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May 5, 2000

VIA MESSENGER

Dr. William D. Travers
Executive Director for Operations
U.S. Nuclear Regulatory Commission
c/o
Public Document Room
2120 L Street, N.W.
Washington, D.C. 20037

Dear Dr. Travers:

Attached is a supplement to the petition filed on behalf of Envirocare of Utah, Inc. under 10 C.F.R. § 2.206 on March 13, 2000, relating to the Nuclear Regulatory Commission's interpretation of the Uranium Mill Tailings Radiation Control Act.

Yours sincerely,

Leonard Bickwit, Jr.

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SUPPLEMENT TO PETITION UNDER 10 C.F.R. § 2.206 REGARDING NRC INTERPRETATION OF URANIUM MILL TAILINGS RADIATION CONTROL ACT

Introduction

The sole purpose of this supplement is to reduce to writing a point discussed in the oral presentations at the Nuclear Regulatory Commission's April 11, 2000, meeting on the pending section 2.206 petitions regarding the NRC's interpretation of the Uranium Mill Tailings Radiation Control Act (UMTRCA). That point is that under the Commission's interpretation of UMTRCA, the disposal of so-called "pre-1978" section 11e.(2) mill tailings currently is subject to neither federal nor state health and safety regulation.[1] As discussed in our original petition, the NRC has taken the position that under UMTRCA it does not have authority over such pre-1978 section 11e.(2) mill tailings, most of which are wastes that are now included in the Formerly Utilized Sites Remedial Action Program (FUSRAP). Both the NRC and the Army Corps of Engineers have indicated that this situation is not troublesome because the tailings are subject to regulation under other federal and state laws. Yet, because the Atomic Energy Act (AEA), as amended by UMTRCA, preempts the field of nuclear safety regulation for such materials, they are not subject to any state regulation intended to protect residents from radiation exposure. Moreover, as noted in our original petition, they are not within the EPA's jurisdiction under the Resource Conservation and Recovery Act (RCRA). Therefore, the NRC's current interpretation of the relevant statutes leaves the disposal of these materials entirely unregulated.

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[1] The term "pre-1978" section 11e.(2) material is used here to mean uranium and thorium mill tailings over which the NRC claims it has no jurisdiction under the Atomic Energy Act.

I. State Regulation of Section 11e.(2) Material Is Preempted By Federal Law.

The AEA prevents states from regulating any of the nuclear safety aspects of section 11e.(2) material. Since the NRC has not exercised jurisdiction over pre-1978 section 11e.(2) material, it could be argued that the states may regulate such material without creating any conflict with federal regulation. However, even such non-conflicting state regulation would be preempted under the doctrine of "field preemption," since Congress has indicated its intent in the AEA that federal regulation of source, special nuclear, and byproduct material is exclusive, absent an agreement delegating NRC authority to a state. Moreover, under the Commission's interpretation of UMTRCA, pre-1978 section 11e.(2) material cannot be regulated by agreement states, since the NRC cannot confer through a federal-state agreement regulatory authority that it does not possess. Therefore, if the NRC does not regulate the disposal of pre-1978 section 11e.(2) material, no state will be able to regulate it either.

A. When Congress Has Occupied an Entire Field of Regulation, All State Regulation in that Field is Preempted, Even if the State Regulation Does Not Directly Conflict With the Federal Law.

There are two basic kinds of federal preemption: "field" preemption and "conflict" preemption. As the Supreme Court has explained, "state law can be pre-empted in either of two general ways." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). First, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." Id. Second, "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id. (citations omitted).

It is the doctrine of "field" preemption that is implicated here. Under that doctrine, states may not regulate in a field in which Congress has shown its intent to "occupy the field" by enacting a

pervasive regulatory scheme, even though state regulation on a particular issue may not directly conflict with federal law. That is, "Congress' intent to supersede state law altogether may be found from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (internal quotations omitted) (alteration in original).

All state regulation is invalid in such an "occupied" field, even if the state regulation furthers the objectives of the federal regulatory scheme. "[I]f Congress has validly decided to 'occupy the field' for the federal government, state and local regulations within that field must be invalidated no matter how well they comport with substantive federal policies." Laurence H. Tribe, 1 American Constitutional Law 1205 (3d. ed 2000).

B. State Regulation of Byproduct Material— Including Pre-1978 Material— is Preempted by Federal Law Under the Doctrine of Field Preemption.

The Supreme Court has clearly indicated that safety regulation of source, special nuclear, and byproduct material, including section 11e.(2) byproduct material, is reserved exclusively to the federal government by the AEA. By means of the AEA, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." Pacific Gas, 461 U.S. at 212. Under this pervasive regulatory scheme, "[t]he AEC . . . was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. Upon these subjects, no role was left for the States." Id. at 207 (internal citations omitted).

The NRC acknowledges that pre-1978 tailings are defined as "byproduct material" under the Atomic Energy Act. Therefore, under the "field preemption" doctrine, such material may not be

regulated by the states. So states the controlling AEC General Counsel's opinion on federal preemption of state law:

> The Atomic Energy Act of 1954 had the effect of preempting to the Federal Government the field of regulation of nuclear facilities and byproduct, source and special nuclear material. Whatever doubts may have existed as to that preemption were settled by the passage of the Federal-State amendment to the Atomic Energy Act of 1954 in 1959.

10 C.F.R. § 8.4(c) (1999) (footnote omitted). This opinion of the General Counsel is in accord with controlling case law. In addition to being consistent with the Supreme Court's holding in Pacific Gas, it also comports with Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). There the court noted that the AEC possesses "sole authority to regulate radiation hazards associated with by-product, source, and special nuclear materials." Id. at 1149. As the Supreme Court has explained, "[t]he comprehensive regulatory scheme created by the AEA embraces the production, possession, and use of three types of radioactive materials — source material, special nuclear material, and byproduct material." Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 5-6 (1976). Thus, "the states possess no authority to regulate radiation hazards unless pursuant to the execution of an agreement . . . under § 2021(b)." Northern States, 447 F.2d at 1149-50.

Because states are precluded from regulating byproduct material except pursuant to an agreement with the NRC, and because the NRC claims that it has no authority of its own to delegate under such an agreement where pre-1978 11e.(2) material is concerned, no state can have authority as to such material. That states may assert otherwise does not affect the analysis. Since states are preempted from regulating in the field of byproduct material, any state statutes or regulations purporting to address pre-1978 11e.(2) material cannot have the force of law.

II. The EPA Lacks Jurisdiction to Regulate Pre-1978 Byproduct Material.

Because pre-1978 mill tailings qualify as "byproduct material" under the AEA, only the NRC has authority to regulate those materials with respect to nuclear safety. RCRA specifically denies EPA the authority to regulate Atomic Energy Act byproduct material. See Envirocare's Petition Under 10 C.F.R. § 2.206, at 4 n.2, 8-9. The NRC has exclusive authority over the nuclear safety aspects of such materials. See Train, 426 U.S. 1 (reading the Federal Water Pollution Control Act to preclude EPA regulation of source material, special nuclear material, or byproduct material under that Act, in light of the NRC's "full" and "exclusive" control over the discharge of such materials).

III. The NRC Should Avoid Reading UMTRCA in a Manner that Mandates that Significant Amounts of Byproduct Material Go Entirely Unregulated.

Under the foregoing analysis, there are at least two reasons why the NRC should interpret its jurisdiction to include pre-1978 section 11e.(2) material. First, the NRC should do whatever it can to avoid what all would agree is an indefensible result from the standpoint of sound public policy: the absence of any federal or state authority to regulate nuclear safety hazards associated with the disposal of pre-1978 section 11e.(2) material. Agencies, of course, should not ignore the clear mandate of a statute simply because it produces a policy result that the agency finds unacceptable. Yet even the staunchest proponent of the NRC's reading of UMTRCA would not argue that the statute provides any such clear mandate unequivocally forbidding NRC jurisdiction.

Second, the NRC should avoid reading UMTRCA in a way that the Congress that enacted the statute could not possibly have intended it to be read. Given the congressional concerns regarding health and safety that prompted the enactment of UMTRCA, see, e.g., Petition at 7-8, it is unreasonable to interpret UMTRCA in a way that precludes NRC regulation of pre-1978 material. Although Congress may not have focused on the matter specifically, it is not conceivable that it would have wanted to bring such material within the scope of an exclusive, preemptive regulatory regime (as

it did by including tailings within the definition of "byproduct material") without also providing jurisdiction over such tailings to the agency administering that regime. Yet the NRC's current interpretation imputes to Congress just such a decision.

Conclusion

The disposal of pre-1978 section 11e.(2) material, i.e., most FUSRAP mill tailings, is now taking place in an unregulated environment. The NRC is not exercising any authority over these mill tailings. The EPA lacks authority under RCRA. And although some states have laws that are intended to deal with such disposal, they are preempted and therefore unenforceable. The result is that any state that receives these tailings will receive radioactive material that is subject to neither federal nor state regulation. The NRC can solve this problem only by reversing its position that it lacks authority over the FUSRAP material. Until that solution is adopted, pre-1978 section 11e.(2) material will continue to be disposed of free of any enforceable government regulation.