of surcharges to generators in the Midwest Compact.⁶³ At issue were surcharges that were collected from January, 1990 to December, 1991.⁶⁴ These surcharges would have been used to fund the promotion of a disposal facility for Compact members and to run the commission.⁶⁵

However, a portion of the escrowed money is in dispute because the Department of Energy determined that the Midwest Compact failed to satisfy federal law as far as providing assurances that the Compact would provide for disposal of its members' waste.⁶⁶ As the 1985 Act requires, if a compact fails to meet a deadline of January, 1993 in providing for disposal of waste via a contractual agreement, the compact is penalized resulting in the collected surcharges being returned to generators.⁶⁷

The government's contention is since there is no written contract between Barnwell and the Midwest Compact, Midwest Compact members' have no assurances that their waste will be disposed of; Barnwell is not legally bound to accept Midwest Compact members' waste.⁶⁸ The Midwest Compact argued that although they fell out of compliance during a temporary Barnwell shutdown, they later regained compliance and should be entitled to the surcharges.⁶⁹

Several events occurred that placed the Midwest Compact in this position. In 1979, Washington and Nevada were forced to shut down temporarily because of improper handling, transporting and packaging.⁷⁰ Washington voters passed a ban on waste outside their borders by initiative petition, later struck down as unconstitutional and

⁵⁵*New York v. United States*, 505 U.S. 144.

⁵⁶*Id.* at 150.

⁵⁷PERCIVAL, *supra* note 5, at 183.

⁵⁸Midwest Compact Report, *supra* note 10, at 4.

⁵⁹*Id.* The South Carolina General Assembly adjourned without passing legislation that would keep Barnwell operating. Midwest Compact Report, *supra* note 10. The Barnwell facility will close permanently once it reaches capacity in approximately seven to ten years.

⁶⁰*Id.*

⁶¹Midwest Compact Report, *supra* note 10, at 4.

⁶²Interview with Greg Larson, *supra* note 38.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷PERCIVAL, *supra* note 5, at 172.

⁶⁸Interview with Greg Larson, *supra* note 38.

⁶⁹*Id.*

⁷⁰*New York v. United States*, 942 F.2d 116 (2d Cir. 1991).

then announced plans to shut down permanently to members in and outside its compact.⁷¹ Nevada's facility at Beatty shut down in 1993. Since Missouri is not a member of Nevada's compact, Barnwell remained the sole disposal site for Missouri generators.⁷²

In June 1994, the South Carolina General Assembly adjourned without passing legislature that would keep Barnwell operating.⁷³ For a year, Missouri generators were forced to store waste on-site.⁷⁴ During this time, the remaining half of the surcharges that would have gone to the Midwest Compact Commission, were instead returned to the generators in monthly payments to defray the cost of waste storage, as outlined by federal law.⁷⁵ However, the monthly surcharge payments have continued to be paid to generators. The Midwest Compact contends these payments should cease and the remaining escrowed money — \$400,000 to \$500,000 — should be given to the commission.⁷⁶

The court ruled that the Midwest Compact failed in its obligation to provide for long term storage capacity and that the Department of Energy was entitled to deference by a court because they were the agency authorized to enforce the law.⁷⁷ An appeal has been filed in the Eighth Circuit District Court.⁷⁸

In its appeal, the Midwest

Compact contends the court failed to take into consideration that rules promulgated by the Department of Energy entitle the Compact to surcharges when it regains compliance.⁷⁹ Additionally, it argues that there are some inconsistencies in the Department of Energy's interpretation of Congress' 1985 Act.⁸⁰ Congress' purpose in drafting the 1985 Amendments was to encourage states to comply with the 1980 law.⁸¹ However, the actions of the Department of Energy ultimately defeat underlying policy. The Midwest Compact, with few options available, has complied with finding a disposal outlet for members' waste. Depriving the Compact of funds needed to run its administrative commission and further progress of building a disposal facility does not carry out the policies of Congress.

E. Conclusion

There are several uncertainties lurking between now and 2005. South Carolina has stated that if it appears the Midwest Compact is not moving toward building its own facility, Barnwell will close its doors to Midwest Compact members.⁸² There is the possibility that the ballot referendum will be passed by Ohio voters or political backlash may occur once a site is actually chosen that could cause Ohio to bail out of the

agreement as Michigan did. Barnwell may also reach its capacity sometime before the Ohio facility is built. If that occurs, there is a strong probability that on-site storage will continue to build up and present hazards in the metropolitan areas.

Another concern is the consequences of the failure of the Midwest Compact to Missourians. Missouri would face the responsibility of building its own disposal facility at six times the cost that it would incur otherwise if the Compact functioned according to federal requirements. Additionally, it would not be afforded protection against the Interstate Commerce Clause, as happened to New York, and would be forced to accept waste from other states.

On the other hand, the money generated in surcharges could amount to a giant bolstering of Missouri's state coffers. South Carolina left the Southeast Compact in order to control access to Barnwell, and consequently implemented a disposal surcharge estimated to bring in \$140 million annually to the state's coffers.⁸³ However, the price is high, and one should ask whether or not it is too high. And in the words of Justice O'Connor, who will be politically accountable for such decisions?⁸⁴

⁷¹*Id.*

⁷²*New York v. United States*, 505 U.S. 144.

⁷³Midwest Compact Report, *supra* note 10, at 4.

⁷⁴*Id.*

⁷⁵Interview with Greg Larson, *supra* note 38.

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹PERCIVAL, *supra* note 5.

⁸²Interview with Thomas Lange, *supra* note 13.

⁸³*Id.*

⁸⁴PERCIVAL, *supra* note 5, at 168. Justice O'Connor, in her opinion in *New York v. United States*, stated that the Congressional scheme in the 1985 Amendments should have allowed the states to retain the ultimate decision whether or not to comply. That way, she wrote, the state electorate can then decide whether "making provision for disposal of radioactive waste is in their best interest, and can elect state officials that share their view." If the federal government compels a state to regulate, she points out then state officials cannot act in accordance with the views of their electorate and "the federal officials who devised the program remain insulated from the electoral ramifications of their decision." *New York v. United States*, 505 U.S. at 144.