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To: Kane, NMSS

AUTHOR: MARCY LEAVITT

AFFILIATION: NM

ADDRESSEE: RICHARD MESERVE

SUBJECT: NEW MEXICO ENVIRONMENT DEPARTMENT'S COMMENTS ON NRC DRAFT
RULEMAKING PLAN (SEPTEMBER 11, 2000)

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GARY E. JOHNSON
GOVERNOR

**State of New Mexico
ENVIRONMENT DEPARTMENT**

**Office of the Secretary
Harold Runnels Building
1190 St. Francis Drive, P.O. Box 26110
Santa Fe, New Mexico 87502-6110
Telephone (505) 827-2855
Fax (505) 827-2836**



PETER MAGGIORE
SECRETARY

PAUL R. RITZMA
DEPUTY SECRETARY

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

January 19, 2001

The Honorable Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
MS T-7J8
Washington, DC 20555

RE: New Mexico Environment Department's (NMED) Comments on NRC Draft
Rulemaking Plan (September 11, 2000)

Dear Chairman Meserve:

On September 11, 2000, the Nuclear Regulatory Commission (NRC) published a Draft Rulemaking Plan for public comment. Attachment 1 of the Plan proposes new regulations governing uranium and thorium recovery facilities, to be codified as 10 C.F.R. Part 41, pursuant to the Atomic Energy Act (AEA), 42 U.S.C. §§ 2001 to 2296. The proposed Plan has potentially serious implications for the administration and implementation of hazardous waste management and ground water protection programs in non-agreement states that have these facilities.

On December 22, 2000, the New Mexico Environment Department (NMED) submitted its comments on the Draft Rulemaking Plan to Mark Haisfield of the NRC on behalf of the State of New Mexico, citing a number of concerns it has with the proposed regulations, as well as recent NRC decisions upon which the Plan is based. Please find the attached copy of the NMED's December 22, 2000 letter to the NRC for your information.

If you have any questions about the enclosed materials, please contact either Kevin Myers at (505) 476-3506 or Mary Heather Noble at (505) 827-2782.

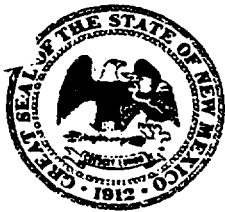
Sincerely,



**Marcy Leavitt, Chief
Ground Water Quality Bureau**

Enclosure

**Cc: The Honorable Greta Joy Dicus
 The Honorable Nils J. Diaz
 The Honorable Edward McGaffigan, Jr.
 The Honorable Jeffrey S. Merrifield
 Karen D. Cyr, General Counsel, NRC Office of the General Counsel
 William F. Kane, Director, NRC Office of Nuclear Material Safety and
 Safeguards
 Michael F. Weber, Director, NRC Division of Fuel Cycle Safety and Safeguards
 Phillip Ting, Chief, Fuel Cycle Licensing Branch**



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Fax (505) 827-2836



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SECRETARY

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DEPUTY SECRETARY

BY TELEFAX AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

December 22, 2000

Mark Haisfield
Division of Industrial and Medical Nuclear Safety
Office of Nuclear Material Safety and Safeguards, T9-C24
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Comments on NRC Draft Rulemaking Plan (Sept. 11, 2000)

Dear Mr. Haisfield:

The New Mexico Environment Department ("NMED") submits the following comments on the Nuclear Regulatory Commission's ("NRC") September 11, 2000 Draft Rulemaking Plan. Attachment 1 of the Plan proposes new regulations governing uranium and thorium recovery facilities, to be codified at 10 C.F.R. Part 41, pursuant to the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011 to 2296.

NMED has a number of concerns with the Draft Rulemaking Plan and the recent NRC decisions upon which it is based. NMED notes that many of the proposals in the Plan are adopted from the mining industry "white paper," entitled *Recommendations for a Coordinated Approach for Regulating the Uranium Recovery Industry: A White paper Presented by the National Mining Association* (1998). NMED views this industry "white paper" as representing the views of only one stakeholder group. NMED urges the NRC to consider the views of other stakeholders, including non-agreement states such as New Mexico in this rulemaking process, and to seriously reconsider its decisions on some of the following issues.

1. Regulations for *In Situ* Leach Facilities

NMED recognizes the need for and supports NRC's proposal to promulgate new regulations to establish appropriate clean-up criteria and standards for soils and ground water impacted by *in situ* leach ("ISL") facilities. The current regulations under 10 C.F.R. Part 40 are not adequate. NMED would be happy to work with NRC staff in crafting such regulations.

2. Regulations for Disposal of Other Material in Tailings Piles

NRC suggests that the Draft Rulemaking Plan would "allow more flexibility" in authorizing the disposal of non-byproduct material,¹ including hazardous wastes, in uranium mill tailings impoundments. NMED believes that serious environmental and legal problems would emerge with allowing disposal of hazardous wastes in uranium mill tailings impoundments, and that such a proposal would be unwise.

Under the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k, and analogous state laws, hazardous wastes must be disposed of at permitted disposal facilities. Such facilities must comply with strict, detailed regulatory requirements that have been established for the protection of human health and the environment. 40 C.F.R. Parts 260-272. RCRA is implemented by the United States Environmental Protection Agency ("EPA") and authorized states (such as New Mexico) that have enacted hazardous waste programs no less stringent than the federal program.

The disposal of hazardous waste in mill tailings impoundments would constitute land disposal, as defined by RCRA. 42 U.S.C. § 6924(k).² When Congress enacted the 1984 RCRA amendments, it strongly disfavored land disposal of hazardous waste and established particularly stringent regulatory requirements for the use of this disposal method. Congress specifically found that:

[C]ertain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly [by] landfill and surface impoundment, should be the least favored method for managing hazardous waste.

42 U.S.C. § 6901(b)(7). Accordingly, as part of RCRA, Congress enacted a set of provisions known as the "land disposal restrictions." 42 U.S.C. § 6924(b) through (m).

¹ Section 11e.(2) of the AEA defines "byproduct material" as "the tailings or waste produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2).

² Section 3004(k) of RCRA defines the "land disposal" of hazardous waste as "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." 42 U.S.C. § 6924(k).

These provisions generally prohibit the land disposal of hazardous waste unless the waste is first treated to meet stringent standards developed by EPA. 42 U.S.C. § 6924(m); 40 C.F.R. Part 268. Congress also enacted "minimum technology" requirements, mandating that hazardous waste landfills and surface impoundments be designed with double liners, a leachate collection system, and groundwater monitoring. 42 U.S.C. § 6924(o).

From NMED's perspective, an NRC proposal to "allow more flexibility" for the disposal of hazardous wastes in mill tailings impoundments would enable industry to circumvent the RCRA and analogous state regulatory and permitting requirements, including the land disposal restrictions and minimum technology requirements. Such a proposal would open an expansive loophole in the RCRA regulatory scheme, create an increased risk of harm to human health and the environment from releases of hazardous wastes and hazardous constituents, and undermine congressional objectives in enacting and amending RCRA.

Moreover, NMED cannot see where NRC has the legal authority to promulgate such a rule. RCRA directs the administrator of EPA to implement the hazardous waste program and promulgate implementing regulations. State agencies administer analogous state programs authorized by EPA. NMED does not believe that NRC would have authority to promulgate rules exempting the disposal of hazardous waste in mill tailings impoundments from the requirements of RCRA or analogous state laws.

3. Regulations for Processing Alternate Feed Material

See comments in item #2 above.

4. Concurrent Jurisdiction With Non-Agreement States

NMED is particularly disturbed by NRC's apparent decision to renounce the concurrent NRC and non-agreement state jurisdiction over non-radiological hazards associated with byproduct material, as defined in section 11e.(2) of the AEA. This decision overrules longstanding NRC policy³ that has been implemented without serious problems for over twenty years.

a. Environmental Issues

NMED is concerned that the NRC's decision, if implemented, will result in unacceptable degradation of ground water in New Mexico and other non-agreement states. Preemption of state authority over non-radiological hazards associated with section 11e.(2) byproduct material would allow uranium recovery facilities to evade cleanup of non-radiological contaminants that NRC does not recognize as a "hazard." For example, existing New Mexico state law requires abatement of non-radiological constituents that the NRC does not regulate, including chloride, nitrate, sulfate, and total dissolved solids. NMED

³ This policy was set forth in a memorandum from Howard K. Shapar, Executive Legal Director, NRC, to Chairman Ahearne (Apr. 28, 1980).

enforces ground water quality standards for these constituents to protect its ground water resources for future domestic and irrigation use. New Mexico is a rapidly developing, arid state that relies on the state regulatory authority for protection of this precious resource. NMED would consider such unregulated degradation of New Mexico's ground water resources to be unacceptable.

Furthermore, preemption of state jurisdiction would leave the NRC with exclusive authority to decide how ground water cleanup should be implemented, including review and approval of alternate concentration limits ("ACL's"). NMED believes that state agencies have a much deeper understanding of the hydrogeologic conditions surrounding uranium facilities within their jurisdiction, and is concerned that the states' ground water protection efforts may be frustrated if the NRC serves as the sole authority for review and approval of ACL's and other aspects of ground water cleanup.

In addition, NMED is concerned that the new regulations will not adequately address off-site ground water contamination, due to NRC's traditional focus on regulatory efforts within license boundaries. NMED is currently dealing with this issue at the Homestake Mining Company ("HMC") former uranium recovery facility in Grants, New Mexico. At this site, elevated concentrations of uranium, molybdenum, and selenium in ground water outside the licensee's property boundary are not being addressed under the Corrective Action Plan that is overseen by NRC, despite the inclusion of cleanup standards for these constituents in HMC's license. NRC has not required corrective action to address off-site contamination; all of HMC's point-of-compliance wells are located within the property boundary. NMED is therefore seeking to address the off-site contamination using State authority. NRC's preemption of NMED's authority to regulate non-radiological hazards associated with byproduct material, coupled with its failure to address off-site contamination at this site, will result in further unregulated degradation of ground water intended for future domestic and irrigation use.

Preemption of state jurisdiction also appears to be inconsistent with the NRC's proposal to defer to the federal underground injection control ("UIC") program⁴ for protection of ground water at ISL facilities. The UIC program is implemented by the EPA and states with UIC primacy status. 42 U.S.C. § 300h-1(b)(3). NRC's proposal would apparently defer the protection of ground water from 11e.(2) byproduct material at ISL facilities to EPA and primacy states, while simultaneously preempting all other non-agreement state regulation of hazards from such material. NMED believes that these decisions present a fundamental contradiction that may thwart NRC's attempts to establish a workable framework for ground water protection at ISL facilities, at least in non-agreement states that have primacy for administration of the federal UIC program.

⁴ The UIC program is established pursuant to Part C of the Safe Drinking Water Act, 42 U.S.C. §§ 300h to 300h-5.

b. Legal Issues

NMED further disagrees with NRC's conclusion that Congress intended to preempt state regulation of non-radiological hazards associated with 11e.(2) byproduct material. Indeed, NMED believes that the AEA demonstrates that Congress intended no such thing.

Section 274(k) of the AEA expressly reserves state authority to regulate non-radiological hazards:

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. § 2021(k). In his comments regarding the concurrent jurisdiction issue, Chairman Meserve stated his belief that section 274(k) merely serves to establish that "by becoming an Agreement State, a state does not give up any authority that it otherwise would have the power to exercise."⁵ However, section 274(k) on its face applies not only to agreement states, but also to "any State or local agency." NMED finds Chairman Meserve's interpretation of this provision to be strained.

NMED also contests the argument that Congress intended to preempt state authority over non-radiological hazards when it enacted the Uranium Mill Tailings Control Act of 1978 ("UMTRCA"). It is true that UMTRCA amended the AEA to authorize federal regulation of the non-radiological hazards associated with 11e.(2) byproduct material. 42 U.S.C. §§ 2022(b)(1) and 2114(a)(1). However, because Congress did not repeal or amend section 274(k) in UMTRCA, this provision remains valid and in effect. Nor does any conflict between section 274(k) and the UMTRCA provisions exist to support a conclusion that section 274(k) has been implicitly superseded or repealed, as has been argued.⁶ To the contrary, the provisions are perfectly reconciled simply by recognizing that Congress intended concurrent federal and state jurisdiction.

Furthermore, the Supreme Court has held that a federal statute does not preempt state authority unless it was "the clear and manifest purpose of Congress" to do so. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Accordingly, at least one federal court of appeals has found that "regardless whether or not a state has entered into [an agreement

with the NRC], the state retains its authority to regulate non-radiation hazards." *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571, 580 (7th Cir. 1982), *cert. denied*, 459 U.S. 1049; *accord Kerr-McGee Chem Corp. v. City of West Chicago*, 914 F.2d 820 (7th Cir. 1990); *Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234 (7th Cir. 1985). The court of

⁵ Commissioner Comments on SECY-99-0277 (Aug. 11, 2000) (comments of Chairman Meserve).

⁶ *Id.*

appeal's analysis in these cases is bolstered by the Supreme Court's decision in a state common law tort case, in which the Court held:

[F]or a state law to fall within the preempted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels.

English v. General Elec. Co., 496 U.S. 72, 85 (1990).

The fact that Congress declined to repeal or revise section 274(k) is particularly significant in light of these decisions. The cases were decided in 1982, 1985, and 1990; Congress amended the AEA in 1983 and 1992. According to the Supreme Court, when Congress reenacts a statute in the face of clearly developed caselaw, the reenactment includes the settled judicial interpretation of the statute. *Herman & McLean v. Huddleston*, 459 U.S. 375, 384-86 (1983).


Thus, NMED's reading of the statute leads to the conclusion that Congress did not intend to preempt state authority to regulate non-radiological hazards associated with section 11e.(2) byproduct material. Federal caselaw strongly supports this conclusion.

5. Clarification of Reporting Requirements

NMED does not agree that a spill threshold volume of 10,000 gallons for ISL facilities will adequately provide for ground water protection. NMED suggests that spill reporting requirements include recording *all* spills, while reserving those releases of a threshold value (e.g., $\geq 10,000$ gallons) or releases outside the permitted area for immediate notification. A complete record of all spills could be reported on a quarterly or annual basis.

NMED appreciates the opportunity to comment on the Draft Rulemaking Plan. If you require clarification on any of the above comments, please do not hesitate to contact the NMED Office of the Secretary at (505) 827-2855.

Sincerely,



Peter Maggione
Cabinet Secretary



Richard Mertz
General Counsel

cc: Myron Knudson, Director, Superfund Division, EPA Region 6