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March 14, 2001

Stephen H. Lewis, Esq.
United States Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852-2738

Re: **UniTech Services Group, Inc.**

Dear Steve:

Last week I sent you and several other NRC Staff members a memorandum prepared by the law firm of Goodwin Procter (counsel to UniTech Services Group, Inc. in the *Interstate Nuclear Services Corp. v. The City of Santa Fe* litigation) [1] and our firm regarding local regulation of discharges of Atomic Energy Act materials to sanitary sewer systems. The transmittal also contained a number of supporting, background documents.

It has come to my attention that in duplicating and binding the materials, portions of the left margin of the memorandum were obscured, making it difficult to read that document. As a result, I am transmitting to you, John Greeves, Paul Lohaus and Janet Schlueter full corrected copies of the transmittal. I apologize for any inconvenience and look forward to hearing from you once you have reviewed the enclosed materials.

Sincerely,

Donald J. Silverman

Enclosure

cc: Mr. John T. Greeves
Mr. Paul H. Lohaus
Janet R. Schlueter, Esq.

[1] UniTech Services Group was formerly known as Interstate Nuclear Services Corp.

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ERIDS 06C01

MEMORANDUM REQUESTING NRC ACTION REGARDING LOCAL REGULATION OF AEA MATERIALS AND THE "LARAMIE LETTER"

Submitted on behalf of UniTech Services Group, Inc.

Date: March 8, 2001

UniTech Services Group, Inc. ("UniTech") is a radioactive materials licensee previously known as Interstate Nuclear Services Corp. UniTech recently concluded two years of litigation against The City of Santa Fe, New Mexico, over the City's passage of an Ordinance regulating the discharge of radionuclides to the local sewer system (*Interstate Nuclear Services Corp. v. The City of Santa Fe*, No. 98-1224 (D.N.M.)). That Ordinance has been struck down by a federal court, but the City was emboldened in its enactment and defense of the Ordinance by a 1993 letter from the Nuclear Regulatory Commission's ("NRC") Office of the General Counsel to the City Attorney for the City of Laramie, Wyoming ("the Laramie Letter"). In light of this experience, which portends further threats to important federal policies, UniTech hopes to persuade the NRC that it should 1) reiterate that local governments have no authority to regulate discharges of Atomic Energy Act ("AEA") materials to sanitary sewer systems; and 2) further clarify the federal preemption principles set forth in the Laramie Letter so they will not be further misunderstood.

I. Background and Summary

City of Santa Fe Ordinance 1997-3 ("the Ordinance") barred all industrial users "handling radioactive materials under license from the Nuclear Regulatory Commission or the state" from discharging radioactive elements with half-lives greater than 100 days into the City's sewer system. The NRC has imposed no similar restrictions. The Ordinance also referenced the NRC's discharge limitations at 10 C.F.R. Part 20, Appendix B, Table III and substituted discharge limits 50 times more stringent. (Portions of the Ordinance are attached at Exhibit A.) The Ordinance also wholly exempted "hospitals and other medical professionals" from these restrictions. The practical effect of the Ordinance was the permanent closure of UniTech's Santa Fe laundry facility, which had laundered protective garments and other gear for the Los Alamos National Laboratory since 1957.

Before being enacted in February 1997, the (proposed) Ordinance was opposed not only by UniTech but also by the New Mexico Environment Department ("NMED"), the state agency with authority over radioactive materials pursuant to New Mexico's "Agreement State" relationship with

the NRC. NMED pointed out to the City Council that, among other things, the City's own drinking water failed to meet the Ordinance's standards. After these efforts failed to persuade the City that its Ordinance was illegal, UniTech was compelled to file a federal suit, alleging that the Ordinance was preempted by the AEA. UniTech was joined in its preemption argument by NMED, as *amicus curiae*, which explained that the City's draconian local regulations would create an "untenable" dual regulatory scheme in New Mexico. NMED also concluded, as had UniTech, that the City's radionuclide provisions were "unquestionably" motivated by health and safety concerns. (NMED brief attached at Exhibit B.) An *amicus* brief in support of UniTech's argument was also submitted by the Nuclear Energy Institute ("NEI"), which reiterated that municipalities had no authority to pass radionuclide regulations that the NRC would bar even state agencies in Agreement States from implementing, and that the Ordinance was "incompatible" with current NRC regulations.

Discovery disclosed that the City's real purpose in passing the Ordinance was to regulate a perceived radiation hazard — UniTech's discharge of radioactive wastewater to the local sewer system. More importantly, City officials had convinced the City Council to pass the Ordinance by distorting a letter from the NRC to another municipality, the City of Laramie, Wyoming, several years before. The City, and another municipality (the Northeast Ohio Regional Sewer District) appearing as *amicus* on its behalf, then relied on that letter in the litigation as a justification for the City's position.

The Laramie Letter (Exhibit C) was originally sent by NRC Deputy General Counsel Martin Malsch to the City Attorney for Laramie in November 1993, in response to that city's query about whether it had authority to regulate radionuclide discharges. The letter explained the general parameters of preemption under the AEA but neither authorized specific municipal regulation nor purported to expand local authority to regulate radionuclides. Yet the letter has had nationwide impact on the local level, as municipalities have circulated it and misread its terms to support local nuclear regulation that is, in our view, beyond anything contemplated by the NRC or the drafters of the AEA.

In this instance, the City of Santa Fe's misplaced reliance on the Laramie Letter led to two years of burdensome and expensive litigation. The radionuclide provisions of the Ordinance were eventually struck down and the City conceded that the Ordinance was preempted,[1] but the

[1] In January 2000 the District of New Mexico (Black, J.) awarded UniTech summary judgment on the basis that the City had not been given authority by the State of New Mexico — an Agreement State — to set limits on the discharge of radionuclides. The court also concluded that "[t]here can also be little serious debate that the [discharge limits in the City's Ordinance], setting the hurdle 50 times higher than state or federal standards, would make it close to impossible for INS to operate a Santa Fe laundry in Santa Fe to service the Los Alamos National Laboratory. Substantial legal precedent might therefore support federal preemption." Because of its ruling that municipal regulation of radioactive materials was preempted by state law, however, the Court chose to defer the federal issue. The Court declared the relevant provisions of the City's Ordinance null and void. (Copy attached at Exhibit D.)

On November 14, 2000 the City conceded to judgment against it on Count I of UniTech's complaint, which alleged that the City's Ordinance was preempted by federal law as well. The City paid UniTech $1.1 million in

widespread influence of the Laramie Letter remains a danger to orderly regulatory control of nuclear materials. Other municipalities — including Oak Ridge, Tennessee; Albuquerque, New Mexico; and St. Louis, Missouri — have already entered this regulatory arena, and more may do so in the future, including municipalities where UniTech and/or other NRC licensees operate. It is incumbent on the NRC to consider whether its advice is being misunderstood or misused, and to take appropriate action in response.

II. Overview of Operative Legal Principles

A. Preemption Under the AEA

Since Congress passed the first AEA in 1946, the field of nuclear energy has been under federal control. *See* Pub. L. No. 79-585, 60 Stat. 755 (1946). Today the AEA retains its preemptive force, ensuring that the federal government is able to maintain adequate, uniform, and sensible standards in the regulation of source, byproduct and special nuclear materials ("AEA materials") nationwide. The AEA expressly provides that, except for the authorized state-level programs the NRC approves and monitors under 42 U.S.C.§ 2021, state and local governments may only regulate AEA material-related activities "for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k) (emphasis added).

The United States Supreme Court has reaffirmed that the AEA reserves to the federal government control of the field of nuclear health and safety issues, except insofar as authority is ceded to an Agreement State under the AEA. *See Pacific Gas & Electr. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 212 (1983); *see also* 10 C.F.R. § 8.4(j). Even then, however, Agreement State programs are required to maintain regulations that are compatible with the federal ones. *See NRC Statement of Principles*, 62 Fed. Reg. 46517 (criteria for acceptance as an Agreement State).[2] In short, state and local laws passed for the purpose of protecting public health and safety from the radioactive hazards of AEA materials, especially when they substantially alter NRC requirements, are generally preempted.

The relevant case law on preemption has evolved significantly since *Pacific Gas*. Two aspects of this evolution are especially important for present purposes. First, a state or local enactment is preempted even if just one of the purposes motivating the law pertains to protecting health and safety. Federal preemption could work no other way. If local legislatures could avoid preemption simply by stating purposes beyond the preempted one, they could avoid preemption at will just by mouthing the right words. The Supreme Court has recognized this problem. *See, e.g., Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 105 (1992) (OSH Act did not "lose its

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damages.

[2] New Mexico became an Agreement State in 1974. *See* 39 Fed. Reg. 14743 (April 26, 1974) (Notice of Atomic Energy Commission Agreement with State of New Mexico). NMED's regulations on the discharge of radioactive effluent to local sewers are the same as their federal counterparts. *See* 20 NMAC 3.1 § 400 App. B & Table III.

preemptive force" *vis a vis* local regulation just because "the state legislature articulate[d] a purpose other than (or in addition to) [the preempted field of] workplace health and safety"); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971) ("We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration.").[3]

Second, state and local laws are also preempted — regardless of the motivations behind them — if they "infringe upon" the NRC's regulatory authority. As the Supreme Court explained in *English v. General Electric Co.*, 496 U.S. 72 (1990), *Pacific Gas* "did not suggest that a finding of safety motivation was necessary to place a state law within the preempted field." *Id.* at 84 (emphasis in original). Accordingly, a local law is also preempted if it has a "direct and substantial effect" in the preempted field of nuclear health and safety, even if it was not passed for health and safety purposes. As one federal appeals court has noted, the "effects" aspect of field preemption analysis, as explained by the Supreme Court in *English,* is similar to conflict preemption, in which the question is whether the local law "frustrates" federal purposes. *State of Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990).

These two important aspects of the preemption doctrine are not reflected in the Laramie Letter.

B. The AEA's Compatibility Requirement

Section 274 of the AEA (now codified at 42 U.S.C. § 2021) gives the NRC authority to enter into agreements with States in which States assume the NRC's "regulatory responsibilities with respect to byproduct, source, and special nuclear materials." 42 U.S.C. § 2021(a)(4). Before permitting a state to assume these responsibilities, the NRC must find that the State program is compatible with the NRC's program for the regulation of such materials. *Id.* § 2021(d)(2). The legislative history of § 274 indicates that the purpose of the compatibility requirement was to ensure uniform national standards.[4] In executing this directive, the NRC has determined that certain NRC

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[3] Courts in other contexts have enforced this view of preemption. Several courts, for example, have considered whether local smoking Ordinances are preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), which prohibits local regulation "based on smoking and health." Those courts conclude that one preempted purpose is sufficient to invalidate an Ordinance passed for several purposes. *See, e.g., Rockwood v. City of Burlington,* 21 F. Supp.2d 411, 418 (D. Vt. 1998) ("[A] state law with more than one purpose would be preempted if one of the purposes interfered with the federal regulatory scheme."); *Chiglo v. City of Preston*, 909 F. Supp. 675, 677-78 (D. Minn. 1995) ("merely having one permissible goal cannot remedy a statute that has at its basis" a goal that is preempted); *see also Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73 (2d Cir. 1994) (city's economic concern could not save from preemption Ordinance concerned with smoking and health).

[4] *See* Final Recommendations on Policy Statements and Implementing Procedures For: "Statement of Principles and Policy for the Agreement State Program" and "Policy Statements on Adequacy and Compatibility of Agreement State Programs," SECY-97-054 (March 3, 1997).

requirements, including basic radiation protection standards,[5] are so critical to the fulfillment of the NRC's health and safety mission that they must be adopted essentially verbatim by Agreement States.[6]

Section 20.2003(a)(2)-(3) of 10 C.F.R., the regulation the City of Santa Fe's Ordinance altered by a factor of 50, is one of the rules that the NRC has found to be such a basic radiation protection standard that it must be adopted essentially verbatim by Agreement States. This requirement has, consequently, been categorized by the Office of State and Tribal Programs as a "Category A" provision.

Although the NRC does permit Agreement States to tailor their non-Category A rules to accommodate local needs, 62 Fed. Reg. at 46517, such flexibility may not "preclude a practice authorized by the Atomic Energy Act, in the national interest." A "State may design its own program, including the incorporation of more stringent, or similar, requirements in certain areas so long as that program does not preclude or effectively preclude a practice in the national interest without an adequate public health and safety or environmental basis related to radiation protection." *Id.*[7] UniTech was engaged in just such a practice before being shut down by the City of Santa Fe. It had laundered protective garments and other gear used in the Los Alamos National Laboratory ("LANL"), as authorized under the AEA, since 1957. This business was not only authorized by the AEA, but was also in the national interest; LANL has long served the nation's civil and military scientific nuclear requirements, and UniTech supported that effort.

C. Reconcentration Concerns and NRC Regulation of Discharges to POTWs

Legal standards for the discharge of radioactive effluent received renewed NRC attention in the 1980s, with the discovery of elevated levels of radioactive materials in sewage sludge and incinerator ash at publicly owned treatment works ("POTW"). As a result, the NRC itself conducted a limited survey of 15 radioactive materials licensees and their associated POTWs to determine if radioactive material discharged to sewage systems was reconcentrating in sludge. Its efforts culminated in revised radioactive discharge regulations, which were intended to prevent

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[5] Because of the "large number of individual radiation programs nationwide [it was] recognize[d] that to maintain consistent nationwide regulation for certain activities some program elements must be consistent from jurisdiction to jurisdiction. These are the program elements identified as radiation protection standards, those with significant and direct transboundary implications, and those needed to ensure that conflicts and gaps in the nationwide pattern are avoided." Analysis for Agreement State and Public Comments, included as Attachment 1 to SECY-97-054 (emphasis added).

[6] *See* Final Policy Statement on Adequacy and Compatibility of Agreement State Programs, SECY-95-112 (stating that the NRC must ensure that there is "an adequate level of protection of public health and safety that is consistent and stable across the nation" (emphasis added)).

[7] A "practice" is a "use, procedure, or activity associated with the application, possession, use, storage, or disposal of agreement material." 62 Fed. Reg. at 46525 (emphasis added).

reconcentration of radionuclides in POTWs. *See NRC Standards for Protection Against Radiation (Final Rulemaking)*, 56 Fed. Reg. 23360, 23381 (May 21, 1991). Explaining the new regulations, the NRC observed that "[insoluble radioactive] materials may accumulate in the sewer system, in the sewer treatment plants, and in the sewer sludge. . . . [This] is no longer permitted because of potential reconcentration of these materials in the sanitary sewer system, sewage treatment plants, and sewage sludge. . . ." 56 Fed. Reg. at 23381.

In January 1994 these regulations took effect, roughly coinciding with a General Accounting Office ("GAO") report on the reconcentration issue. *See NRC Information Notice 94-07* (Jan. 28, 1994); *GAO Report: Action Needed to Control Radioactive Contamination at Sewage Treatment Plants*, GAO/RCED-94-133 (May 1994). Since 1991 the NRC has not publicly identified any noteworthy reconcentrations of radionuclides in any POTW, but the issue continues to be studied. *See Joint NRC/EPA Sewage Sludge Radiological Survey: Survey Design and Test Site Results* (August 1999) (survey to review effect of 1994 regulatory revisions); *see also Guidance on Radioactive Materials in Sewage Sludge and Ash at Publicly Owned Treatment Works* (June 2000) (issued by ISCORS; draft guidance for POTW owners).

D. The Laramie Letter

In September 1993, concerned about potential liability for radiation levels in its municipal sludge, the City of Laramie, Wyoming asked the NRC the following question: "Can a municipality lawfully regulate or prohibit the discharge of radioactive materials into its wastewater treatment system, with or without an industrial pretreatment program mandated by EPA?" *See* Exhibit C. The NRC's response was simply to repeat what the law already said: that the federal government exclusively controls the regulation of AEA materials for safety purposes, and that local regulation is only valid if it is based on "something other than the protection of workers and [the] public from the health and safety hazards of regulated materials." *Id.* Laramie was thus "not compelled" to accept radioactive discharges, said the NRC Deputy General Counsel, so long as it had "sound reasons, other than radiation protection," for its regulations. *Id.* The NRC then noted that materials regulated under the AEA were exempt from regulation under the Clean Water Act, but that new NRC regulations, revised to address the reconcentration issue, would take effect in January 1994.

As the GAO noted in its 1994 report, the City of Laramie found the NRC's advice too vague to support the regulation Laramie envisioned: "[A Laramie] city official indicated that this NRC guidance was too vague and did not answer the question of whether a municipality or a treatment plant could lawfully regulate or prohibit a licensee's discharge of radioactive materials into its sewage system." Report at App. III. Since 1993, however, the Laramie Letter has been misconstrued by others to justify broader municipal authority than the law actually allows. It has also been used as a template for passing laws in the preempted field of nuclear health and safety, by packaging those laws as motivated by economic, instead of health or safety, concerns.

III. Misuse of the Laramie Letter by the City of Santa Fe

As UniTech learned from the litigation, City officials, with the help of a local citizens group, had used the Laramie Letter as a guide for enacting otherwise impermissible restrictions on radionuclide discharges. Although in fact motivated by alleged health-and-safety concerns, however misguided, the City knew that regulation addressing these concerns was preempted under the AEA. Accordingly, it filled the legislative record with references to pretextual economic objectives in an attempt to avoid preemption.[8]

A. The City's Focus on UniTech And Its Concern About Alleged Health and Safety Effects

City officials had UniTech in their regulatory cross-hairs for almost two years before the Ordinance was enacted in February 1997. In April 1995 UniTech had applied to NMED for renewal of its radioactive materials license, a proceeding that grew contentious because a local citizens group called Concerned Citizens for Nuclear Safety ("CCNS") opposed the renewal. The City also tried to intervene in the proceeding, claiming that "[t]he health and safety of the citizens of Santa Fe may be affected should the Environment Department renew [UniTech's] license," but that request was denied. (UniTech's license was eventually renewed with conditions in November 1996, after several days of public hearings.) Meanwhile, after a surprise raid of UniTech's plant in March 1996, the City issued an administrative order closing the facility. UniTech contested the order and the dispute eventually resulted in state court litigation.

At the same time that the City was pursuing UniTech through enforcement proceedings, City officials and CCNS were also active on the regulatory front. In a letter dated March 23, 1996 (attached at Exhibit F), CCNS, arguing that radionuclide discharges "are dangerous to the public health" and "pose an unacceptably high increase in risk of cancer mortality," urged the City Council of the City of Santa Fe to regulate them in the City's revised sewer code. But, as its Public Utilities Director, Patricio Guerrerortiz, admitted during City Council meetings and under oath during his deposition, the City did not attempt to regulate radionuclides at that time — despite its desire to do so — because it believed such regulation would be illegal.

B. The City's Discovery of the Laramie Letter

Just a few weeks later, however, the City became emboldened. By letter dated May 31, 1996 (attached at Exhibit G), CCNS suggested to Mr. Guerrerortiz that the City could avoid preemption if it purported to regulate radionuclides for economic — as opposed to health and safety — reasons. In its letter CCNS said it had "spent some time" talking to the NRC, and had been told of an "NRC legal counsel's letter advising that municipalities have the legal authority to regulate discharges of

[8] To supplement the summary presented below, attached at Exhibit E is UniTech's supplemental memorandum filed in the Santa Fe litigation in support of its motion for summary judgment on preemption grounds. The memorandum sets forth UniTech's findings from discovery conducted on the preemption issue.

radionuclides in furtherance of the economic interests of the City, without running afoul of the NRC's preemption of regulation for safety purposes." A week later CCNS forwarded the Laramie Letter to the City. The copy attached at Exhibit C bears fax signatures showing that it was first sent to CCNS by the NRC on June 6, 1996, and then forwarded to Royallen Allen, a City public works official.

Within days Mr. Guerrerortiz had drafted a resolution authorizing the drafting of revisions to the sewer code that would restrict the discharge of radioactive materials. At a June 12, 1996 City Council meeting, Mr. Guerrerortiz spoke candidly about the resolution. He told the City Council that "for a year now we have been revising the [sewer] code . . . and we have come across this difficulty in regulating radionuclides or radioactive material[. U]p until very recently we were not aware of this extension [sic] to the preemption by the federal government. . . . With this recent discovery, if you want to call it, we are looking at a possibility, and that's why the resolution was worded the way it is."

The wording to which he referred was the resolution's avowed "economic" concerns surrounding the reuse of sludge and preserving the "biological processes" within its POTW. Mr. Guerrerortiz called these economic references "the key part of the resolution." He continued, now specifically referring to the Laramie Letter:

> · This exception . . . based on the letter that you have a copy of from the Nuclear Regulatory Commission, allows us to regulate that based on protecting the economic interest of the city. In this case, the reuse of the — of the effluent, and the reuse of the sludge.

Similarly, Guerrerortiz told CCNS by letter a week later (attached at Exhibit H):

> [M]ost local government officials think that since the federal government has reserved for itself the duty of regulating radio nuclides, local governments cannot do anything else to protect the health and safety of the public from the potential effects of this type of compounds [sic].
>
> However, we recently found out that there are some exceptions to this preemptive power of the federal government, and we are preparing to exercise our options under these exceptions. As you may know, the Council has instructed the city staff to propose revisions to the city code that will make it possible to regulate specific man-made radio isotopes.

In short, the City concluded that the Laramie Letter provided an "exception" to the preemption doctrine, allowing it to "protect the health and safety of the public" as long as it made references to alleged "economic interests."

C. The Passage of the Ordinance

Inspired by the Laramie Letter, City officials proceeded to draft, and the City Council ultimately adopted, draconian restrictions on radionuclide discharges, as explained above. The alleged "economic" motivation of the City's regulatory efforts (to enable the City to sell its treated POTW effluent) was a sham, as the City essentially admitted under oath in the litigation: the City had never made an effort to sell its treated effluent; no one had ever refused to buy the effluent because of radiation concerns; the City had never found any evidence of radiation build-up in its POTW; and it had never even tested its sludge for radiation reconcentration. City officials also admitted that their purported economic objectives were, at bottom, themselves health-and-safety objectives. Radionuclides are perceived as affecting "reuse" of POTW byproducts because reusing radioactive effluent or sludge could in theory endanger those in proximity to it; there is no other reason why a municipality would hesitate to reuse such materials. Similarly, radionuclides could affect "marketability" only if people will not buy these products because they are perceived as dangerously radioactive.

The Ordinance reflecting these revisions was passed at a February 12, 1997 City Council meeting. Events at that meeting removed all doubt that the City's invocation of "economic concerns" was mere legal cover, guided by the Laramie Letter, for a law meant to combat the alleged health-and-safety threat posed by UniTech's discharges. The majority of city councilors at that meeting gave free voice to their fears, declaring that the "public health and safety must be protected," because radionuclides "hang around and do things like cause cancer." The Laramie Letter was raised several times during the meeting — the city attorney in fact used it to justify the City's regulatory effort — but the Public Utilities Director never told the City Council that the City of Laramie itself had declined to follow it.[9]

D. The Litigation

The Laramie Letter was also used by the City to defend its actions throughout the ensuing litigation. In response to UniTech's motion for summary judgment on its claim of field preemption under the AEA, the City once again invoked the Letter, attaching it to its opposition brief along with the GAO report and a draft POTW guidance document issued by the ISCORS Sewage Subcommittee in May 1997. The City used the letter to support the argument that it was not "compelled" to accept

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[9] The City had also written to the NRC a month before, on January 13, 1997, saying that it would be "exercising its local government authority" to regulate radionuclides. The City observed that "the [NRC] has in the past approved of such regulation as consistent with the Atomic Energy Act (See attached letter of November 9, 1993 from NRC to City of Laramie, Wyoming)." The NRC responded on March 26, 1997 (attached at Exhibit I), taking pains to "clarify that this letter [the Laramie Letter] . . . does not contain any explicit approval of particular actions by the City. Instead, the letter simply provides an explanation of the legal principles of preemption in the context of the Atomic Energy Act (AEA) of 1954, as amended." By this point, of course, it was too late; the City of Santa Fe had passed its Ordinance the month before.

radioactive effluent discharged by UniTech, and was free to bar it under the City's inherent police powers and the Clean Water Act. The City then made similar claims in oral argument before Judge Bruce Black, arguing that the Laramie Letter signified that POTWs need not "take [radioactive effluent] at all, and if you have other concerns besides safety doses to people of radiation, go ahead and regulate." For its part, the Northeast Ohio Regional Sewer District ("NEORSD") cited the letter in two *amicus* filings in support of the City's position. (A copy of NEORSD's *amicus* brief is attached as Exhibit J.)

In short, the Laramie Letter was key to the City's decision to attempt to regulate radionuclides. The City's Public Utilities Department saw the Laramie Letter as a blueprint of the necessary steps to pass a law regulating AEA materials for public health purposes by couching it in economic terms to avoid preemption. And it further appears that the City's misplaced reliance on the Laramie Letter caused it to cling to an untenable position once litigation ensued.

IV. Summary of Reasons Why the NRC Should Be Concerned About the City of Santa Fe's Defiance of Federal Authority

There are several reasons why the NRC should be concerned about the City of Santa Fe's actions, especially its misuse of the Laramie Letter.

First, the City's actions took expensive, burdensome litigation by a duly authorized licensee to remedy, and evidence a continuing threat to federal preemption principles that will be equally costly to future licensees.

Second, the City's actions threaten the related, equally important federal policy of "compatibility." The NRC would never have allowed an Agreement State to adopt the Ordinance passed by the City of Santa Fe. If an Agreement State subject to NRC oversight failed to follow the NRC's directives in this regard, the NRC would take steps necessary to correct the situation, and would thereby maintain regulatory uniformity and avoid a "patchwork" of varying standards. Even if the AEA did not already foreclose local regulation, NRC policing of local regulations on a case by case basis would be inefficient at best. The better approach is for the NRC to clarify on a generic basis that local governments may not regulate in the preempted field.

Third, it should be of even greater concern to the NRC that local governments believe they can regulate AEA materials despite lacking both NRC oversight and the technical resources enjoyed by state-level agencies in Agreement States. The Santa Fe litigation is a good example of the risks involved; the City passed the Ordinance despite NMED's urgings that the City reconsider and the Public Utilities Director's total, and admitted, lack of technical expertise. The result was regulations stringent enough to block discharge of local drinking water.

Fourth, local action threatening these important federal policies is likely to recur. There is substantial cross-fertilization among municipal regulators, as the NEORSD *amicus* role on behalf of Santa Fe demonstrates. The Santa Fe Ordinance itself was inspired by similar provisions in an

Albuquerque ordinance. Moreover, a widely disseminated misinterpretation of the Laramie Letter holds that municipalities have broader authority to regulate the discharge of AEA materials than is actually granted under existing law. As noted above, after observing that the City of Laramie could regulate radionuclides for purposes other than radiation protection, the NRC Deputy General Counsel went on to conclude that "[t]hus, NRC regulations . . . do not compel" POTWs to accept radioactive discharges. (Letter at Exhibit C; emphasis added.) What the NRC must have meant was that, under the express terms of the AEA, because municipalities are free to regulate radioactive effluent if they have the right reasons, the AEA could not be read as forcing them to accept it.

But by saying that nothing "compels" municipalities to accept radioactive discharges, some have also read the Laramie Letter as implying that there might be some basis, independent of the narrow exception granted by the AEA, for municipalities to regulate AEA materials. For example, in a 1995 article appearing in the journal *Environmental Permitting*, the authors, one of whom is a member of the ISCORS Sewage Subcommittee, cited the Laramie Letter as their sole support for the proposition that, while "the exclusive nature of [the NRC's] jurisdiction is limited to the regulation of health and safety," "[r]egulation with regard to environmental impacts presumably can be undertaken by other federal, state or local agencies." *Proposed Radionuclide Regulations: Broad Scope May Reach Your Clients*, ENVIRONMENTAL PERMITTING, Spring 1995, at 67.

Similarly, in a draft POTW guidance document issued by the ISCORS subcommittee on May 29, 1997, the subcommittee tracked the language of the Laramie Letter and wrote:

> [T]he NRC has found that if a municipality has sound reasons, other than radiation protection, a municipality can require the pre-treatment of wastes to eliminate or reduce radioactivity. Furthermore, although NRC regulations allow users of regulated materials to discharge to treatment plants, these regulations do not compel a sewerage treatment operator to accept radioactive materials from NRC licensees. Some localities are addressing the potential problem of concentration of radioactive material at POTWs by . . . limiting the discharge of radioactive materials.

Draft Guidance on Radioactive Materials and Sewage Sludge/Ash at Publicly Owned Treatment Works at 4 (May 29, 1997) (emphasis added).[10]

The impression that the AEA, by not "compelling" POTWs to accept discharges, allows them to refuse such discharges by invoking other authorities, has led certain municipalities to conclude that such independent authority can be found in the Clean Water Act. As the Supreme Court has held, however, this is not true — the EPA has no jurisdiction under the Clean Water Act to limit the discharge of AEA materials to local POTWs by NRC-licensed facilities. *Train v. Colorado Publ.*

[10] Also note that this language is not contained in the latest draft of the POTW guidance document.

Int. Group, 426 U.S. 1, 15, 25 (1976). Nonetheless, both the City of Santa Fe and the NEORSD argued that municipalities have the authority to regulate the discharge of radioactive materials under the Clean Water Act. (In its briefs the City cited the Laramie Letter and the draft POTW guidance document quoted above, while Thomas Lenhart, the ISCORS member that wrote the 1995 article, is in-house counsel for the NEORSD.) Other municipalities seem to agree; at a minimum, municipal enforcement of regulations not compatible with NRC standards may tempt other localities to follow suit. Accordingly, the NRC has a fundamental interest in correcting a widespread misimpression of the limits of municipal authority under the AEA, and in otherwise taking action to protect federal policy in this context.

V. Conclusion

What is remarkable about the Santa Fe litigation, and the primary reason for UniTech's summary of this issue for the NRC, is that were it not for the Laramie Letter the City of Santa Fe probably never would have passed its radionuclide regulations. Those regulations were motivated by health-and-safety concerns and patently in conflict with NRC and NMED discharge limitations. Their enactment forced a long-standing radioactive materials licensee to spend large sums defending the exclusive authority of the NRC and its Agreement States, and jeopardized the consistency in radionuclide regulation that is a primary goal of the AEA. Furthermore, the Laramie Letter continues to be misunderstood, creating the risk that other states and municipalities will rely on it to pass laws infringing on areas reserved to federal control.

The NRC has an undeniable interest in protecting both its own jurisdiction and the jurisdiction it cedes to Agreement States. Congress granted exclusive authority to the NRC in this area because that is the only way to ensure a rational, consistent (and ultimately more effective) system of regulation. Local government efforts to impose their own conceptions of adequate protection of public health and safety are a continuing threat to that system. The NRC's silence in the face of those intrusions, moreover, gives the mistaken impression that a) the NRC tacitly agrees that its own regulations are too lenient, and b) local governments need not concern themselves overly much about the NRC protecting its own regulatory authority.

UniTech respectfully requests that the NRC address the continuing confusion the Laramie Letter has generated. Several types of clarification would be helpful. First, the NRC should reiterate that the Laramie Letter adds nothing to the law as it already stands and in any event, is not a binding opinion of the NRC's General Counsel. Second, the NRC should clarify that regulation of the radiation hazards of AEA materials remains the exclusive province of the NRC and the Agreement States and that state and local governments may not intrude into the protected field. Third, we strongly encourage the NRC to reexamine the federal preemption case law since the 1983 *Pacific Gas & Electric* Supreme Court decision. As explained above, the federal preemption doctrine has been clarified since 1983, and it is now evident that a state or local law is invalid under the AEA either if (a) its purpose (in whole or in part) is health-and-safety or (b) it has a "direct and substantial" effect in the health-and-safety area, regardless of its purpose.

CHAPTER XXII

SEWERS*

22-1 SANITARY SEWERS AND WASTEWATER COLLECTION, DISPOSAL AND POTENTIAL REUSE.

22-1.1 Short Title. This chapter may be cited as the "Wastewater Utility Ordinance". (Ord. #1997-3, § 2)

22-1.2 Purpose and Service Area.

A. The purpose of this chapter is to set uniform requirements for the users of the city of Santa Fe's wastewater collection system and treatment works, to enable the city to comply with the provisions of the Clean Water Act and with other applicable federal, state and local laws and regulations, to provide for the public health and welfare and to protect the city's economic interests in the publicly owned treatment works (POTW) and its waste treatment by-

*Editor's Note: Prior ordinance history includes portions of 1953 Code §§ 22-1–22-6, 22-8–22-10, 22-12–22-34, 22-36, 22-37, 22-39, 22-40, 22-46, 22-47, 22-50–22-54, 22-57, 22-58; 1973 Code §§ 28-1–28-14, 28-16–28-34, 28-36–28-39, 28-44, 28-45, 28-48–28-52, 28-55–28-70; 1981 Code §§4-4-1–4-5-8, 4-5-10–4-10-13; and Ordinance Nos. 10-24-41, 1954-6, 1956-22, 1966-23, 1974-39, 1974-44, 1978-55, 1979-13, 1979-17, 1980-38, 1980-63, 1981-64, 1982-39, 1984-33, 1985-36, 1986-23, 1988-16, 1989-22, 1990-21, 1991-25, 1992-35, 1993-9, 1993-23, 1996-22.

industrial users located beyond the municipal limits shall comply with terms and conditions established in this section, as well as any permits or orders issued hereunder as if they were located within the boundaries of the city of Santa Fe and subject to the jurisdiction of the city and the courts in the same manner as any discharger located within the city limits. (Ord. #1997-3, § 60)

22-9.2 General Sewer Use Requirements.

A. Limitations and prohibitions on the quantity and quality of wastewater which may be lawfully discharged into the POTW are hereby established. Pretreatment of some wastewater discharges shall be required to achieve compliance with this section and the Act. The specific limitations set forth herein are necessary to enable the city to meet requirements contained in its NPDES permit, to protect the public health and the environment, to protect the city's potential options for the beneficial reuse, marketing, reclamation or disposal of waste treatment by-products, and to provide efficient wastewater treatment and protect the health and safety of wastewater personnel.

B. The following pollutant limits are established to protect against potential pass through or potential interference. No person shall discharge wastewater containing in excess of the instantaneous maximum allowable discharge limits. These limits are the highest allowable concentration in any type of sample, either a grab or composite collected over any time interval and are as follows:

TABLE 22-1

Constituent	Local Discharge Limits
pH	5-11
Oil & Grease	200 mg/l (animal or vegetable)
Oil & Grease	100 mg/l (petroleum)
Arsenic	2.74 mg/l
Cadmium	0.09 mg/l
Chromium	5.32 mg/l
Copper	0.13 mg/l
Cyanide	0.24 mg/l
Lead	0.39 mg/l
Mercury	0.01 mg/l
Nickel	4.95 mg/l
Silver	0.03 mg/l
Zinc	0.46 mg/l
Temperature	104° F @ Headworks
Temperature	140° F to POTW
Total Toxic Organics	2 mg/l

Total toxic organics (TTO) is the sum of all concentrations of organic compounds from a priority pollutant scan, that are above the detection limit. TTO monitoring shall be required where applicable under specific industries per 40 CFR or where the city division determines the necessity for a priority pollutant scan to be performed to determine pollutant concentrations discharged.

C. Concentrations and the general prohibitions below in paragraph D hereof apply at the point where the industrial wastewater is monitored or as determined by the division. All concentrations for metallic substances are for "total" metal. The division may impose mass limitations in addition to or in place of the concentration based limitations above. Compliance with all parameters may be determined from a single grab sample. Exceedance of any continuous or instantaneous pollutant limits listed above constitutes a violation of this chapter.

D. These general prohibitions shall apply to all users of the POTW whether or not the user is subject to categorical pretreatment standards or any other national, state or local pretreatment standards or requirements. The following pollutants shall not be introduced into the city's sanitary sewer system and/or the POTW:

(1) Any pollutant or wastewater which may potentially interfere with the operation of the POTW, or with the city's potential options for the beneficial reuse, marketing, reclamation or disposal of waste treatment by-products.

(2) Any liquids, solids or gases which, by reason of nature or quantity are, or may be sufficient, either alone or by interaction with other substances, to cause fire or explosion or be injurious in any other way to the POTW. Included in this prohibition are wastestreams with a closed cup flashpoint of less than 140°F (60°C). The standard test method as described in the ASTMD 3278-89 index, or any other method determined by the city will be applied. At no time shall two successive readings on an explosion hazard meter at the point of discharge into the POTW or at any point in the POTW be more than five percent (5%) nor any single reading over ten percent (10%) of the lower explosive limits (LEL) of the meter. Prohibited materials include, but are not limited to, gasoline, kerosene, naphtha, benzene, toluene, xylene, ethers, alcohols, ketones, aldehydes, peroxides, chlorates, perchlorates, bromates, carbides, hydrides, sulfides, and anything else which has been determined by the city, state or EPA to be a potential fire or other hazard to the POTW.

(3) Solid or viscous substances in amounts which may potentially cause obstruction to the flow anywhere in the POTW or otherwise interfere with the operation of the POTW or pass through the treatment system but in no case solids greater than one-half inch (1/2") (1.27 centimeters) in any dimension. Prohibited substances

include, but are not limited to manure, whole blood, feathers, ashes, cinders, sand, spent lime, stone or marble dust, metal, glass, straw, shavings, grass clippings, rags, spent grains, spent hops, waste paper, wood, plastics, gas, tar, concrete, asphalt, residues from refining or processing of fuel or lubricating oil, mud, glass grindings, paraffin or polishing wastes.

(4) Any pollutant, including oxygen demanding pollutants (BOD, etc.) released at a flow rate and/or concentration sufficient to cause interference.

(5) Any toxic pollutant or wastewater containing a toxic pollutant in sufficient quantity, singly or by interaction with other pollutants, which may potentially injure or interfere with any POTW treatment process, constitute a hazard to humans or animals, or create a toxic effect in the POTW effluent as defined by this chapter. In no case shall any discharge, toxic pollutant or wastewater containing a toxic pollutant exceed national categorical pretreatment standard limitations or the limits established by this chapter or by any other ordinance adopted by the city.

(6) Any fats or greases, including but not limited to petroleum oil, non-biodegradable cutting oil, complex carbon compounds, or products of mineral oil origin, in amounts that will cause interference or pass through.

(7) Any wastewater having a pH less than 5.0 or more than 11.0, or which may otherwise potentially cause corrosive structural damage to the POTW, or harm city personnel or equipment.

(8) Any wastewater containing pollutants in such quantity (flow or concentration), either singly or by interaction with other pollutants as to potentially cause pass through or interfere with the POTW, any wastewater treatment or sludge process, or constitute a hazard to humans or animals or otherwise to potentially impair the city's economic interests or the city's potential options for the beneficial reuse, marketing, reclamation or disposal of waste treatment by-products.

(9) Any liquids, gases or solids or other wastewater which, either singly or by interaction with other wastes, are sufficient to create a public nuisance or hazard to life or property or are sufficient to hinder entry into the sewers for maintenance and repair.

(10) Any substance which may potentially cause the waste treatment by-products to tend to be unsuitable for the city's potential plans for the beneficial reuse, marketability, reclamation or disposal of waste treatment by-products. In no case, shall a substance discharged to the POTW cause the city to be in noncompliance with sludge use or disposal regulations or permits issued under Section 405 of the Act, the Solid

Waste Disposal Act, the Clean Air Act, the Toxic Substances Control Act, or other state or local requirements applicable to the sludge use and disposal practices being used by the city.

(11) Any wastewater which imparts color which cannot be removed by the current treatment process, such as, but not limited to, dye wastes and vegetable tanning solutions, which consequently imparts color to the treatment plant effluent.

(12) Any wastewater having a temperature greater than 140°F (60°C), or which will inhibit biological activity in the treatment plant resulting in interference, but in no case, wastewater which causes the temperature at the introduction into the treatment plant to exceed 104°F (40°C).

(13) Any discharge from an industrial user who is handling radioactive materials under license from the Nuclear Regulatory Commission or the state, except hospitals and medical professionals administering radioactive materials as part of medical diagnosis or treatment, unless all of the following criteria are met:

(a) The industrial user demonstrates, to the satisfaction of the Division, that discharge from its normal operations will not exceed the following limits as determined at 25°C and pH7:

(i) Any radioactive material and any product in its decay chain present in the discharge has a half-life no greater than one hundred (100) days; and

(ii) No radioactive coumpounds in a representative sample of the discharge shall be present on the filer after the sample is filtered through a 0.45 micron filter; and

(iii) The concentration in a weekly representative sample is 1/50 of the concentration levels in 10 CFR 20 App. B. Table III; and

(iv) If more than one radioactive compound is discharged, the sum of the fractions of the limit in (ii) above as determined by dividing the actual weekly average concentration by 1/50 of the concentrations of the radioactive compounds listed in 10 CFR 20 App. B, Table III, does not exceed unity.

(b) Any industrial user which demonstrates compliance with subparagraph (a) shall be permitted to discharge, but shall analyze a representative sample of its discharge weekly to demonstrate continuing

compliance with such subparagraph (a) and shall retain all such sampling records pursuant to subsection 22-9.6 K of this chapter. Any discharge which exceeds the limits of subparagraph (a) shall be reported to the division immediately by telephone, and written confirmation of such report shall be hand-delivered to the division within twenty-four (24) hours thereafter.

(c) Any discharge which does not meet the requirements of subparagraph (a) shall be considered a violation of this chapter and of the industrial user's permit.

(14) Any trucked or hauled wastes, of more than ten (10) gallons except at authorized discharge points designated by the city and in accordance with city regulations for septic tank and chemical toilet wastes transported into the sanitary sewer system and/or around the POTW.

(15) Storm water, surface water, ground water, artesian well water, roof runoff, subsurface drainage, condensate, deionized water, cooling water, and unpolluted industrial wastewater, unless specifically authorized in writing by the division.

(16) Any industrial wastes containing floatable fats, waxes, grease or oils, or which become floatable at the wastewater temperature at the introduction to the treatment plant during the winter season.

(17) Any sludges, screenings, or other residues from the pretreatment of industrial wastes.

(18) Any medical wastes, except as specifically authorized by the division, in a wastewater permit.

(19) Any material which, in the judgment of the city, contains ammonia, ammonia salts, or other chelating agents which may potentially produce metallic complexes that may interfere with the POTW.

(20) Any material considered hazardous waste according to 40 CFR Part 261.

(21) Portions of the human anatomy including but not limited to whole blood and blood products discharged by medical facilities as waste.

(22) Any wastes containing detergents, surface active agents, or other substances which may cause excessive foaming in the POTW's wastewater treatment system.

(23) Any substance which may cause the POTW to violate its NPDES permit, or any other federal, state or local permits or requirements, including any receiving water quality standards.

E. Wastes prohibited by this section shall not be processed or stored in such a manner that these materials could be discharged to the POTW. All floor drains located in process or materials storage areas must discharge to an industrial user's pretreatment facilities before connecting with the POTW or be adequately protected to prevent accidental releases.

F. Users subject to categorical pretreatment standards are required to comply with applicable standards as set out in 40 CFR Chapter I, Subchapter N, Parts 405-471 and incorporated herein by this reference, and any applicable local limits.

G. The city will accept into the POTW, septage waste only at the city designated discharge points and only septic tank wastes which exhibit the characteristics of domestic wastes and in accordance with the other provisions of this chapter.

H. The city reserves the right to establish by ordinance or resolution or in wastewater discharge permits, more stringent limitations or requirements on discharges to the POTW if deemed reasonably necessary to comply with the objectives presented in this chapter or the general and specific prohibitions in this section, or with any other reasonable objective of the city.

I. No user shall in any way attempt to dilute a discharge as a partial or complete substitute for adequate treatment to achieve compliance with a discharge limitation.
(Ord. #1997-3, § 61)

22-9.3 Pretreatment of Wastewater.

A. Industrial users shall provide, at their own expense, necessary wastewater treatment required to comply with this chapter and with all permit conditions and shall achieve compliance with all categorical pretreatment standards or local limits or prohibitions, as defined by subsection 22-9.2. Any facilities or equipment reasonably required to pretreat wastewater to a level required by this chapter shall be installed, operated, and maintained at the industrial user's expense.

Rehng List

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

INTERSTATE NUCLEAR SERVICES CORPORATION,

Plaintiff,

vs.

No. CIV 98-1224 BB/LFG

THE CITY OF SANTA FE,

Defendant.

BRIEF *AMICUS CURIAE* OF THE
NEW MEXICO ENVIRONMENT DEPARTMENT

Amicus curiae New Mexico Environment Department (**NMED**) submits its brief in support of the motion filed on December 4, 1998, by plaintiff Interstate Nuclear Services Corporation (**INS**) for partial summary judgment on grounds of federal field preemption (Count I) (**Motion**), as follows:

NMED's STATEMENT OF INTEREST

NMED is interested in the federal field preemption question before the Court because the City of Santa Fe's (**City**) ordinance creates untenable dual regulation of radionuclide discharges to public sewers (publicly owned treatment works, **POTW**) in the City. Contrary to the City's claim that there is a regulatory vacuum (*Defendant The City of Santa Fe's Response in Opposition to Plaintiff Interstate Nuclear Services Corporation's Motion for Partial Summary Judgment on Count I*, p. 8), the City's ordinance creates confusion among regulated entities and impedes NMED's mandated responsibility for state-wide regulation of radioactive materials to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well being. NMSA 1978, § 74-1-2 (1998); **see** N.M.

Const., art. XX, § 21.

NMED would license INS to discharge licensed material into the City's sanitary sewer if each of the following requirements were met:

> 1. [t]he material is readily soluble, or is readily dispersible biological material, in water; and
>
> 2. [t]he quantity of licensed ... radioactive material that the licensee ... releases into the sewer in 1 month divided by the average monthly volume of water released into the sewer by the licensee ... does not exceed the concentration listed in Table III of Appendix B [20 NMAC 3.1.361]; and
>
> 3. [i]f more than one radionuclide is released, the following conditions must also be satisfied:
>
>> a. [t]he licensee ... shall determine the fraction of the limit in Table III of Appendix B represented by the discharges into sanitary sewerage by dividing the actual monthly average concentration of each radionuclide released by the licensee ... into the sewer by the concentration of that radionuclide listed in Table III of Appendix B; and
>>
>> b. [t]he sum of the fractions for each radionuclide required by § 435 A 3 (a) [next preceding subsection] does not exceed unity; and
>
> 4. [t]he total quantity of licensed ... radioactive material that the licensee ... releases into the sanitary sewerage in a year does not exceed 5 Ci (185 Gbq) of hydrogen-3, 1 Ci (37 Gbq) of carbon-14, and 1 Ci (37 Gbq) of all other radioactive materials combined.

20 NMAC 3.1.435(A). 20 NMAC 3.1.461 (Appendix B, Table III) sets out maximum dischargeable monthly concentrations for every radionuclide that may be disposed of into a public sewer. These are the same concentrations allowed under 10 CFR Part 2 App. B, Table III of the NRC regulations.

In contrast, the City's ordinance drastically reduces the EIB's allowable concentrations. The ordinance first divides NMED's allowed discharges to the City's sewer by a factor of 4 in requiring maximum weekly concentrations, not monthly. Second, the ordinance allows only 1/50th of the NMED allowed concentration. As set forth in NMED's letter to the City Manager on the proposal before it was adopted by the City Council, the City has reported

drinking water supply from one of its production wells with natural radiation at levels higher than could be discharged to the POTW under Ordinance 1997-3 (Rev.Ord.Supp.3/97) § 22-9.2(D)(13). NMED's letter dated February 12, 1997 is attached to INS' complaint as Exhibit A, **see** ¶ 2, p. 1.

THE REGULATORY SCHEME

NMED is the executive branch agency of New Mexico state government solely responsible for enforcing rules promulgated by the New Mexico Environmental Improvement Board (**EIB**) concerning the health and environmental aspects of radioactive materials. NMSA 1978, §§ 9-7A-4 (1994) and 74-1-7(A)(5) (1993).

Through the Governor of New Mexico, the EIB and NMED entered into an agreement with the United States Atomic Energy Commission (**AEC**), now the Nuclear Regulatory Commission (**NRC**), effective May 1, 1974, for the state's takeover of the regulatory function for radioactive materials. 42 U.S.C. § 2021; NMSA 1978, § 74-3-15 (1993).[1] A copy of New Mexico's agreement is attached as Exhibit B to INS' *Memorandum in Support of the Motion*.

The EIB is the state's radiation consultant and is statutorily required to promulgate rules for licensure and registration of the possession, use, storage, disposal, manufacture, process, repair or alteration of radioactive material in New Mexico. NMSA 1978, §§ 74-1-8(A)(5), 74-3-9 (1998), and 74-3-5 and 8 (1993). The EIB's

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[1] Federal supervision of New Mexico's state-agreement performance transferred to the NRC by the Energy Reorganization Act of 1974, P.L. 93-438, 42 U.S.C. §§ 5801 *et seq.*, **see** 42 U.S.C. § 5841(f). NRC reviews NMED's performance periodically to ensure consistency and compatibility with NRC radioactive material regulatory requirements.

radiation protection rules are compiled as 20 NMAC 3.1.

Thus, NMED is the only agency under New Mexico law authorized to implement the EIB's radioactive materials regulations, as prescribed by NRC; and the EIB and NMED neither have, nor have authority to, subdelegate this duty to the City.

INS' RADIOACTIVE MATERIALS LICENSE

INS had a specific license from the AEC for its laundry in Santa Fe since 1957. After 1974, when the federal licensure function transferred to NMED, INS has had a specific radioactive materials license from NMED under 20 NMAC 3.1.303(B).[2] A copy of INS' current, interim license from NMED dated March 25, 1998 is attached to INS' *Memorandum in Support of the Motion for Partial Summary Judgment on Count I* as Exhibit A. The license contemplates reduced activities based on INS' request for temporary use submitted in its letter to NMED dated February 12, 1998.[3] A copy of the letter is attached to the City's *Memorandum in support of Motion to Dismiss Counts IV, X, XI, and Portions of Count IX, of the Complaint, Pursuant to Rule 12(b)(1)* as Exhibit C. The third paragraph of the letter says that no water will be used in radiologically controlled areas and no use of the City's sanitary sewer will be made. INS asked NMED to issue a temporary renewal for the limited purpose of storing collected laundry for shipment

[2] NMED's predecessor, the Health and Environment Department, issued INS' first license from the state according to the executive branch organization at the time. NMED continues the state's licensure and enforcement under a later reorganization in 1991. NMSA 1978, §§ 9-7-4 and 9-7A-4 (1993).

[3] In numbered ¶ 1 on p. 12 of the City's Response, the City tries to make the point that INS' current license from NMED allows only laundry storage.

to another INS facility in California, where it is decontaminated by washing and drying as was previously done in Santa Fe. The clean laundry is then returned to Santa Fe where it is stored for delivery to INS' customers in this region. The interim license issued March 25, 1998.

The interim license is a consequence of the City's order that INS stop discharging its wash water into the City's sewer. The City served its order while the public hearing on INS' license renewal application before the NMED Secretary was still under way. At the close of the public hearing, the NMED Secretary approved the license renewal, subject to conditions, including installation of new wastewater filtration equipment, designed to improve removal of radioactive material from the wastewater. Because the City would not lift its cease and desist order, INS has waited to install the new wastewater filtration equipment and resume operations under the NMED approved renewal. This *impasse* persists today.

The interim license is a temporary accommodation under the NMED Secretary's decision on INS' license renewal application, which allows laundry washing after the new wastewater filtration equipment is installed, tested and approved by NMED. NMED will revise INS' license to allow for laundry washing, and wastewater discharges to the City's sewer under 20 NMAC 3.1.435, as soon as INS notifies NMED that it has the City's leave and is ready for testing and approval of the new equipment.

Point 1. THE RADIOACTIVE DISCHARGE LIMITS IN THE CITY's ORDINANCE UNQUESTIONABLY REGULATE HEALTH AND SAFETY.

In Point V of the City's response in opposition to the Motion

the City says, "A determination of preemption would allow INS to continue to discharge radioactive wastes to the City's POTW virtually without regulatory controls to prevent contamination of the POTW." City's *Response in Opposition to Plaintiff Interstate Nuclear Services Corporation's Motion for Partial Summary Judgment on Count I*, p. 23. The statement belies the City's Argument IV beginning on p. 22 of its response that the ordinance does not "second guess the NRC's or NMED's determination of the 'safe' levels of radiation exposure ...." *Ibid.*, p. 23. The only reason radionuclide contamination at the City's POTW would cause a problem is that city workers would be exposed to health risks. Therefore, contamination at the POTW is a problem only because of health and safety effects. **See also** "[w]hat the Ordinance does is **limit the concentrations of radioactive waste that the City will accept to its POTW.**" (Emphasis added.) *Id.*

Equally so, the affidavit from the City's Public Utilities Director attached in support of the City's response (Utilities Director Affidavit), is incorrect that "... discharges to [the] ... POTW are not regulated by the State." Utilities Director Affidavit, ¶ 7. Discharges by INS to the City's POTW are indeed regulated under 20 NMAC 3.1.435(A), set out *supra* on p. 2.

More to the point might be a statement that NMED does not license the City's POTW under the state radioactive materials rules. Therein, apparently, is the source of the City's argument. The Utilities Director Affidavit says that in other localities, the discharge concentration criteria enforced by the NRC and the

agreement states have not prevented reconcentration of radionuclides in POTW sludge in some cases." Utilities Director Affidavit, ¶¶ 16, 17, 18, 19, 20, 21 and 22. Based on these examples, the affidavit decries that "no one can effectively predict how radioactive materials reconcentrate in the sludge during treatment" and that "it is currently impossible to determine what level of radioactive discharge will be 'safe' for the POTW itself." Utilities Director Affidavit, ¶ 24. The truth is that maximum levels of radionuclide contamination already are set out in the rules as prescribed by NRC and adopted by the EIB.

Point 2. **THE CITY KNOWS ITS POTW, ITS TREATED EFFLUENT AND ITS RESIDUAL SLUDGE ARE NOT CONTAMINATED.**

NMED has worked closely with the City and other municipal, state and federal agencies to study the actual radionuclide content of water courses and facilities impacted by discharges of radioactive material in New Mexico. In 1991, NMED surveyed the City's POTW sludge deposition field and determined that except for an elevated cobalt-60 reading, which was well within allowable limits for public exposure, none of the radiation present in the sludge exceeded background levels found throughout Santa Fe County. Again in 1996, when INS had been lawfully discharging wastewater in Santa Fe for 37 years, NMED conducted radiological surveys at the City's POTW and sludge field. NMED also sampled soil from the Santa Fe Country Club golf course, from the Santa Fe Downs infield and from the Santa Fe Polo Grounds, where Santa Fe POTW treated effluent had been used as irrigation for years. The 1996 survey and sample results showed no values in excess of background. All

findings were well below the levels set in the radioactive materials rules for the protection of public health and safety. NMED routinely shares these data with the City's Utilities Division.

The City's argument that the great unknown has forced it to enact the radical effluent discharge limitations in § 22-9.2(D)(13) of the Ordinance to be sure the POTW would not become contaminated, is insupportable and should be disregarded. The same is true for the City's treated effluent and for the POTW's sludge.

CONCLUSION

The Court should grant INS' federal field preemption summary judgment motion.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By: _____

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CERTIFICATE OF SERVICE

This certifies that on this 26th day of May, 1999, I filed the original of the foregoing brief *amicus curiae* with the Clerk as allowed by the Court's Order filed May 21, 1999, and mailed copies to the following attorneys of record:

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NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

To: Patricia Gutierrez 984-6627

NOV 09 1993

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To: Gerald Gerken	No. of Pages: 2
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Dear Mr. McFadden:

In your letter to the NRC of September 9, 1993 you requested an expression of views on the following question: "Can a municipality lawfully regulate or prohibit the discharge of radioactive materials into its wastewater treatment system, with or without an industrial pretreatment program mandated by EPA?" We understand the context of your question to be a city plan to begin producing sludge in 1996, and the related facts that Laramie has a hospital with a nuclear medicine department and that the University of Wyoming does some research with radioisotopes.

By necessity our response has to be general, limited to the principles of law that govern this agency and its relationships with states and municipalities. The primary legal principle is that the Atomic Energy Act of 1954, as amended, occupies the field with respect to issues of radiation protection in the use of source, byproduct, and special nuclear material, as these terms are defined in the Act. If, however, the basis for the state or local governmental action is something other than the protection of workers and public from the health and safety hazards of regulated materials, the action is not preempted. See, e.g. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U. S. 190 (1983). As a consequence of the Atomic Energy Act occupying the field dual Federal-State regulation of the radiation hazards associated with use of these materials is not allowed. See 10 C.F.R. 8.4 and 10 C.F.R. Part 150.

However the extension of these general Federal preemption principles to actions of State or Local government entities in their proprietary capacity (say as owners of POTWs) raises additional issues which have not been resolved definitely. More important here, however, is that if the city of Laramie were to have sound reasons, other than radiation protection, to require pretreatment of wastes from the hospital or university to eliminate or reduce radioactivity, such pretreatment would not fall afoul of the Atomic Energy Act. Thus, NRC regulations that allow users of regulated materials to discharge to sanitary sewers do not compel a waste water treatment operator to accept those radioactive materials. We note, however, that the materials regulated by this agency are exempted from regulation under the Federal Water

Pollution Control Act and the Resource Conservation and Recovery Act. Thus pretreatment to eliminate or reduce the regulated isotopes would not be required by these environmental statutes.

In January of 1994 new rules take effect in 10 C.F.R. Part 20 that will limit the discharge to sanitary sewer systems to only those licensed materials which are soluble in water or which are readily dispersible biological material (such as may be found in a university research laboratory), see 10 C.F.R. 20.2003. Finally, there is no limit on radioactivity that may be discharged to a sanitary sewer in excreta from patients undergoing medical diagnosis or therapy. You may wish to consult with the radiation safety officers of the hospital and university to gain an understanding of the technical characteristics of the isotopes used in these institutions and their fate in waste water treatment.

The problem of certain radioactive materials ending up in the sludges from waste water treatment, or in ash from the incineration of sludges, is well known to the staff of the NRC. A generic study is underway to understand the dimensions of the issue and whether it poses a particular health and safety matter that needs to be dealt with by more specific regulation. The Atomic Energy Act encourages the useful and beneficial uses of radioisotopes in medicine and research, at the same time the NRC is highly cognizant of the health risks to third parties that may result from such uses. We believe that our regulation is appropriately balanced between the need to protect the public from the undue hazards of the regulated materials and also to allow their beneficial use in a controlled manner.

I hope that this response will be helpful to you. If you have any further questions you may call either me at area code 301-504-1740, or Robert L. Fonner at area code 301-504-1643.

Sincerely yours,

Martin G. Malsch
Deputy General Counsel for
Licensing and Regulation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

INTERSTATE NUCLEAR
SERVICES CORPORATION,

Plaintiff,

v. No. CIV 98-1224 BB/LFG

CITY OF SANTA FE,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the motion of Plaintiff, Interstate Nuclear Services Corporation ("INS"), for summary judgment. Having considered the several briefs of the parties and *amici* and entertained oral argument on two occasions, the Court is of the opinion the motion is well taken and it will be Granted.

I. Background Facts

INS operates a Santa Fe laundry which cleans garments from workers exposed to various sources of radiation at the Los Alamos National Laboratory. This operation was licensed by the United States Atomic Energy Commission in

1957. Since 1974, when the federal government delegated oversight authority to the State of New Mexico, INS has operated under a radioactive materials license from the New Mexico Environment Department ("NMED") and its predecessor agencies. *See* 20 NMAC 3.1.30B(B).

In May 1996, the City of Santa Fe ("City") issued an "Administrative Compliance Order" ordering INS to cease and desist discharging water into City sewers. Based on the cease and desist order, INS was unable to provide its local laundry service to the Los Alamos National Laboratory and was required to ship that laundry to California. INS sued to overturn the City order in state district court. *Interstate Nuclear Serv. v. City of Santa Fe*, SF 96-1546(C). The parties settled that suit when INS agreed to build a new treatment facility which would satisfy the conditions imposed by the NMED. Additionally, INS agreed to pay the City $50,000.00 to monitor its compliance.

Also during 1996, the NMED initiated hearings on the renewal of the INS radioactive materials license. The City sought to intervene in these proceedings but was denied permission by the NMED. Following the appropriate public hearing, the Secretary of the NMED approved the INS license renewal, subject to conditions, including the installation of new wastewater filtration equipment

which was designed to improve removal of radioactive material from the wastewater to meet state and federal standards. These conditions were incorporated into the license granted to INS in March 1998.

In spite of the NMED license, the City refused to lift its cease and desist order, relying upon its newly adopted Ordinance 1997-3 ("the Ordinance"). The Ordinance repealed the City's prior sewer provisions and, unlike the prior ordinance, imposed specific provisions regulating radiological materials of the type handled at the INS facility.

Prior to the adoption of the City Ordinance, the NMED had promulgated regulations on discharging wastewater containing radionuclides. These NMED regulations set out specific maximum dischargeable monthly concentrations for every radionuclide to be disposed into a public sewer. 20 NMAC 3.1.435(A); 20 NMAC 3.1.461. The state regulations are directly patterned on the guidelines promulgated by the United States Nuclear Regulatory Commission ("USNRC"). 10 C.F.R. Part 2, App. B. The City Ordinance uses the same units to measure radiological material as the NMED and the USNRC, but reduces the permissible level of radionuclide discharge by 98%.

The City Council debate over the Ordinance was lengthy, but can be summarized by reference to the recorded statements of several councilors.[1] Prior to the initiation of the debate, Councilor Montano cautioned, "I think it's going to be very important, as we make our comments, to understand that there is a possible threat of litigation out there. So I would think that it's important to watch what you say." Santa Fe City Council Notes 2-12-97 at 26. Nonetheless, several councilors raised serious questions about their authority to adopt the Ordinance and its effect. In this context there was substantial dialogue about the authority of the City *vis-a-vis* the state and federal governments. For example, in response to a question from a City councilor as to whether the Ordinance would be enforceable, the assistant city attorney attending at the meeting opined:

> **In terms of jurisdiction, it's my understanding, and my legal research has indicated to me, that we do have jurisdiction, we do have from the Nuclear Regulatory Commission, who has usurped authority under federal law for most regulations of radionuclides in the United States especially when it deals with health and safety.**

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[1] The City argues legislative history is not a proper basis for statutory interpretation. This opinion does not rely on any or all of the Council debate to reach the holding herein, but notes the principle advanced by the City derives from the fact that there is no record of debate in the New Mexico legislature and not from anything inherently unreliable about such a legislative record. *See Regents of the Univ. of New Mexico v. New Mexico Federation of Teachers*, 962 P.2d 1236, 1246 (N.M. 1998) (noting absence in New Mexico of state-sponsored system of recording legislative history, with result that courts in this state engage in statutory construction rather than resorting to legislative history).

> However, where there is an economic interest of a municipality or a local entity, that municipality or local entity is allowed to protect its economic interest.

Ibid at 90.

Later in the discussion, Councilor Moore stated it was his opinion that "it is not the proper role of the federal government to set a maximum on how high a standard of health, safety or economic justifications that local government can set." After his analysis of the scientific basis for the City standards, he concluded:

> So anyway, what I'm trying to say is, these standards are stricter than the federal and state standards. Yes, indeed. Then, again, the federal and state government is unduly influenced by the nuclear industry. I think that is a well-known and well-documented fact. If we adopt standards that are stricter, and if we are one of the first several cities to do that in the United States, then that will be just one more of the ways in which we are The City Different and we are doing something unique that we can be proud of. I also think it makes sense [applause] – I also think it makes sense for us to worry about the marketability of our effluent ....

Ibid at 100.

The "problem" of the specific effect of the Ordinance on INS was also specifically discussed. Councilor Manning said:

> Oh, what this does, this section here, I think, by excepting certain facilities, is that it does make it seem as though we are targeting one certain business. And we know we're talking about INS. And with that regard, I would like to, at the proper time, perhaps make an amendment ....

Ibid at 91.

In debating the proposed amendment, the following exchange took place:

> COUNCILOR MANNING: This is an existing business right now. They're in operation right now.
>
> COUNCILOR SANCHEZ: No.
>
> COUNCILOR MOORE: No they're not.
>
> COUNCILOR MANNING: I mean, well, we shut it down, but if they want to come into compliance we need to give them some time.
>
> COUNCILOR MONTANO: Well, you know –
>
> COUNCILOR BUSHEE: – There are no limits in the ordinance. –
>
> COUNCILOR MONTANO: – No, we're not, you know, this really isn't targeted towards one particular industry.
>
> COUNCILOR MANNING: Well, it appears that way. I mean, to me it does.
>
> COUNCILOR MONTANO: Well, even if it is, they have two other locations. How are they going to be

> put out of business? They send the laundry to two other locations. So that is not a –

Ibid at 94-5.

II. The Issue

Does the City have the governmental authority to adopt a radionuclide water disposal standard fifty times more stringent than the standard adopted by the state and federal governments?

III. Discussion

A. Regulatory History

In 1974, New Mexico accepted partial responsibility for the regulatory function of nuclear materials. The Governor of New Mexico entered into an agreement with the United States Atomic Energy Commission ("AEC"), now the USNRC. 42 U.S.C. § 2021; NMSA 1978, § 74-3-15 (1993). The State then established the New Mexico Environmental Improvement Board ("EIB") which is an independent board whose members are appointed by the Governor with the advice and consent of the New Mexico Senate. NMSA 1978, § 74-1-4 (1993). The EIB is the state's radiation consultant and is statutorily required to "promulgate all regulations applying to persons and entities outside of the agency" for "liquid waste," "water supply," "hazardous wastes and underground storage

tanks." NMSA 1978 §§ 74-1-5, 74-1-8(A)(2) and (3) and (13) (1998); *see also* NMSA 1978 §§ 74-3-9 (1998) and 74-3-5 (1993). The NMED is the state agency that "shall maintain and enforce" EIB regulations in these areas. NMSA 1978 § 74-1-7 (1998). The NMED has indicated it will license INS to discharge its radioactive waste into the City's sanitary sewer if each of the following requirements were met:

> 1. The material is readily soluble, or is readily dispersible biological material, in water; and
>
> 2. The quantity of licensed ... radioactive material that the licensee ... releases into the sewer in 1 month divided by the average monthly volume of water released into the sewer by the licensee ... does not exceed the concentration listed in Table III of Appendix B [20 NMAC 3.1.361]; and
>
> 3. If more than one radionuclide is released, the following conditions must also be satisfied:
>
> a. The licensee ... shall determine the fraction of the limit in Table III of Appendix B represented by the discharges into sanitary sewerage by dividing the actual monthly average concentration of each radionuclide released by the licensee ... into the sewer by the concentration of that radionuclide listed in Table III of Appendix B; and
>
> b. The sum of the fractions for each radionuclide required by § 435A3(a) [next preceding subsection] does not exceed unity; and

4. The total quantity of licensed ... radioactive material that the licensee ... releases into the sanitary sewerage in a year does not exceed 5 Ci (185 Gbq) of hydrogen-3, 1 Ci (37 Gbq) of carbon-14, and 1 Ci (37 Gbq) of all other radioactive materials combined.

See 20 NMAC 3.1.435(A); 20 NMAC 3.1.461.

The USNRC reviews the NMED's performance to ensure consistency and compatibility with the USNRC's radioactive materials requirements. If the state program is incompatible with federal standards or the state is found incapable of discharging its duty to provide regulatory oversight, the USNRC can terminate or suspend all or part of its delegation to the state. 42 U.S.C. § 2021(j).

In a June 1995 policy statement, the USNRC recognized a publicly owned treatment works ("POTW") may implement or establish a pre-treatment program "if its pollutants (such as radioactive materials) cause interference with their processing technology." Whether the City has established that the INS discharge meets this standard is contested. It is clear, however, that the USNRC together with the United States Environmental Protection Agency has initiated a survey of radionuclide levels in sewage sludge processed by various POTW's. The City was solicited to participate in this survey, but it declined.

B. Governmental Authority

The City's initial, and not insubstantial, hurdle is to show that as a creation of the state, it has the authority to override the liquid waste standards adopted by the NMED. Municipalities are creatures of the state and their powers are derived from the state. *Purcell v. City of Carlsbad*, 126 F.2d 748 (10th Cir. 1942); *Morningstar Water Users Assn. v. Farmington Mun. Sch. Dist.*, 901 P.2d 725 (N.M. 1995). "Municipalities have only those powers expressly delegated by state statute." *City of Santa Fe v. Armijo*, 634 P.2d 685, 686 (N.M. 1981). *See also Sanchez v. City of Santa Fe*, 481 P.2d 401 (N.M. 1971). New Mexico municipalities thus have no inherent right to exercise police power but rather all such rights must derive from authority specifically granted by the state. *Temple Baptist Church v. City of Albuquerque*, 646 P.2d 565 (N.M. 1982); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13 (N.M. 1964). In its *amicus* brief, the NMED asserts:

> **NMED is the only agency under New Mexico law authorized to implement the EIB's radioactive materials regulations, as prescribed by NRC; and the EIB and NMED neither have, nor have authority to, subdelegate this duty to the City.**

Br. *Amicus* of the NMED at 4.

The City argues, "the State has delegated to the City the legal authority necessary to establish, maintain, operate and regulate sewage treatment facilities and to protect those facilities from damage and economic loss. *See* NMSA 1978 § 3-26-1 *et seq*." (City's Resp. at 3.) The statute relied on by the City authorizes a municipality to "acquire and maintain facilities for the collection, treatment and disposal of sewage." § 3-26-1A(1). That act goes on grant authority to allow eminent domain and authorize the general governmental power necessary for a city to acquire and operate a sewer system. However, a statute making a grant of power to a municipality must be strictly construed and the city must keep closely within its limits. *City of Clovis v. Cram*, 357 P.2d 667 (N.M. 1960). There is nothing in the Sewage Facilities Act giving the City power to establish radionuclide standards or even regulate water discharge quality.

In contrast to the general authority granted local governments in the Sewage Facilities Act, the Environmental Improvement Act, NMSA 1978 § 74-1-1 *et seq*, specifically grants the NMED authority over both nuclear safety and water quality. Section 74-1-7A directs the NMED to "maintain, develop and enforce regulations and standards in the following areas: ... (2) water supply, (3) liquid waste ..., (5) radiation control ..., (13) hazardous wastes and underground

storage tanks." As a matter of statutory interpretation, then, the specific grant to the NMED in the Environmental Improvement Act must trump the City's claim to general authority under the Sewage Facilities Act. *Stinbrink v. Farmers Ins Co*, 803 P.2d 664 (N.M. 1990) (a specific statute on a subject controls over the more general).

The New Mexico Court of Appeals rejected a very similar contention in *New Mexico Mun. League, Inc. v. New Mexico Envtl. Improvement Bd.*, 539 P.2d 221 (N.M. App.), *cert. denied*, 540 P.2d 248 (1975). In that case the Municipal League argued that New Mexico municipalities had general statutory authority to maintain and operate solid refuse disposal areas and therefore the EIB regulations governing how refuse was to be picked up and transported were invalid. In rejecting municipal reliance on the general statutory authority to "acquire and maintain refuse and disposal areas or plants," the Court of Appeals used language apropos to the present dispute:

> **This section merely gives municipalities the option or discretion to enact ordinances governing the collection and disposal of refuse. The Environmental Improvement Act, Sections 12-12-1 through 12-12-14, N.M.S.A. 1953 (Repl. Vol. 3, Supp. 1973) is a comprehensive act which applies not only to liquid waste and solid waste sanitation and refuse disposal, but also to such additional and diverse fields as "food**

> protection", "water supply and water pollution", "air quality management", "radiation control", "noise control", "nuisance abatement", "vector control", "occupational health and safety", "sanitation of public swimming pools and public baths", and the general sanitation of public buildings. Section (sic) 14-49-1 through 14-49-7, of the Municipal Code, supra, cover only "refuse" (as defined in § 14-49-1) collection and disposal. It is manifest that it was the intention of the legislature to give the Environmental Improvement Board state-wide, paramount authority to "enforce regulations and standards" in the various areas listed and that all other entities of government and political subdivisions thereof must conform.

539 P.2d at 226-27 (emphasis added). *See also* N.M.A.G. Op. No. 87-48 (1987) (legislature intended to give NMED "exclusive state-wide authority to promulgate and enforce regulations in those areas).

The City's lack of specific authorization to regulate nuclear discharge or even water pollution makes it clear the Ordinance at issue is invalid as beyond the City's delegated authority. Moreover, the subject of radionuclide discharge is specifically committed to the NMED. The Ordinance is an attempt by the City to usurp the authority to regulate "liquid wastes," "radiation control," and "hazardous wastes" that was specifically granted to the NMED by the New Mexico legislature and it is therefore invalid.

Both parties and the *amici* have devoted substantial argument to the question of whether the Ordinance is preempted by the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and regulations of the USNRC. *See, e.g.*, 10 C.F.R. pt. 20, App. B. The City concedes the field of nuclear safety is wholly occupied by federal law but argues that the City is free to protect its economic interests. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). There is no question, however, that the effect of the Ordinance is to limit the percentage of radionuclide discharge to 2% of that permitted by state and federal standards. There can also be little serious debate that the City standard, setting the hurdle 50 times higher than state or federal standards, would make it close to impossible for INS to operate a Santa Fe laundry in Santa Fe to service the Los Alamos National Laboratory. Substantial legal precedent[2] might therefore support federal preemption. Based on this Court's finding that the City lacks the authority under New Mexico law to regulate radioactive waste discharge, however, it is unnecessary to decide federal preemption.

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[2] *See, e.g., State of Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990), *cert. denied*, 499 U.S. 906 (1991); *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); *City of New York v. United States Dep't of Transp.*, 715 F.2d 732 (2d Cir. 1983); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D.R.I. 1982).

ORDER

For the above stated reasons, Interstate Nuclear Services' motion for summary judgment is GRANTED. A Judgment consistent with this opinion shall be drawn up by counsel for Plaintiff and presented to the Court within twenty (20) days.

Dated at Albuquerque this 27th day of January, 2000.

BRUCE D. BLACK
United States District Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

INTERSTATE NUCLEAR SERVICES CORP.,

Plaintiff,

Civil Action No. 98-1224 BB/KBM

v.

THE CITY OF SANTA FE,

Defendant.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF INTERSTATE NUCLEAR SERVICES CORP.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON GROUNDS OF FEDERAL FIELD PREEMPTION (COUNT I)

Plaintiff Interstate Nuclear Services Corp. ("INS") hereby submits its supplemental memorandum in support of its motion for summary judgment on Count I of the Complaint.

INTRODUCTION

On May 28, 1999 the Court heard argument on INS's motion for summary judgment, filed on February 9, in which INS argues that the radionuclide discharge provisions in Santa Fe City Ordinance 1997-3 (the "Ordinance") are preempted under the Atomic Energy Act because they invade a federally preempted field. As INS argued in its initial brief and at the hearing, both the language and legislative history of the Ordinance explicitly demonstrate its impermissible health and safety purposes. These undisputable facts, INS argued, as well as the Ordinance's effects in the preempted field, are enough to preempt the Ordinance, especially in light of *Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88 (1992), and *Perez v. Campbell*, 402 U.S. 637 (1971), which hold that a law passed for an impermissible (that is, preempted) purpose stands preempted despite the existence of other, permissible purposes. The Court concluded at the end of the May 28 hearing that

the Ordinance was "highly suspect," *Hearing Trans.* at 71 (portions at Ex. B), but directed the parties to develop a factual record on the purposes and effects of the Ordinance.

Four months of discovery, including depositions of the City's designated representatives under Rule 30(b)(6), confirms not only that the Ordinance was driven by health and safety concerns, but that the City's alleged "economic" purposes were disingenuous: its purported interests in "protecting" the publicly owned treatment works ("POTW") and in preserving its ability to market POTW byproducts were slipped into the Ordinance to circumvent the preemption doctrine, while the City's supposed interest in avoiding remediation costs is a purely *post hoc* construction with no basis in the Ordinance's text or legislative history. It is not INS's burden to prove these economic purposes were pretextual. But the City's deliberate manipulation of the legislative process is a textbook example of why *Gade* and *Perez* must be the law; a locality cannot be allowed to block the Supremacy Clause by reciting innocuous purposes to insulate its actual purposes from scrutiny.

Discovery has also confirmed the City's arrogant disregard of federal authority. The City chose to supply its own solution to the POTW contamination issue even though the Nuclear Regulatory Commission ("NRC") had just passed regulations on the same subject. When it passed the Ordinance the City a) knew that the NRC had already imposed new regulations in 1994 to address radionuclide contamination in POTWs, Rule 30(b)(6) Deposition of the City ("*City Dep.*") (witness P. Guerrerortiz) at 198:17-24 (portions at Ex. C); b) knew of no instance in which those NRC regulations had not been successful, *id.* at 205:7-11; c) didn't even ask the NRC or the New Mexico Environment Department ("NMED") whether the new regulations had been effective, *id.* at 205:12-25; and d) had never found evidence of contamination in its own POTW. *Id.* at 159-60. The NRC, moreover, announced in March 1999 that its regulatory revisions have worked — no

reconcentration problems have arisen since 1994. *See* part V.B, *infra*.

SUPPLEMENTAL STATEMENT OF FACTS[1]

A. The Text of the Ordinance

1. On February 12, 1997, the City Council of Santa Fe enacted Bill 1997-1, which became the Ordinance. (Portions at Ex. A; certified copy at Ex. C to *INS Summ. Judg. Brief*).

2. The regulations challenged here, § 22-9.2(D)(13)(a)(i)-(iv), are set forth in the "General Sewer Use Requirements" section of the Ordinance. They include, *inter alia*, § 22-9.2(D)(13)(a)(i), which prohibits "[a]ny discharge from an industrial user who is handling radioactive materials under license from the Nuclear Regulatory Commission or the state" unless "any radioactive material [discharged] and any product in its decay chain present in the discharge has a half-life no greater than one hundred (100) days," and §22-9.2(D)(13)(a)(iii), which prohibits discharges from any entity handling "radioactive materials" unless "[t]he concentration in a weekly representative sample" is 50 times lower than those concentrations allowed by the NRC in 10 C.F.R. part 20, Appendix B Table III.

3. The "General Sewer Use Requirements" section of the Ordinance identifies four purposes for the restrictions it imposes, two of which explicitly relate to health and safety. *See* § 22-9.2(A) ("[t]he specific limitations set forth herein are necessary . . . to protect the public health and the environment, . . . and protect the health and safety of wastewater personnel.").

---

[1] INS does not contend that all facts presented in this section are material within the meaning of Rule 56. As INS argued in its initial brief and at the May 28 hearing, INS believes it is entitled to summary judgment even though some of the nonmaterial facts set forth herein may raise triable issues. (For ease of reference this section also contains elements of INS's previous Statement of Undisputed Facts, but does not supersede it.)

B. The Official Legislative Record of the Ordinance

4. At the February 12, 1997 City Council meeting at which the Ordinance was considered and passed, six of eight city councilors said the radionuclide regulations in the Ordinance were needed to protect the public health. For example:

(a) Councilor Chavez asserted that the radionuclide restrictions must be reasonable and ensure "that the public health, safety and welfare is not jeopardized." City Council Minutes, Feb. 12, 1997 ("*2/12/97 Minutes*") at 46 (at Ex. A to INS Reply in Support of Summary Judgment ("*INS Reply*")).

(b) Councilor Manning, wondering why hospitals are exempted, conceded that "I realize, you know, that we have to protect, you know, we need to have an ordinance with some teeth to protect the health and safety in our, here, of, in Santa Fe, but I'm bothered by the fact that we're accepting, well, like the hospitals, the medical professions." *Id.* at 91.

(c) Councilor Moore, justifying banning discharge of radionuclides with half-lives greater than 100 days, said "[such radionuclides] last much longer and are also, incidentally, heavy metals which have greater toxic effects and a greater propensity to stick in a biochemical system and hang around and do things like cause cancer." *Id.* at 99.

(d) Councilor Whitted, expressing her support for the Ordinance, vowed that "we are going to protect the health and safety of our citizens." *Id.* at 102.

(e) Councilor Delgado, summing up the proceedings, observed, "I think its been recognized that there is a possible safety hazard at this time, and I think we're moving in a direction to regulate . . . . We found that there was a situation which we felt is putting our citizens in an unsafe position, and we feel this is why we're doing this." *Id.* at 105.

(f) Councilor Sanchez, referring to the radionuclide provisions and the Ordinance as a whole, says that "[i]t's in our interest, not only for the health, safety and welfare of our citizens, but to [sic] economic interests that we have in that water and sludge." *Id.* at 107.

5. Ten local citizens spoke in favor of the Ordinance at the February 12 City Council meeting. Nine of the ten explicitly appealed to the councilors to protect health and safety:

(a) a representative from Concerned Citizens for Nuclear Safety ("CCNS") — the "lead speaker" — told the Council it needs radioactive discharge provisions because the NRC cannot guarantee "that there is no health risk" from reconcentration of radioactive elements, *id.* at 62;

(b) a former city councilor said the provisions show "a real concern" for "the health, safety, and welfare of residents and guests," *id.* at 65;

(c) a "soccer mom" pleaded with the Council to protect "thousands of children" from radioactive sludge in soccer fields because "there is no safe level of radiation," *id.* at 66-67;

(d) a representative from a downstream community was concerned about "radioactive sources" threatening young pregnant women with "baby blue syndrome and miscarriages," *id.* at 69;

(e) a resident urged protection for Santa Fe citizens because "[w]e're the ones who live here. We're the ones who drink the water. We're the ones who breathe the air," *id.* at 70;

(f) a local doctor, "dismayed" that anyone can "dump[] radioactive waste into our sewer system," told the Council to protect the children from "low-dose radiation exposure," *id.* at 72;

(g) a St. John's College faculty member, a self-proclaimed "soccer dad," wondered how many children's deaths were an acceptable cost of getting the benefits of the "nuclear industry's" presence in Santa Fe, *id.* at 73;

(h) the co-chair of the Green Party attacked the "nuclear industry" and said the discharge provisions "protect the health of the city," *id.* at 74; and

(i) an ex-geography professor warned of radioactive vegetables and invoked Chernobyl, *id.* at 75.[2]

There was no discussion or comment at the City Council meeting regarding the alleged risk that a "reconcentration" or other accumulation of radionuclides in the POTW could result in the City being required to undertake costly remediation efforts.

The City Clerk maintains on file "packets" of documents related to agenda items considered at each City Council meeting, including a packet of materials relating to the February 12,

[2] The tenth speaker, a representative from St. Vincent Hospital, said only that the radioisotopes used by the hospital would not violate the Ordinance. *Id.* at 7.

1997 meeting. *City Dep. (Y. Vigil)* at 5-6;11-13 (testimony of City Clerk; portions at Ex. D).[3]

8. No document considered by the City Council on February 12 in connection with enacting the Ordinance mentions the alleged concern that radionuclide reconcentration in the POTW could result in the City being required to undertake costly remediation efforts.

C. Effect of the Ordinance on INS's Operations

9. INS cannot meet the requirements of § 22-9.2(D)(13)(a)(i) of the Ordinance, which prohibits the discharge of radionuclides with half-lives greater than 100 days. For example, water itself contains tritium, a radionuclide with a half-life of 12 years. Affidavit of Michael R. Fuller ("*Fuller Affid.*") ¶ 8 (Ex. E). Additionally, when it was in operation, INS's Santa Fe facility cleaned garments contaminated with radionuclides with half-lives greater than 100 days, including H-13, C-14, and K-40. *Id.* ¶¶ 4-6.

D. The Impetus for the Ordinance

10. The radionuclide discharge provisions in the bill that became the Ordinance were the direct outgrowth of Resolution 1996-35, passed by the City Council on June 12, 1996 and which directed City staff to draft radionuclide discharge regulations to include in the sewer code. *See* City Council Resolution 1996-35, June 12, 1996 ("*Resolution 1996-35*") (Ex. F).

11. The City staff had wanted to regulate radionuclides for health and safety reasons before June 12, 1996, but understood that the City lacked authority to do so because of federal preemption in that area. City Council Minutes, June 12, 1996 ("*6/12/96 Minutes*") at 19-20 (Ex. G);

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[3] The packet includes an informational packet compiled for the city councilors before the meeting plus any other items distributed at the meeting and given to the City Clerk or the stenographer. *Id.* at 17:13-20. (Materials distributed at the meeting are also in the City's Minute Book as exhibits. *Id.* at 9-10.) Items distributed at the meeting are available to the City Council, but there is no guarantee that every councilor sees every item. *Id.* at 14:11-14, 19:20-25, 20:10-13.

City Dep. (Guerrerortiz) at 248:1-9, 235:20-237:6 (Ex. C).

12. The City had been intensely focusing on INS in the weeks preceding June 12, 1996. On May 14, 1996, alleging that INS had violated its discharge permit, the City issued an administrative order barring INS from discharging wastewater. *See* Admin. Compliance Order, May 14, 1996 (Ex. H). On May 29, 1996 the City Council authorized the City Attorney to intervene in ongoing NMED proceedings on whether INS's state-issued radioactive material license should be renewed. The Council declared that the hearing was "intricately connected" to the City's administrative action against INS and that "the health and safety of the citizens of Santa Fe may be affected should the Environment Department renew INS's license." City Council Resolution 1996-31, May 29, 1996 ("*Resolution 1996-31*") (Ex. I).

13. On approximately June 6, 1996, six days before Resolution 1996-35 was adopted, City officials received information from CCNS that led the City to believe it could regulate radioactive materials without being preempted — as long as it purported to regulate for economic reasons. *See* Letter from C. Balkany to P. Guerrerortiz, May 31, 1996 (Ex. J); Letter from M. Malsch to H. McFadden, Nov. 9, 1993 (faxed to City June 6, 1996) (Ex. K); *City Dep. (Guerrerortiz)* at 242-43.

14. Accordingly, when the City adopted Resolution 1996-35 it deliberately couched its regulatory goals in economic terms, to take advantage of its "recently discovered" exception to federal preemption of radionuclide regulation. *See 6/12/96 Minutes* at 20; *City Dep. (Guerrerortiz)* at 248-51; *see also* Letter from P. Guerrerortiz to L. Lysne (CCNS), June 18, 1996 (Ex. L).

E. <u>The Absence of Contamination in the POTW or its Byproducts</u>

15. When the Ordinance was passed, the City had no evidence that its POTW was

contaminated with radiation, *City Dep. (Guerrerortiz)* at 156-57, 159:4-10, and in fact had not even tested its POTW to find out. *Id.* at 159-60.

16. When the Ordinance was passed, the City had not tested the sludge from its POTW to determine if it was contaminated. *Id.* at 160:15-23; *see also Hearing Trans.* at 57 (Ex. B).

17. The City has never found any radioactive contamination in its effluent, *City Dep. (Guerrerortiz)* at 175:2-5, and itself believes that the effluent is safe. *Id.* at 154:11-15. At the time the Ordinance was passed the City was using its effluent to irrigate soccer fields, golf courses and polo grounds, and to provide water to towns downstream from Santa Fe. *Id.* at 153-54.

18. The City still has no evidence for believing that its POTW, sludge or effluent is contaminated. *Id.*; *City's Resp. to INS's First Set of Document Requests* at 8 (Request No. 34).[4]

ARGUMENT

I. SUMMARY OF FEDERAL PREEMPTION PRINCIPLES

A. Purposes and Effects

Under the Atomic Energy Act, state and local governments may only regulate radiation-related activities "for purposes *other than* protection against radiation hazards." 42 U.S.C. § 2021(k) (emphasis added). The Supreme Court has interpreted the Act as reserving to the federal government absolute control of the field of nuclear health and safety. *E.g.*, *Pacific Gas & Electr. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 212 (1983).[5] "A local government may not

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[4] "Subject to and without waiving its objections, the City states that it has no documents concerning tests or analyses conducted by, commissioned by or done on behalf of the City regarding levels of radioactivity in the City's POTW byproducts or any interference with the City's POTW caused by radiation."

[5] As INS noted in its initial brief, under a narrow exception to the "federal monopoly" on nuclear power, the Atomic Energy Act allows the NRC to delegate certain powers to states by formal agreement. 42 U.S.C. § 2021. In (continued...)

establish itself as a second nuclear regulatory authority with safety requirements over and above those of the NRC." *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F. Supp. 1084, 1094 (E.D.N.Y. 1985); *see also INS Summ. Judg. Brief* at 8-12 (discussion).

A local law is also preempted, regardless of purpose, if it "infringes upon" the NRC's regulatory authority. As the Supreme Court explained in *English v. General Electric Co.*, 496 U.S. 72 (1990), *Pacific Gas* "did not suggest that a finding of safety motivation was necessary to place a state law within the preempted field." *Id.* at 84 (emphasis in original). Accordingly, a local law is preempted if it has a "direct and substantial effect" in the preempted field, even if it was not passed for health and safety purposes. *Id.* at 85; *see also Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 105 (1992) ("[W]e have refused to rely solely on the legislature's professed purposes and have looked as well to the effects of the law."). As one circuit court has noted, the "effects" aspect of field preemption analysis, explained by the Supreme Court in *English*, is similar to conflict preemption, in which the question is whether the local law frustrates federal purposes. *State of Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990) ("[F]ield pre-emption maybe understood as a species of conflict pre-emption"; preempting state legislative veto of waste site on that basis).

In sum, the radionuclide restrictions in the Ordinance are preempted if either of two things are true: a) they were passed for health and safety purposes, or b) they have a direct and substantial effect on the field of nuclear safety. As explained below, in this case both are true.

(...continued)
1974 New Mexico entered such an agreement and now may regulate radioactive materials so long as its regulations are compatible with federal counterparts. *See* 39 Fed. Reg. 14743 (April 26, 1974) (agreement).

B. An Additional Permissible Purpose Will Not Save Legislation With an Impermissible Purpose

If one purpose of the Ordinance was protecting health and safety, it is irrelevant whether the City may have had other concerns. This is clear from the Atomic Energy Act itself: § 2021(k), titled "State Regulation of Activities for Certain Purposes," says that states and local agencies may only "regulate activities for purposes other than protection against radiation hazards"; the Act does not say "in addition to" protection against those hazards. To be truly preemptive a federal law could be interpreted in no other way. If local legislatures could dodge preemption by stating purposes beyond preempted ones, they would dodge it at will by just mouthing the right words.

> We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply . . . articulating some state interest or policy — other than frustration of the federal objective — that would be tangentially furthered by the proposed state law.

Perez v. Campbell, 402 U.S. 637, 651-52 (1971).

The lesson of *Perez* was applied by the Supreme Court in *Gade*, in which the Supreme Court held that an Illinois law was preempted by the Occupational Safety and Health Act ("OSH Act") because, while it had a "public safety" as well as "occupational safety" purpose, the OSH Act did not "lose its preemptive force" just because "the state legislature articulate[d] a purpose other than (or in addition to) workplace health and safety," which was the preempted field. *Gade*, 505 U.S. at 105. That is, the law did not avoid preemption simply because it had purposes besides the one reserved by the federal government.

Gade is hardly a derelict in the law. Several district courts have relied on the principle set forth in *Gade and Perez* in finding local smoking ordinances preempted by the Federal Cigarette

Labeling and Advertising Act ("FCLAA"), which prohibits local regulation "based on smoking and health." *See, e.g., Rockwood v. City of Burlington*, 21 F. Supp.2d 411, 418 (D. Vt. 1998) ("[A] state law with more than one purpose would be preempted if one of the purposes interfered with the federal regulatory scheme."); *Chiglo v. City of Preston*, 909 F. Supp. 675, 677-78 (D. Minn. 1995) ("merely having one permissible goal cannot remedy a statute that has at its basis" a goal that is preempted).[6]

Gade has also been recognized as authoritatively by the Tenth Circuit and other circuit and district courts. In a RCRA preemption case, *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994), the Tenth Circuit quoted *Gade* for general preemption principles and then discussed its holding that the mere presence of a permissible legislative purpose is not enough to save a law from preemption. *Id.* at 1504-05, 1509 (citing *Perez v. Campbell*, 402 U.S. at 651-52). The court construed *Gade* as ultimately requiring an objective review of a law's effect in the preempted field, rather than deference to a legislature's articulated purposes. *Id.* at 1508-09;[7] *see*

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[6] In its first brief (at 19) INS also discussed in this regard *Fed'n of Advertising Industr. Reps., Inc. v. City of Chicago*, 12 F. Supp.2d 844 (N.D. Ill. 1998). That decision has been reversed, *see* 1999 WL 682015 (7th Cir. Sept. 1, 1999), although the Seventh Circuit's reasoning is inapplicable here. The Court found dispositive legislative history to the FCLAA indicating Congress's intent to preserve for states and localities the right to regulate in "traditional areas of local concern." 1999 WL at *4-5. Unlike the FCLAA, the Atomic Energy Act has no such legislative history and explicitly reserves health and safety regulation to the NRC. 42 U.S.C. § 2021. Nuclear power is not "a traditional area of local concern." It began as a federal monopoly, later adjusted to give states some regulatory control. Because of the highly technical aspects of radioactive materials, however, the NRC retains health and safety authority as a means of promoting uniformity and accuracy in regulations based on those objectives. *See, e.g., County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 60 (2d Cir.1984).

[7] Other courts in the Tenth Circuit have cited *Gade* for a variety of preemption-related propositions. *See, e.g., United States v. Vasquez-Alvarez*, 1999 WL 292293, *3 (10th Cir. May 11, 1999) (on construing statutes as expressly preemptive); *Rosene & Assoc., Inc. v. Kansas Munic. Gas Agency*, 1999 WL 212078, *8 (10th Cir. April 13, 1999) (on conflict preemption); *Meyers v. Board of Educ.*, 905 F. Supp. 1544, 1563 (D. Utah 1995) (quoting *Gade* on analyses for federal preemption). The New Mexico Court of Appeals has also cited *Gade* for the same proposition INS invokes here. *See Kennedy v Dexter Consol. Schls.*, 955 P.2d 693, 715 (N.M. Ct. App. 1998) (observing that the "state cannot avoid federal preemption by the way in which it articulates the purposes of state law").

also Vango Media, Inc. v. City of New York, 34 F.3d 68, 73 (2d Cir. 1994) (city's economic concern could not save from preemption ordinance concerned with smoking and health); *Phillips v. Gen. Electr. Co.*, 881 F. Supp. 1553, 1557 (M.D. Ala. 1995) (legislature could not avoid preemption by showing a proper purpose; law at issue preserved because within OSHA safe harbor).

II. THE ORDINANCE IS PREEMPTED BECAUSE ITS LANGUAGE AND LEGISLATIVE HISTORY OVERWHELMINGLY DEMONSTRATE A HEALTH AND SAFETY PURPOSE

First and foremost, the Ordinance itself professes the City's health and safety objective in the "General Sewer Use Requirements" section that contains the radionuclide discharge provisions. That section states four purposes, two of which invoke health and safety: its provisions are needed "to protect the public health and environment" and "to protect the health and safety of wastewater personnel." Ordinance § 22-9.2(A).[8] The words used by the legislature are the best evidence of its intent. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *In re Rodman*, 792 F.2d 125, 128 (10th Cir. 1986) (citing *Perry*).

The Ordinance's legislative history confirms that it was driven by concerns over health and safety. *See United States v. Wicklund*, 114 F.3d 151, 154 (10th Cir. 1997) (court may review legislative history to confirm statutory meaning even where not ambiguous). That legislative history consists of the relevant portion of the minutes of the February 12, 1997 City Council meeting at

[8] The next larger subsection, moreover, purports to "protect city personnel . . . as well as to protect the general public." *Id.* § 22-9.1(A)(4). The City claims that certain of these objectives were in the Ordinance before it was revised to include radionuclide regulations, but the point is irrelevant; all it shows is that the City previously regulated wastewater for health and safety purposes, and now has added radionuclides to the list of elements regulated for those purposes. There is no justification for not taking the Ordinance as it was approved, in final form, by the City Council.

which the Ordinance was passed.[9] Although the Ordinance replaced the entire pre-existing sewer code, the radionuclide discharge provisions dominated the discussion: over 60 of the 83 pages of minutes focus on them. And as INS explained above, this discussion was nearly entirely about health and safety fears. Six of the eight councilors and nine of the ten citizen proponents of the restrictions explicitly articulated health and safety reasons for the Ordinance's radionuclide provisions. In contrast, only one city councilor voiced economic concerns but never mentioned health and safety — Patti Bushee, who sponsored the resolution allowing Mr. Guerrerortiz to draft radionuclide regulations in the first place. *2/12/97 Minutes* at 102 (Ex. A to *INS Reply*); *Resolution 1996-35*(Ex. F).[10] This evidence resoundingly confirms the plain meaning of the Ordinance's terms. *See Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (statements of legislators not controlling, but "provide evidence of . . . intent" if contemporaneous and consistent with statutory language).[11]

III. THE ORDINANCE DIRECTLY AND SUBSTANTIALLY AFFECTS THE FIELD OF NUCLEAR SAFETY, AND SO IS PREEMPTED ON THAT BASIS AS WELL

Given their direct effect on the field of nuclear safety, the discharge provisions in the Ordinance would be preempted even if they had not been passed for health and safety purposes. *English*, 496 U.S. at 84-85; *see also Gade*, 505 U.S. at 105. The Ordinance goes so far as to

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[9] The minutes are the only legislative record because they are the only record of legislative deliberations the City is required — by law — to maintain: New Mexico law requires the City Council to keep minutes of its meetings and to formally approve them. N.M. STAT. ANN. § 10-15-1(G) (open meeting law requirements); *City Dep. (Vigil)* at 24. The minutes are then preserved in the City's files.

[10] The only remaining city councilor, Councilor Montano, expressed neither economic or health and safety concerns, instead choosing to defer to Mr. Guerrerortiz's judgment as to whether the radionuclide provisions were needed. *Id.* at 104.

[11] In light of the city council minutes the Ordinance could be preempted even if it said absolutely nothing about health and safety. *See, e.g., Rockwood*, 21 F. Supp.2d at 417-18 (ordinance preempted because of focus on health issues at city council meeting, despite absence of similar language in either city resolution or law itself); *Greater N.Y. Metro. Food Council v. Guiliani*, 1998 WL 879721, *4-6 (S.D.N.Y. Dec. 16, 1998) (ordinance, which did not discuss health concerns, preempted because legislative history showed that city council was "primarily concerned with health risks").

expressly target entities operating under licenses awarded by the NRC (or the state under agreement with the NRC). *See* § 22-9.2(D)(13) (prohibiting discharges from industrial users handling radioactive materials "under license from the Nuclear Regulatory Commission or the state" unless the discharges meet enumerated criteria) (Ex. A). In other words, the Ordinance only targets entities that have already been permitted to discharge by the federal and state authorities in charge of radiological health and safety. The effect of the radionuclide provisions, in short, are felt only in the preempted field.

The Ordinance, moreover, cross-references the NRC's regulations for radiation protection. *See* § 22-9.2(D)(13)(a)(iii)) (basing limits on 10 C.F.R. pt. 20). The Ordinance then imposes discharge limits 50 times as stringent as the federal limits it identifies, *id.*, and thereby bars radioactive discharges specifically approved by the federal government. The City could hardly have drafted an Ordinance that focuses more "directly, substantially, and specifically" on nuclear health and safety. *See Gade*, 505 U.S. at 107 (law preempted where it "directly, substantially, and specifically" regulated within forbidden field). This laser-like focus on the forbidden field illustrates the difference between this case and cases such as *English*, where the Court found that a "generally applicable" state tort cause of action was not preempted. *English*, 496 U.S. at 84.

The City imposed these incompatible discharge limits even though the NRC requires even duly authorized Agreement States to adopt only discharge limits that are "essentially identical" to the NRC's. *NRC Statement of Principles & Policy for Agreement State Program*, 62 Fed. Reg. 46517, 46524 (Sept. 3, 1997). Anything else is not "compatible" with the NRC's radiological program and defeats the goal of an "orderly pattern in the regulation of [radioactive] material on a nationwide basis." 62 Fed. Reg. at 46523-24 (compatibility "fundamental" to program); *see* 42

U.S.C. § 2021(d)(2).

The City misconceives the "effect" aspect of the preemption inquiry. It ignores the Ordinance's undeniable impact on the field and focuses instead on whether INS is still able to discharge under the Ordinance's restriction. *Hearing Trans.* at 51-52. As a matter of fact, INS cannot discharge under them. *Fuller Affid.* ¶ 9. But it is the effect on the field, not on INS, that causes the Ordinance to be preempted. *See English*, 496 U.S. at 84-85.

IV. THE FACTS UNCOVERED IN DISCOVERY BELIE THE CITY'S PROFESSED "ECONOMIC" RATIONALES FOR THE ORDINANCE

A. The City's Economic Justification for the Ordinance

The City' "economic purpose" argument is somewhat fluid. In its initial opposition the City argued that the Ordinance was "concerned with interference to the POTW," *City Opp.* at 11; meant to protect the City's economic interest in its sludge byproducts, *id.* at 12; and meant "to address the City's concern for the viability of its POTW and the potential for costly remediation." *Id.* at 20. The City's opposition was supported by an affidavit from Mr. Guerrerortiz, *see* Affidavit of Patricio Guerrerortiz ("*Guerrerortiz Affid.*") (Ex. C to that brief), which identified similar "concerns": avoiding remediation costs, *id.* ¶¶ 16-22; preventing "interference" with the POTW, *id.* ¶ 25; and the potential impact of radioactive contamination on "the beneficial reuse of its sludge and treated effluent." *Id.* ¶ 27. Mr. Guerrerortiz has also testified that most of the research he did in drafting the Ordinance concerned the beneficial reuse of POTW products. *City Dep. (Guerrerortiz)* at 46-47. At the May 28 hearing, however, the City focused only on the "remediation" concern, arguing that the Ordinance was primarily motivated by the fear that, if the POTW became contaminated, the NRC might force the City — like it allegedly forced the Northeast Ohio Regional Sewer District — to

incur substantial costs remediating the site.[12]

As INS has explained, given the undisputable evidence of a health and safety purpose, the Ordinance is preempted regardless of whether any of these economic purposes were genuine. That is, the sincerity of the City's economic concerns is not material. But it is telling that each of them collapses under the scrutiny discovery has allowed. With respect to "remediation costs," there is no indication that the City Council was even aware of this concern when the Ordinance was passed. With respect to the City's economic interest in its byproducts, it is actually a health and safety rationale. There is also evidence it was devised to avoid preemption by manipulating the legislative record, and in any event it was disingenuous because there is no evidence of contamination and the City did not bother to get professional input on the issue when it drafted the regulations.

B. Neither the Language nor the Legislative History of the Ordinance Indicate Concern About Remediation Costs

None of the four purposes stated in the section containing the radionuclide provisions ("General Sewer Use Requirements"), § 22-9.2(A), even remotely reflects a concern with avoiding remediation costs. The only purpose articulated in the next larger section, "Industrial Pretreatment Regulations and Procedures," that could possibly espouse this concern speaks to "protect[ing] the city's economic interests in its wastewater treatment system." But this provision more likely refers not to remediation costs, but to the City's alleged purpose of preventing "interference" with the functioning of its POTW, as reflected in Mr. Guerrerortiz's theory that radionuclides can harm "the

[12] *See. e.g., Hearing Trans.* at 35 ("COURT: What are you worrying about? Why are you putting it on the soccer fields and the golf courses then? MS. CASEY: Actually, our worry is not so much about that. Our worry is about what happens in our treatment plant and in our sludge."); *see also id.* at 29 ("We must reasonably regulate these materials to protect the viability of our POTW from contamination."), 32 ("Our concern is contamination. Our concern is having the plant shut down."), 34 ("[T]he NRC could come along, just like they did in Ohio, and determine that we are contaminated, and we are a nuclear waste site and we have to remediate.").

cellular structure of the desirable microorganisms which the POTW uses to remove organic matter from the sewage," and cause "bypass or interference — disruptions which are prohibited by EPA's pre-treatment regulations." *Guerrerortiz Affid.* ¶ 25.[13] In any event, this language says nothing about protecting the public fisc from the costs of a federally-ordered clean up, the City's *post hoc* justification.

Even if the Ordinance language was ambiguous, there is not the slightest indication in the legislative history that the City Council was concerned with potential remediation costs. There is no mention of remediation costs by any city councilor at the June 12, 1996 or February 12, 1997 meetings. *See 6/12/96 Minutes* (Ex. G); *2/12/97 Minutes* (Ex. A to *INS Reply*). Nor was this concerned mentioned in Resolution 1996-35, the resolution authorizing City staff to draft the radionuclide restrictions. *See* Ex. F. Nor does anything in the packet of materials for the February 12 meeting mention the issue. In short, to the people who voted on the Ordinance — and whose understanding matters — remediation costs was not a concern.

This evidentiary deficit did not stop the City, however, from submitting Mr. Guerrerortiz's affidavit to try and show that the Ordinance was driven by concern over "remediation costs." The affidavit relies almost completely on the GAO's 1994 report referring to the issue. *See City Dep. (Guerrerortiz)* at 166:1-5 (descriptions of events at other POTWs came from report), 168:15-24 (paragraph copied nearly verbatim from report), 169-70 (affidavit has no information post-1994 because report issued in that year). While Mr. Guerrerortiz himself had the GAO report before the Ordinance was passed, *id.* at 47:15-18, the City Council did not. He admitted that even he himself

[13] At his deposition Guerrerortiz, who has no background in health physics, admitted that this notion was his own personal theory, unencumbered by science or learning. *City Dep. (Guerrerortiz)* at 188-89.

did not know some of the information in his affidavit until after the Ordinance was passed. *See id.* at 170-71, 31-32 (discussing Kiski Valley POTW). In short, Mr. Guerrerortiz's affidavit is nothing but a *post hoc* fabrication, unsupported by what the Council was actually thinking when it enacted this law. *See, e.g., Mt. Graham Red Squrl. v. Madigan*, 954 F.2d 1441, 1456-57 (9th Cir. 1992) (evidence of legislative intent from after law was passed could not overcome conclusions from contemporaneous legislative history); *Peckham v. Gem State Mutual of Omaha*, 964 F.2d 1043, 1049-50 (10th Cir. 1992) (giving no weight to congressional committee interpretation from after law was passed).[14]

C. The Re-Use Rationale Is At Bottom a Health and Safety Rationale

As for byproduct "reuse" or "marketing," this concern is at bottom a health and safety concern. Radionuclides affect "reuse" because reusing highly radioactive effluent or sludge could endanger those in proximity to it, and it affects "marketability" because no one will buy these products if they are dangerously radioactive. The City admits this. To Mr. Guerrerortiz "the unknown potential for radioactive contamination" could create problems "from the point of view of public perception of the dangers of effluent reuse." *Guerrerortiz Affid.* ¶ 28; *City Dep. (Guerrerortiz)* at 172-73.[15] Councilor Bushee, when asked what she knew about the effect of radionuclides on reuse, said that the fears of local soccer moms for the safety of children playing in the fields "would also be inhibiting us from selling and reusing our resources." *City Dep. (Bushee)* at 28:1-12, 19-20

[14] The City's reliance on Mr. Guerrerortiz's affidavit resembles the position it took in moving to compel discovery regarding INS's other facilities, even where nothing indicated the City Council had access to such information when it passed the Ordinance. Both positions fundamentally misconceive the notion of legislative purpose.

[15] "Q: They are afraid of contaminated water? A: Yes, they are afraid of contaminated water and they may be afraid of anything that may even sound radioactive." *Id.* at 173:4-7.

(portions at Ex. M). In turn, at the June 12, 1996 meeting where the City decided to regulate radionuclides, a councilor told of his constituents' fears that the City's wastewater wasn't "safe to use." *6.12.96 Minutes* at 28 (Ex. G); *see also City's Resp. to INS's First Set of Requests for Admissions* at 3 (Request No. 9).[16]

The City cannot conceal health and safety concerns by masking them in economic terms. "It is a truism that almost all matters touching on matters of public concern have an associated economic impact on society. But such economic concern does not displace a local government's primary interest — whether it be public safety, the common good, or in this case public health." *Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73 (2d Cir. 1994) (holding ordinance preempted because actually based on smoking and health concerns).[17]

D. The City's Purported Re-Use Rationale Reflects Conscious Manipulation of the Legislative Record in Order to Avoid Preemption

The City asserted economic objectives for the Ordinance because it knew that otherwise its true purpose would render the Ordinance preempted. In March 1996 CCNS, warning that radionuclide discharges "are dangerous to the public health" and "pose an unacceptably high

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[16] "[T]he City admits that a potential purchaser of POTW byproducts may perceive byproducts contaminated with radionuclides to be 'unhealthy or unsafe,' and that this perception would have an economic impact on the City's ability to dispose of, market or reuse its sludge byproducts."

[17] The City cannot even show a good faith effort to sell its POTW products. At the February 12, 1997 meeting Guerrerortiz told the Council that the Ordinance "would protect our ability to sell our water." *2/12/97 Minutes* at 41. Two years later the City is still "currently examining its ability to reclaim and market its sludge byproduct." *Guerrerortiz Affid.* ¶ 29. In May 1999, Guerrerortiz agreed that efforts to reuse or reclaim sludge "were still in the planning stages," *City Dep. (Guerrerortiz)* at 142-43, even though the City apparently had broached the issue with the Forest Service and the Santo Domingo Reservation in the early 1990s. *Id.* at 139-40. Nor has anyone ever told the City that they would not purchase its POTW products because of radiation concerns. *See City's Resp. to INS's First Set of Requests for Admissions* at 5 (Request No. 18) ("[T]he City admits that no person or entity has expressly indicated that they would decline to purchase POTW byproducts from the City solely based on a fear that the byproducts had been contaminated by radioactive materials.").

increase in risk of cancer mortality," urged the City Council to regulate them in the sewer code it was then revising. Letter from C. Balkany to Councilor C. Moore, March 23, 1996 (Ex. N). CCNS noted that it would be telling its "6000 person mailing list" of the radionuclide "problems" in the City's sewer system, and that CCNS members would be attending City Council meetings.

But the City, while pursuing INS on other fronts, made no move to regulate radionuclides because it believed any effort to do so for health and safety reasons would be preempted. *See 6/12/96 Minutes* at 19; *City Dep. (Guerrerortiz)* at 235:20-237:6. On May 14, 1996 the City shut down INS by administrative order, claiming that at some time in the past or future INS had or would discharge sludge to the sewer system. Ex. H (administrative order). Two weeks later the City tried to intervene in state proceedings on renewing INS's radioactive materials license. When it resolved to do so, the City declared that "[t]he health and safety of the citizens of Santa Fe may be affected should the Environment Department renew INS's license." *Resolution 1996-31* (Ex. I).

On May 31, 1996, however, CCNS suggested that the City might avoid preemption by regulating for economic — as opposed to health and safety — reasons. Letter from C. Balkany to P. Guerrerortiz, May 31, 1996 (Ex. J); *6/12/96 Minutes* at 19-20 (Ex. G). A week later CCNS forwarded to the City the now-infamous "Laramie letter," in which an NRC attorney informed the City Attorney of Laramie, Wyoming that the Atomic Energy Act only preempted local laws motivated by nuclear health and safety. *See City Dep. (Guerrerortiz)* at 242-43; Letter from M. Malsch to H. McFadden, Nov. 9, 1993 (Ex. K). His "recent discovery" in hand, Mr. Guerrerortiz went to the City Council and the effort proceeded. He was frank about his intent. He told the City Council that "up until very recently we were not aware of this extension [sic] to the preemption by the federal government. . . . With this recent discovery, if you want to call it, we are looking at a

possibility, and that's why the resolution was worded the way it is." *6/12/96 Minutes* at 19-20; *City Dep. (Guerrerortiz)* at 247-51; *see also Resolution 1996-35* (Ex. F). He later told CCNS:

> At this point, the list of local limits in our code does not include any radioactive materials. This is also the case for the . . . vast majority (if not all) of municipalities around the country. Presumably, this is the result of the federal government's preemption of local government involvement in the regulation of any radionuclides. In other words, most local government officials think that since the federal government has reserved for itself the duty of regulating radionuclides, local governments cannot do anything else to protect the health and safety of the public from the potential effects of this type of compounds [sic].
>
> However, we recently found out that there are some exceptions to this preemptive power of the federal government, and we are preparing to exercise our options under these exceptions. As you may know, the Council has instructed the city staff to propose revisions to the city code that will make it possible to regulate specific man-made radio isotopes.

See Ex. L (Letter of June 18, 1996 to L. Lysne of CCNS; emphasis added).

Thus Guerrerortiz (and other City officials) understood the need to emphasize the economic aspects of the Ordinance. Ultimately, however, he could not script the concerns the City's elected officials would express — and whose intentions are the only ones that are relevant. Accordingly, at the February 12, 1997 City Council meeting at which the Ordinance was passed, the majority of the City Councilors gave free voice to the worries Mr. Guerrerortiz and others had tried to obscure.[18]

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[18] At the meeting Guerrerortiz also apparently misled the City Council. Although he and City Attorney Sherry Tippett repeatedly referred to the Laramie Letter as the source of the City's authority to regulate radionuclides, *2/12/97 Minutes* at 45-49, 89-90, they failed to inform the Council that, as reported in the GAO Report, Laramie itself didn't follow the NRC's advice because it was "too vague." *See* GAO Report, May 1994, at App. III (App. III is at Ex. B to *INS Reply*). In addition, when asked by the Council if other cities have regulated radionuclides, Mr. Guerrerortiz cited Albuquerque as having "a regulation more strict than ours," but didn't mention that that city does not enforce its ordinance. *Id.* at 97. Nor did he mention that the Albuquerque City Attorney's Office, which feared litigation "cost[ing] hundreds of thousands of dollars" and "a potential appeal to the U.S. Supreme Court," was "firmly convinced" that "local government is prohibited from regulating radioactive discharges into the sewer system by the doctrine of federal preemption." *See* City of Albuquerque Legal Dept. Memorandum, May 12, 1993 (Ex. O).

The NRC has since warned the City that the "Laramie letter" "does not contain any explicit approval of particular actions by the City. . . . [It] simply provides an explanation of the legal principles of preemption in the context of the Atomic Energy Act (AEA) of 1954, as amended." Letter from P. Lohaus to P. Guerrerortiz, March 26, 1997 (Ex. P). (continued...)

E. The Sincerity of the City's Economic Purposes is Belied By the Fact that it Enacted the Ordinance Without (1) Any Basis for Believing its POTW was Contaminated or (2) the Benefit of Any Technical Expertise

The sheer absence of any actual problems in the City's byproducts or sewage plant further confirms that the City latched onto "economic interests" in its POTW and "potential options for . . . reuse, marketing, reclamation or disposal" to avoid preemption. As of February 12, 1997 the City had no evidence its POTW was contaminated with radiation, *City Dep. (Guerrerortiz)* at 159:4-10, nor had it bothered to test its POTW for to find out. *Id.* at 159-60. The City also had not tested its sludge for contamination, *id.* at 160:15-23, and it was using its effluent to irrigate soccer fields, golf courses, the polo grounds, and to provide water to towns downstream from Santa Fe. *Id.* at 153-54. As of today, the City has yet to find any contamination in its effluent, *id.* at 175:2-5; believes its effluent is safe, *id.* at 154:11-15; and — still — uses the effluent to irrigate fields and provide water downstream. *Id.* at 153-54.

Nor did the City care to secure reliable technical expertise for its efforts. A City engineer urged retaining technical experts as early as April 9, 1996, Memorandum from B. Landin to Mayor Jaramillo, April 9, 1996 (Ex. Q), but the City never did so. *City Dep. (Guerrerortiz)* at 92-93. The only technical advice sought by the City was from a person suggested — unsolicited — by CCNS, *id.* at 24:18-23, at a time when the City knew that CCNS strongly advocated restricting radionuclide discharges. *Id.* at 215:14-17 (discussing Bernd Franke). The City, however, "didn't do any in-depth investigation" of Mr. Franke's credentials, *id.* at 213:4-8, and could not recall learning anything about him beyond what he told Mr. Guerrerortiz on the telephone. *Id.* at 218:18-22; *see also id.* at

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[8] (...continued)

214:8-11. Finally, the City did not get Mr. Franke's input until early February 1997 — after the radionuclide provisions had been drafted and first submitted to the City Council. *Id.* at 25-26.

The City received no other formal advice on whether or how to regulate radionuclides because, despite forming a task force on the issue, it passed the Ordinance before the group could meet. *See id.* at 89:15-25 (task force to assist in drafting), 112 (task force did not meet before bill submitted). The task force, like INS, fell victim to the City's growing impatience with federal regulatory efforts. *Id.* at 202:17-22 ("we cannot wait a hundred years before they complete every report and every study"), 281-82 ("There was a point where something had to get started. . . . [I]f we waited for the NRC to make a decision, today we would not have an ordinance."). The task force has never met. *Id.* at 119.

V. THE CITY HAS NO INDEPENDENT AUTHORITY TO REGULATE RADIONUCLIDES, AND THERE IS NO REGULATORY VACUUM REQUIRING THAT IT DO SO

A. The City has no Legal Authority Allowing it to Regulate Radionuclides

NMED is the state agency expressly authorized to regulate radioactive materials pursuant to New Mexico's status as an Agreement State, *e.g.*, N.M. ANN. § 74-3-1 *et seq.* (Radiation Protection Act), and it has made clear that the City's own efforts in that area are not authorized by state law. *See* NMED's Brief *Amicus Curiae*, May 26, 1999 ("[T]he City's ordinance impedes NMED's mandated responsibility for state-wide regulation of radioactive materials[.]"). New Mexico law (*e.g.*, the municipal code) bestows on the City no authority to regulate radiation. With regard to the City's "police powers," at the time it passed the Ordinance the City was not even a home-rule municipality, and any inherent authority it may have cannot trump express state regulation anymore than it can trump the NRC. Nuclear power is not a traditional bastion of local control; it is the

traditional province of the federal government. *See Pacific Gas*, 461 U.S. at 206-08 (describing initial "federal monopoly"); *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571, 579 n.15 (7th Cir. 1982) (in nuclear field, traditional federal/state relationship is reversed).

On the federal level, the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA") gives the City no independent power to regulate the discharge of materials governed by the Atomic Energy Act. This has been clear since *Train v. Colorado Publ. Int. Group*, 426 U.S. 1 (1976), in which the Court ruled that the term "pollutant," as defined in the CWA, does not include radioactive materials regulated by the NRC.[19] Accordingly, EPA's authority under the CWA to regulate — on any basis — the effluent from individual sources of waste does not extend to NRC-regulated materials.[20] *See also Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1429 (9th Cir. 1998); *INS Reply* at 5. *Waste Action Project* involved the contamination of groundwater by an individual source of uranium mill tailings, a radioactive material regulated by the NRC. Following *Train*, the court ruled that these materials are not "pollutants" under the CWA and are thus beyond EPA's regulatory power. *Id.*

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[19] The *Train* decision addressed the definition of "pollutant" in the CWA itself, and so applies to all references to the term in the statute and regulations promulgated under it. The EPA amended its regulations at 40 C.F.R. § 122.2 (NPDES Program definitions) to reflect *Train*, but failed to amend the definition applicable to General Pretreatment Regulations (40 C.F.R. § 401.11(f)). Despite this editorial inconsistency, the *Train* court's interpretation of the term in the statute must control, since all EPA regulations on the subject grow from the regulatory authority given by the CWA.

[20] Under Congress' 1973 reorganization, EPA has the authority to establish generally applicable radiation standards limiting the total amount of radiation in the general environment. However, the NRC retains responsibility for the implementation and enforcement of those standards through its licensing authority:

> EPA was to set generally applicable radiation standards, limiting the total amount of permissible radiation in the environment from major categories of sources, while the AEC [now NRC] was to prescribe the limitations applicable to discharges of licensed materials from particular sources which contribute to the total.

Train, 426 U.S. at 24, n.20 (emphasis added). This is exactly what the Ordinance does — it limits discharges of NRC-licensed material from a particular source, and does that by identifying NRC's own regulations and altering them.

Thus the City's obligation under the CWA to prevent "interference" with the operation of its POTW cannot justify regulating radionuclide discharges. This accounts for why EPA does not include radionuclides in its own sludge regulations or authorize the City to so regulate in its NPDES permit. *See* NPDES Permit No. NM0022292, Part III (November 1988). It is also why EPA warned the City two months after the Ordinance was passed that "[t]his is an area over which EPA has no authority." *See* Letter from L. Bohme to P. Guerrerortiz, April 24, 1997 (Ex. B to INS's Complaint). The City acknowledges that it sets pretreatment standards as required by EPA and subject to EPA approval. Its authority to regulate discharges to the POTW is grounded in EPA authority, and EPA does not regulate discharge of NRC licensed materials. The City cannot now argue that its authority is broader than that enjoyed by the EPA, *i.e.*, that it extends to the regulation of radionuclide discharges licensed under the Atomic Energy Act, because that outcome would turn the NPDES regulatory scheme on its head (and flatly ignore the holding in *Train*).

B. There is no "Regulatory Vacuum": the NRC has Specifically Addressed and Resolved the Precise POTW Contamination Issue on which the City now Relies

At the May 28 hearing the City declared that "if the NRC comes along and says, POTWs, this is how much you can have in your sludge, this is how much you can have in your POTW, . . . and this is going to take care of your contamination concerns, we are out of there." *Hearing Trans.* at 45 (Ex. B). The NRC has done exactly this. In 1991 the NRC announced revised discharge regulations intended to prevent reconcentration of radionuclides in POTWs. *See NRC Standards for Protection Against Radiation (Final Rulemaking)*, 56 Fed. Reg. 23360, 23381 (May 21, 1991) (Ex. R); *City Dep. (Guerrerortiz)* at 198:21-24. This effort was the culmination of ten years of study and over 800 sets of commentary from interested public and private entities. *Id.* at 23360-63 (describing

review of proposed revisions to 10 C.F.R. pt. 20). Explaining the new regulations (10 C.F.R. § 20.2003 & App. B Table III), the NRC stated:

> [Insoluble radioactive] materials may accumulate in the sewer system, in the sewer treatment plants, and in the sewer sludge. . . . [This] is no longer permitted because of potential reconcentration of these materials in the sanitary sewer system, sewage treatment plants, and sewage sludge. . . . In view of past contamination incidents (involving cobalt-60 and americium-241) and the reduction in the dose limit for members of the public, the Commission believes that continuation of the higher limits is no longer desirable.

56 Fed. Reg. at 23381 (emphasis added). The revised regulations also took into account discharge of radionuclides by multiple users to a single POTW. *Id.*

In 1994 these regulations took effect. *See NRC Information Notice 94-07*, Jan. 28, 1994 (new limits effective January 1, 1994, and intended "to help prevent further reconcentration incidents at public sewage treatment facilities"). Since then the NRC has found no noteworthy reconcentrations of radionuclides in any POTW, but it continues to study the issue. *See Joint NRC/EPA Sewage Sludge Radiological Survey: Survey Design and Test Site Results*, August 1999 (noting that "neither the NRC nor the Agreement States have seen further problems associated with POTW reconcentration of radioactive materials since NRC's regulations were revised in 1991[.]") (portions at Ex. S);[21] *see also City Dep. (Guerrerortiz)* at 205-06 (City was unaware of any POTW contamination incidents since NRC regulations implemented in 1994).

The risks inherent in radioactive discharges are the NRC's to deal with, and it has acted on that basis. There is no "regulatory vacuum"; the regulatory scheme just doesn't include the City. The proper, federal regulatory process has worked, if not with the speed and force deemed

[21] The survey will review 300 POTWs to determine if, despite the 1994 revisions, the radionuclide reconcentration issue requires further regulation. If it does the federal government will act accordingly. *Id.* at 3.

appropriate by the radiological gurus at the City and CCNS. *City Dep. (Guerrerortiz)* at 202:12-22, 281-82. The City's impatience and presumption, however, do not justify its own preemption of federal authority.

CONCLUSION

For the foregoing reasons and those presented in INS's initial briefing, the Court should grant INS's Motion for Partial Summary Judgment on Grounds of Federal Field Preemption (Count I).

Respectfully submitted,

INTERSTATE NUCLEAR SERVICES CORP.,

by its attorneys,

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Dated: October 15, 1999
DOCSA\661997.11

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by mail[illegible] on 10/15/99
_____ (fax as well)

CCNS
Concerned Citizens for Nuclear Safety

March 23rd, 1996

The Hon. Cristopher D. Moore
City Council Member
The City of Santa Fe
P.O. Box 909
Santa Fe, New Mexico 87504

Dear Councilor Moore,

Concerned Citizens for Nuclear Safety (CCNS) is very concerned that no City of Santa Fe ordinance currently contains any regulation or prohibition of the discharge of radionuclides into the City sewage system. CCNS research indicates that the levels of discharge which are possible in the absence of limitation by the City are dangerous to the public health, pose an unacceptably high increase in risk of cancer mortality, and are greatly in excess of the levels which the U.S. Environmental Protection Agency uses to justify preventative or protective action. The City's failure to regulate these discharges exposes City workers at the treatment plant to radioactivity contamination, and may result in legal liability by the City.

I have studied in detail the report of the Radioactive Waste Discharge Policy Study Group, *Radioactive Discharges to the City of Albuquerque Wastewater System*. That study group, too, is concerned about the dangers posed by radionuclide discharges into its city owned treatment system.

CCNS sees no need to continue permitting non-essential activities which create this permanent type of dangerous waste, posing severe economic ramifications for the City and for property owners. We see no value in exposing the City to liability for problems from our downstream neighbors. We endorse an ordinance which prohibits all radionuclide discharge other than patient excreta, with a time period for hospital and physician dischargers to voluntarily limit their discharges pending review of regulatory prohibition of their discharges as well.

107 Cienega Santa Fe • New Mexico • 87501 • USA (505) 986-1973

Since the City waste water treatment ordinance is currently undergoing a revision, this seems to the appropriate time to remedy this gap in City licensing. We urge you to consider this problem, and to direct the Public Utilities Director, Patricio Guerrerortiz, to include in the proposed revision a prohibition on radionuclide discharges to the City sewage, other than from patient excreta.

CCNS would like the opportunity to comment on the proposed ordinance when the opportunity arrives for public comment. We would appreciate being notified of that date, and sent a copy of the proposed ordinance when it is available for review.

CCNS plans to hold several public meetings on this topic and to send out information to our 6,000 person mailing list on the problems resulting from radionuclide discharge into the City sewage system. Many of our supporters will want to be in attendance at any public meetings where this is discussed, as well as at City Council meetings when the ordinance is ultimately reviewed. Accordingly, as much prior notice as is possible would be appreciated for the convenience of our members.

As you may know, CCNS has been actively discussing the problems posed by the radioactive discharges to the City sewer system from Interstates Nuclear Services, the 'nuclear laundry' on Siler Road. Many of our members are extremely upset about the reported activities of this facility; the absence of City regulation has helped make the reported abuses possible.

I have this date written to the Mayor and the other city council members advising them of our position and requests.

Thank you in advance for your cooperation.

Sincerely,

Caron Balkany

CARON BALKANY, Esq.

CCNS
Concerned Citizens for Nuclear Safety

May 31st, 1996

Patricio Guerrerortiz
Public Utilities Director
P.O. Box 909
Santa Fe, New Mexico 87504-0909

Re: Interstate Nuclear Services

Dear Patricio,

I'm sorry our Thursday meeting was cancelled, but I'm glad to hear that the hospital stay was a short one. I believe you have a copy of the two sets of Comments which I had prepared for that meeting. I understand from Bill that he will be scheduling another meeting for us for sometime in the week of June 10th. I hope the Comments will help present our position.

I also would like to bring some other information to your attention. In reviewing the new information submitted by INS, and looking at the proposed expansion areas, it appears as though the new construction would involve building over some highly contaminated areas such as the underground tank, the above-ground settling pit, the controlled area, and some underground sewer lines, all of which are contaminated to some degree or another. We believe the law and sound practice require that these areas be cleared of any contamination prior to construction which would later prohibit such clean up. It is also our understanding from soil sample experts that core samples need to be taken to determine the amount of contamination from the underground tank which may have seeped into the ground and may have to be cleaned up.

We find no indication that INS is proposing such clean up. Perhaps they are, and have simply not detailed that in the application. We do not know whether the State will be requiring such de-contamination if they approve the expansion. However, I believe that the City should require such compliance by INS as well. Since the new filtration system would be placed there, and since this system requires your approval under the cease and desist order, I believe you have the legal authority to require that any such construction be lawful under state, federal, and local laws. In fact, I believe you are required to so insist, and I did not want you to be unaware of this contamination issue.

I spent some time today speaking with a researcher from the Nuclear Regulatory Commission (NRC). She is forwarding me a copy of NRC legal counsel's letter advising that municipalities have the legal authority to regulate discharges of radionuclides in

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furtherance of the economic interests of the City, without running afoul of the NRC's pre-emption of regulation for safety purposes.. She also advises that the POTW in St. Louis has done precisely that with good effect.

Thus, I believe there are no legal impediments to the City's imposition of discharge parameters lower than those set forth by the NRC, or any other requirements which further the purposes of the POTW, including the safety of the POTW workers, the treatment plant itself, and the marketability of the sludge and reuse water. The City can impose requirements for use of a recyling water system, zero total suspended solids, hold up times prior to discharge, third party monitoring, bonds and indemnification requirements to protect the City from liability without running afoul of the NRC. I will forward a copy of that letter when received.

She was also concerned that plutonium is not readily soluable, and suggested that you take a look at that because it might violate the NRC regulations for discharge.

Sincerely,

Caron Balkany

CARON BALKANY

cc: Royallyn Allen, Sherry Tippett, Esq.

City of Santa Fe, New Mexico

Debbie Jaramillo, Mayor
David Coss, City Manager

Councilors: Frank Montaño, Mayor Pro Tem, Dist. 3
Larry A. Delgado, Dist. 1
Patti J. Bushee, Dist. 1
Cristopher D. Moore, Dist.2
Molly Whitted, Dist. 2
Art Sanchez, Dist. 3
Amy Manning, Dist. 4
Peso Chavez, Dist. 4

June 18, 1996

Mr. Lee Lysne,
Executive Director,
Concerned Citizens for Nuclear Safety
107 Cienega
Santa Fe, New Mexico 87501

RE: INS Industrial Pretreatment Permit

Dear Mr. Lysne:

Thank you for your letter dated June 6, 1996, regarding the case of the Interstate Nuclear Services (INS) industrial pretreatment discharge. As you point out, the city currently does have authority to regulate some of the constituents of the wastewater that can be discharged by an industrial customer into the public sanitary sewer system.

At this point, the list of local limits in our code does not include any radioactive materials. This is also the case for the industrial pretreatment programs of the vast majority (if not all) of municipalities around the country. Presumably, this is the result of the federal government's preemption of local government involvement in the regulation of any radionuclides. In other words, most local government officials think that since the federal government has reserved for itself the duty of regulating radionuclides, local governments cannot do anything else to protect the health and safety of the public from the potential effects of this type of compounds.

However, we recently found out that there are some exceptions to this preemptive power of the federal government, and we are preparing to exercise our options under these exceptions. As you may know, the Council has instructed city staff to propose revisions to the city code that will make it possible to regulate specific man-made radio isotopes. Once these revisions are completed by staff, a public hearing will be scheduled for all interested parties to provide their feedback and opinion.

Please feel free to contact me if I can be of further assistance to you.

Sincerely,

Patricio Guerrerortiz, P.E.,
Director
Public Utilities Department

cc: David Coss, City Manager
Qustandi Kassisieh, Wastewater Management Division
PUD/File

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 26, 1997

Mr. Patricio Guerrerortiz, P.E.
Public Utilities Department Director
City of Santa Fe, New Mexico
200 Lincoln Avenue
P.O. Box 909
Santa Fe, NM 87504-0909

Dear Mr. Guerrerortiz:

Thank you for your letter of January 13, 1997 expressing concern on the filtration and wastewater policies of the Interstate Nuclear Services (INS) facility in Santa Fe, New Mexico. In your letter, you note the suggested criteria for solubility of radionuclides described in the INS proposal enclosed with William Floyd's November 12, 1996 letter to me to be "grossly inadequate from our municipal perspective."

Pursuant to the Atomic Energy Act of 1954, as amended, the Nuclear Regulatory Commission (NRC) must assure that all Agreement State radiation control programs are adequate to protect public health and safety and also are compatible with NRC's regulatory program. However, as an Agreement State, New Mexico exercises regulatory jurisdiction over the INS facility and, therefore, the licensing decision for the facility rests with the State. New Mexico has requested technical assistance from NRC in the review of the proposed system. We have previously provided you, for your information, a copy of our response to that request (February 5, 1997 letter from P. Lohaus to W. Floyd). The results of our review have been provided to the State for their use in reaching a licensing decision. The NRC itself has no authority to make a licensing decision. Given that the NRC does not have regulatory jurisdiction, we are providing New Mexico with a copy of your letter, such that the State can consider your concerns as a part of their process in reaching a licensing decision.

In your letter, you make reference to a November 9, 1993 exchange of correspondence between the NRC and Hugh McFadden in Laramie, Wyoming. We wish to clarify that this letter from Martin Malsch of NRC's Office of the General Counsel to Hugh McFadden does not contain any explicit approval of particular actions by the City. Instead, the letter simply provides an explanation of the legal principles of preemption in the context of the Atomic Energy Act (AEA) of 1954, as amended. With limited exceptions not relevant here, the preemption issue addressed in that letter does not apply in Agreement States, such as New Mexico, where Atomic Energy Act authority of the NRC has been discontinued. In those cases, the division of responsibility between the State government and a local government is determined by State law.

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We trust that this responds to your request. If you have any questions, please contact me at (301) 415-2326.

Sincerely,

Paul H. Lohaus, Deputy Director
Office of State Programs

cc: William Floyd

001616

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

INTERSTATE NUCLEAR SERVICES CORPORATION,

Plaintiff,

v. No. CIV 98-1224 BB/KBM

CITY OF SANTA FE,

Defendant.

BRIEF OF
THE NORTHEAST OHIO REGIONAL SEWER DISTRICT
AS AMICUS CURIAE

I. INTRODUCTION

The Northeast Ohio Regional Sewer District ("District") has solicited and received copies of the pleadings in this matter. These pleadings have raised grave concerns at the District on behalf of itself and any other publicly-owned wastewater treatment works ("POTWs") to which a licensee of the United States Nuclear Regulatory Commission ("NRC") or an Agreement State discharges wastewater containing radionuclides.

The District discovered in 1991 that the lagoons and land areas in which it stored incinerated biosolids were contaminated with radioactive Cobalt-60. Years of discharges of Cobalt-60 discharges (much of which was likely legal under NRC regulations) had been removed by the District's routine wastewater treatment operations, accumulating in concentrations that exceeded the NRC's allowed soil contamination levels. While no threat

to human health or safety was posed by the contamination, it was nonetheless in excess of NRC criteria.

As a result, the District incurred hundreds of thousands of dollars in expenses for characterizing and containing the contamination. The District had to engage a radiation consultant, fence off large portions of its property, post radiation warning signage, and follow strict procedures when accessing or working in the problem areas. In addition, hundreds of hours were spent in responding to employee, media and public concerns.

The District's investigation showed that the Cobalt-60 had been discharged to the District by an NRC licensee, Advanced Medical Systems, Inc. The NRC did not assist the District in seeking reimbursement of a penny of the costs the District incurred. Instead, the NRC made it clear to the District that it would hold the District, and *not* its licensee, responsible for appropriately dealing with the contamination, regardless of the costs to be incurred.

The District was forced to seek reimbursement for its expenses through civil litigation against the NRC licensee. During discovery, it was determined that this NRC licensee had contaminated a section of the London Road Interceptor, part of the District's collection system. (This area remains contaminated to this day, even though it had eventually become an NRC license provision that the licensee clean it up.) Further, the District discovered that the NRC licensee *continued to discharge* radioactive Cobalt-60 to the public sewers, including NRC-prohibited insoluble Cobalt-60. When the NRC was notified by the District

of the ongoing actions of its licensee, the NRC did not curtail the licensee's discharges to the public sewer.

The District was thus placed by the NRC and its licensee in the position of being held potentially responsible for radioactive contamination on its premises, but with no help whatsoever in stopping the conduct causing such contamination. Rather than continue to accept radioactive materials into its system, the District plugged the NRC licensee's connection to the public sewer. At a temporary restraining order ("TRO") hearing in state court, the District litigated its right to prohibit radioactive discharges from the NRC licensee's connection to the public sewer. (A copy of the Cuyahoga County Common Pleas Court TRO is attached hereto as Exhibit "A".) The District also litigated in federal court its right to prohibit radioactive discharges from storage tanks at the licensee's facility. (A copy of the Federal District Court for the Northern District of Ohio, Eastern Division, TRO is attached hereto as Exhibit "B".)

In each case, the NRC licensee argued that its discharges were allowed by NRC regulations, and that the federal regulations preempt the District's *Code of Regulations*. In other words, the NRC licensee insisted that it could discharge Cobalt-60 to the public sewer, even if those discharges interfered with the operations of the District, so long as the radionuclide concentration limitations in the NRC regulations (10 C.F.R. § 20.2003) were not exceeded.

Neither logic nor the law supports such a position. It will be demonstrated below that

the NRC regulations, which are designed solely to protect the public from excessive doses of radiation, do not preempt enforcement of a POTW's own regulations enforced against an NRC or Agreement State licensee to protect the integrity of wastewater treatment facilities and treatment by-products. Because it is not attempting to regulate in the area of radiological health and safety, the POTW is empowered to refuse to accept radioactive discharges in any amount. Contrary to the NRC licensee's argument that NRC regulations permitted it to continue discharging Cobalt-60 to the District's sewers, the federal court found that these regulations did not present any legal impediment to the issuance of injunctive relief on behalf of the District. Accordingly, both the state and federal courts issued TROs in favor of the District.

Based on this experience, however, the District became vividly aware of the remarkable lack of knowledge on the part of the NRC as to how POTWs operate, of the absence of any NRC criteria for radionuclide discharges to sanitary sewage systems based on the effect such discharges may have on those systems, of the absence of effective enforcement of what regulations the NRC does have, and the NRC's unwillingness to assist a POTW in protecting itself.

II. SUMMARY OF ARGUMENT

It is well settled that total preemption of state and local authority by federal law can result only through an express statement of Congress or a scheme of federal regulation so all-encompassing as to make reasonable an inference that Congress intended to supplant state

and local authority. *See Pacific Gas & Electric Co. v. Energy Resources Comm.*, 461 U.S. 190, 203-204 (1983) and cases cited therein. In addition, where Congress does not occupy a given field, state or local law will be preempted to the extent that it conflicts with federal law. *Id.* Thus, in order for plaintiff Interstate Nuclear Services Corporation ("INS") to prevail, it must show that Congress has vested in the NRC complete authority over the disposal of radioactive material in sanitary sewer systems, or that defendant City of Santa Fe's ("the City's") Ordinance 1997-3 ("the Ordinance") conflicts with NRC regulations. INS cannot demonstrate either point.

Courts have consistently held that preemption applies only to areas that Congress and the regulator have specifically and explicitly identified as preempted. As it relates to the instant dispute, both Congress and the NRC have pronounced that the authority to regulate radioactive material for purposes other than health and safety *is not preempted* by federal regulations.

The injuries suffered by a POTW due to radioactive discharges are not related to health and safety issues, but instead are injuries to the POTW's ability to protect its treatment processes so as to be able to perform its statutory duty to treat wastewater, its ability to use its property as it needs or desires, its ability to use or dispose its wastewater solids in the most cost-effective manner, and its ability to protect its ratepayers from excessive and wholly preventable remediation expenses. POTW prohibitions of, or limitations on, radioactive discharges are both authorized by law and enforceable by this Court, and the doctrine of

federal preemption does not bar enforcement of the City's Ordinance. Because a POTW's authority to order appropriate and necessary measures to protect its operations is not preempted by the Atomic Energy Act or NRC (or Agreement State) regulations governing the handling of radioactive material, the City's Ordinance regarding discharges of contaminated wastewater is both lawful and enforceable.

ARGUMENT

1. THE CITY'S ORDINANCE IS NOT PREEMPTED BY FEDERAL LAW

A. Municipalities May Regulate the Discharge of Nuclear Materials Based on Economic Concerns.

State and local law is preempted under the Supremacy Clause of the United States Constitution only if (1) Congress evidences an intent to occupy a given field, or (2) it is impossible to comply with both local and federal law, or (3) the state or local law stands as an obstacle to the accomplishment of the purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). None of these circumstances are present in this dispute.

First, when Congress enacted the Atomic Energy Act, 42 U.S.C. § 2014, *et seq.* ("AEA") (pursuant to which the NRC adopted the regulations upon which INS relies for its preemption argument), it made clear that:

> 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(i) (emphasis added). It followed, then, that when the Supreme Court had before it the issue of the scope of federal regulation of nuclear material, it held that:

> Congress, in passing the 1954 [Atomic Energy] Act and in subsequently amending it, intended that the Federal Government should regulate the *radiological safety aspects* involved in the construction and operation of a nuclear plant, *but that the States retain their traditional responsibilities*. . . .

Pacific Gas, 461 U.S. at 205 (emphasis added).

Municipal ordinances such as the City's that regulate radioactive discharges are not motivated by the safety aspects of any radionuclide discharge (which are governed by federal law), but rather by the deleterious effect of radioactive materials on a POTW's ability to continue to process and treat wastewater (which is not governed by the AEA or regulations adopted by the NRC and Agreement States). Accordingly, enforcement of such ordinances is not preempted by federal law. *See, e.g., Pacific Gas,* 461 U.S. at 223 (state regulation of nuclear power prompted by economic, not safety, concerns is not preempted by federal law).

Further, because Congress did not explicitly state otherwise, it can be presumed that it did not intend that the AEA would preempt the federal, state and local authority of POTWs to prevent contamination by radionuclide discharges. *Pacific Gas,* 461 U.S. at 206 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Thus, under the AEA, a sewer authority seeking to maintain the continuation of wastewater treatment for its ratepayers, to ensure that the use of its facilities will not be restricted, and

to protect those ratepayers from incurring multi-million dollar remediation and disposal costs, cannot be deemed to be interfering in the federal government's regulation of "radiological health and safety."

In fact, the NRC's own regulations expressly recognize that they do not preempt the entire field of regulation of nuclear materials: "Nothing in this subpart relieves the licensee from complying with other applicable Federal, *State and local regulations* governing any other toxic or hazardous properties of materials that may be disposed of under this subpart." 10 C.F.R. § 20.2007 (Subpart K-Waste Disposal) (emphasis added).

This conclusion is further supported by pronouncements of the United States Supreme Court, which have narrowed the scope of federal preemption in cases having much more to do with nuclear health and safety than does the City's Ordinance. For example, in *Silkwood,* it was held that state-imposed punitive damage awards for personal injury caused by radiation were not preempted by the federal occupation of the field of radiological health and safety. The Supreme Court held that:

> Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards.

Silkwood, 464 U.S. at 257. The Court further explained that "[p]aying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does [it] frustrate any purpose of the federal remedial scheme." *Id.* at 256.

See also, English v. General Electric Co., 496 U.S. 72 (1990) (state-law claim against nuclear industry employer for intentional infliction of emotional distress by former employees who reported safety violations held not preempted by federal law); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (Ohio's increased workers' compensation award for injury caused by safety violation at a nuclear facility held to be acceptable "incidental regulatory pressure" and not preempted by federal occupation of nuclear safety regulation).

B. The NRC Does Not Have Exclusive Regulatory Authority Over Off-Site Radiological Impacts

Contrary to the tenor of INS' argument, the Supreme Court has concluded that the NRC has *relinquished* its authority over the field of off-site radiological impacts, a conclusion which is directly applicable to the present circumstances. In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), the Supreme Court affirmed the United States Environmental Protection Agency ("U. S. EPA") decision not to subject three types of radioactive material to its federal water pollution permit system. The unanimous Court added:

> It does not follow, however, that the EPA has no role to play in protecting the environment from excessive radiation attributable to AEA-regulated materials. . . . Among the functions transferred to the EPA [in 1970] were:
>
> The functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended, . . . [that] consist of establishing *generally applicable environmental standards for* the protection of the general environment from radioactive material . . . *outside the boundaries of locations under the*

control of persons possessing or using radioactive material.

Train, 426 U.S. at 25 n. 20 (citing Reorganization Plan No. 3 of 1970, § 2(a)(6) 84 stat. 2088, 5 U.S.C. App. p. 610) (establishing the functions of the new U.S. EPA)) (emphasis added).

Accordingly, the NRC does *not* have exclusive regulatory authority over off-site radiological impacts. Instead, the U.S. EPA has express authority to implement environmental standards which in effect regulate certain off-site radiological impacts. *See id.* As explained in the City's briefs, the U.S. EPA has designated the City as the "control authority" for purposes of the operation and regulation of the City's POTW. This delegated pretreatment authority under the Clean Water Act is the means through which the City may enforce a *generally applicable environmental standard* to protect the wastewater treatment works which are entirely *outside the boundaries* of any location under the control of NRC licensees *(e.g.,* INS' facility). After 1970, the Atomic Energy Commission (now the NRC) relinquished exclusive authority over off-site impacts (if, indeed, such authority ever did exist), and thus cannot preempt the City's action on the basis that it occupies the field of off-site radiological impacts.

In light of the NRC's relinquishment of authority over off-site impacts, any reliance by INS on cases that address only site-specific, on-site regulation of radiological safety is clearly misplaced and should be disregarded.[1] The City's Ordinance is asserting a generally-

[1]Such cases include *Brown v. Kerr-McGee Chemical Corp.*, 767 F. 2d 1234 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986) (addressing NRC's approval of site-specific, on-site disposal decisions); *Northern States Power Company v. State of Minnesota*, 447 F. 2d 1143

applicable limitation on radionuclide discharges to prevent interference with its off-site treatment works. Clearly, such limitations on the discharge of radioactive materials are not aimed at regulating on-site activities at INS' facilities, but, instead, are aimed at regulating deleterious, off-site impacts. The distinction between the regulation of on-site activities and the regulation of off-site impacts is essential to understanding the City's valid enforcement efforts.

C. The City Has the Authority to Limit the Radioactive Discharges It Will Accept to Its POTW.

As the designated control authority for its POTW, the City is mandated by the U.S. EPA's pretreatment regulations to regulate all discharges to the City's sewer system to prevent the introduction of pollutants to its system which will: (1) interfere with the City's operation of its POTW; (2) interfere with its use and disposal of sludge by-products; and/or (3) allow the pass-through of pollutants to the receiving waters or allow the introduction of pollutants that are incompatible with the POTW and its treatment system. 40 C.F.R. § 403.2. The U.S. EPA's sludge regulations also require the City to improve opportunities to recycle and reclaim wastewater and sludge. 40 C.F.R. § 503. The U.S. EPA's pretreatment regulations, which control every aspect of the City's operation of its POTW, define the term

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(1971) *aff'd mem.*, 405 U.S. 1035 (1972) (addressing site-specific permit requirements including on-site monitoring); *Hanni v. Cleveland Electric Illuminating Co.* , 87 Ohio App.3d 295, 303 (1993) (addressing employee discharge regulations at nuclear power plant sites); *U.S. v. City of New York*, 463 F.Supp. 604 (S.D.N.Y. 1978) (addressing city health and safety certification prerequisite to on-site operation of a nuclear reactor).

"pollutant" to include radioactive materials. 40 C.F.R. § 401.11(f).[2] Thus, under the Clean Water Act and the U.S. EPA's pretreatment regulations, the City has the authority, as well as the duty, to protect the operational viability of its POTW by preventing the introduction of pollutants, including radioactive materials, that may interfere with or contaminate the POTW.

D. The Prohibition or Limitation of Sewer Use Does Not Conflict With Congressional Purposes or NRC Regulations

Finally, although it is true that local regulation may be preempted if it is impossible to comply with both local and federal law, or if the local law stands as an obstacle to the accomplishment of a Congressional purpose, these exceptions do not apply here. INS is fully capable of complying with both federal law and the City's Ordinance.

First, it must be recognized as a matter of law that the NRC does not *mandate* the discharge of licensed radioactive material into sanitary sewer systems. Rather, the NRC's regulations include *six (6) different options* for disposal of the material:

(1) transfer to an authorized recipient (10 C.F.R. §§ 20.2001 and 20.1.006);

(2) decay in storage (10 C.F.R. § 20.2001);

---

[2]INS apparently attempts to confuse this Court by asserting that the U.S. EPA, after *Train*, excluded radioactive materials from the definition of "pollutant" contained in the pretreatment regulations. *See INS Reply to the City's Response to Its Motion for Partial Summary Judgment at 5-6 and 6 n.5.* This is not the case. The deletion of radioactive materials from the "pollutant" definition did not occur in a section applicable to the pretreatment regulations governing the City's responsibilities to exclude pollutants which can interfere with or pass-through the sewer system. Compare 40 C.F.R., § 401.11(f) and 40 C.F.R., § 122.

(3) release in effluents other than discharge to sanitary sewers (10 C.F.R. § 20.1301);

(4) treatment or disposal by incineration (10 C.F.R. § 20.2004);

(5) disposal by release into sanitary sewerage (10 C.F.R. § 20.2003);

(6) any other method of disposal approved by the Commission (10 C.F.R. § 20.2002).

Despite these broad alternatives, INS claims that the *option* to discharge soluble radioactive waste into the City's sanitary sewer (an option that does not exist for insoluble radionuclides) *requires it* to transfer its disposal problem and all the associated costs to the POTW under a cloak of federal preemption. This is nonsense. Clearly, as a matter of law, no NRC or Agreement State licensee must discharge its radioactive wastes to the public sewers to maintain compliance with NRC regulations. Moreover, the NRC does not require a POTW to accept nuclear material. Thus, the City's limitations on radioactive discharges into the sanitary sewer do not conflict with the permissive -- but not mandatory -- NRC regulations. *See Silkwood,* 464 U.S. at 257 (finding no preemption where complying with both federal and state laws was not "physically impossible").

In sum, the NRC does not claim federal preemption over a POTW's refusal to accept, or regulation of, radioactive materials to protect the treatment works. This cannot be disputed, especially because every NRC or Agreement State licensee has other disposal options. *Cf. Jersey Central Power & Light v. Lacey Twp.*, 772 F.2d 1103 (3rd Cir. 1985),

cert. denied, 475 U.S. 1013 (1986) (township's total prohibition on transport and storage of nuclear materials left *no* options and was *thus* preempted).

The City's purpose in limiting discharges of radioactive materials to its POTW is to protect the integrity of its treatment works as required by federal law (i.e., the Clean Water Act and the U.S. EPA's pretreatment regulations)—a purpose distinct from the preempted field of radiological health and safety. Even if the effect of this protection would be to force INS and other licensees to pursue another available disposal option, it is a result that would be entirely consistent with the NRC's regulations and the AEA. *See English v. General Electric Co.*, 496 U.S. 72 (1989) (finding no federal preemption where state action has no direct and substantial effect on radiological safety decisions). Any Congressional purpose served by allowing licensees to discharge radioactive waste products into the sanitary sewer is countered by U.S. EPA's and the City's clear interest in facilitating the unfettered working of the City's sanitary sewer system. Because there is no direct conflict in these purposes, the U.S. EPA's and the City's interests should control here. Consequently, the City's Ordinance is not preempted by federal law and is enforceable.

E. The NRC Has Clearly Stated that Its Regulations Do Not Preempt Municipal Governmental Action on Bases Other than Protection of Public Health and Safety.

The NRC itself has determined that the preemption argument advanced here by INS is simply wrong. In official correspondence to governmental entities, the NRC has expressly stated that POTWs have the authority to prohibit the discharge of radioactive material into their sewer systems if the prohibition imposed is not related to health and safety. For example, in a November 9, 1993 response to a series of questions posed by the United States General Accounting Office, the NRC Deputy General Counsel for Licensing and Regulation stated:

> QUESTION 6.
>
> What authority, if any, do the POTWs have to refuse to allow NRC licensees to make disposals of radioactive materials into their systems? Please explain.
>
> ANSWER
>
> A recent letter to the city attorney for Laramie, Wyoming, discusses the issue raised in this question. . . . As the letter explains, *a POTW may under certain circumstances refuse to allow disposals of radioactive materials into the treatment system.*

(Ex. "C" attached hereto) (emphasis added).

In the referenced letter to H.B. McFadden, City Attorney for Laramie, Wyoming dated November 9, 1993, the NRC Deputy General Counsel stated:

> If . . . the basis for the state or local governmental action is

> something other than the protection of workers and public from the health and safety hazards of regulated materials, *the action is not preempted.* See, e.g. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190 (1983).

(Ex. "D" attached hereto) (emphasis added).

In a June 16, 1994 letter, the Director of the NRC Office of Nuclear Materials Safety and Safeguards confirmed this position to William B. Schatz, General Counsel for the District:

> [Tlhe Commission has expressed its view that the Atomic Energy Act of 1954 *does not prohibit actions by state or local authority on bases other than protection of public health and safety from radiological hazards.*

(Ex. "E" attached hereto) (emphasis added).

Finally, in a draft guidance developed by the ISCORS[3] Sewage Subcommittee, representatives of the NRC, the EPA and POTWs stated:

> The NRC has found that if a municipality has sound reasons, other than radiation protection, a municipality can require the pretreatment of wastes to eliminate or reduce radioactivity. Furthermore, although NRC regulations allow users of regulated material to discharge to treatment plants, these regulations do not compel a sewage treatment operation to accept radioactive materials from NRC licensees. Some localities are addressing the potential problem of concentration of radioactive material at

[3]ISCORS is an acronym for Interagency Steering Committee on Radiation Standards. It is composed of representatives from the NRC, the EPA, the Department of Energy, the Department of Defense, Department of Transportation, the Occupational Safety and Health Administration of the Department of Labor, and the Department of Health and Human Services.

> POTWs by either (1) requiring pretreatment of waste by specific licensees or (2) limiting the discharge of radioactive materials. For example, the State of Oregon and the City of Portland, Oregon, ordered a state licensee to install a pretreatment system to control the discharge of thorium oxide into sewer lines. The Metropolitan St. Louis Sewer District passed an ordinance in 1991 that limits the aggregate discharge of radioactive materials into the sewage system.

See Exhibit "E" to the City's Response to INS' Motion for Partial Summary Judgment.

A clearer statement of regulatory intent cannot be imagined. The NRC recognizes the problems for POTWs associated with radionuclide contamination and reiterates its long-standing position: if a municipality takes action against an NRC or Agreement State licensee on any basis other than protection against the health effects of excessive doses of radiation, such action is *not* preempted. This case falls squarely into the fact pattern under which the NRC has determined that federal preemption does not arise. The NRC points with approval to the efforts of the State of Oregon and the cities of Portland and St. Louis in "addressing the potential problem of concentration of radioactive material at POTWs..." in the same manner as the City has done with its Ordinance.

The City is seeking to prevent the sort of economic injury to its ability to operate its POTW that the District and several other POTWs have experienced, as well as to dispose of its POTW by-products and to utilize its property as it sees fit. Moreover, the City seeks to prevent the potential injury to its ratepayers which would result if radioactive contamination of the City's POTW requires the expenditure of costs that must be passed on to the ratepayers

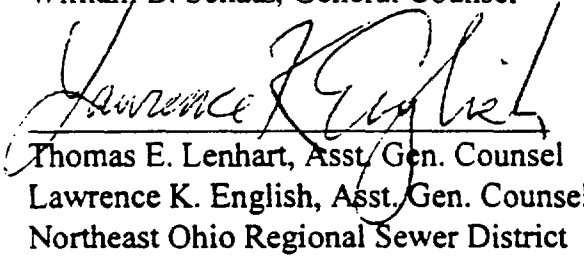
in the form of excessive user charges. This case does not involve the City's attempt to regulate in the field of radiological health and safety. Thus, the City's attempt to ensure the continued viability of its treatment system is not preempted.

III. CONCLUSION

The City's authority to regulate radioactive discharges pursuant to its Clean Water Act authority does not impermissibly intrude into the regulated field of radiological health and safety. Nor does it conflict with the AEA or with NRC regulations. Simply stated, if a local action is not preempted by federal law, and is otherwise authorized, it is enforceable. Thus, the City's Ordinance is not preempted by federal law.

Respectfully submitted,

William B. Schatz, General Counsel



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Northeast Ohio Regional Sewer District
3826 Euclid Avenue
Cleveland, Ohio 44115
(216) 881-6600

Counsel for the Northeast Ohio
Regional Sewer District

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT	)	CASE NO. 249860
Plaintiff,	)	JUDGE STUART A. FRIEDMAN
v.	)	
ADVANCED MEDICAL SYSTEMS, INC., et al.	)	**TEMPORARY RESTRAINING ORDER**
Defendants.	)	

This cause came on for hearing on the 28th day of October, 1994, before the Honorable Stuart A. Friedman, upon motion of Plaintiff for a Temporary Restraining Order restraining Defendant Advanced Medical Systems, Inc., each of the other defendants herein, and their agents (collectively "Defendants"), from certain conduct and activity, pending further hearing on Plaintiff's Application for a Preliminary Injunction.

Upon consideration, the Court finds that Defendants were given notice of Plaintiff's intention to move for a Temporary Restraining Order, through its counsel, and further finds Plaintiff's Motion for a Temporary Restraining Order is well-taken because it clearly appears Plaintiff's Code of Regulations will be violated contrary to Ohio law before Defendants can be fully heard in this matter unless a Temporary Restraining Order issues.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that until November 29, 1994:

(1) Defendants and their agents are enjoined and restrained from discharging any water, wastewater or stormwater runoff from Defendants' 1020 London Road Facility into the public sewer system;

(2) Defendants are ordered to implement alternative method(s) to collect and dispose of the discharges enjoined by this Order. Said method(s) must be in place and able to receive the discharge by or before 5:00 p.m. on November 18, 1994. Defendants shall immediately certify to this Court (with copy to Plaintiff) that such method(s) have been implemented;

(3) Plaintiff is hereby permitted to install a temporary compression-type plug in the 1020 London Road lateral sewer near its connection with the London Road Interceptor immediately after Defendants have implemented the alternative disposal method(s) described in the preceding paragraph;

(4) Defendant Advanced Medical Systems, Inc. is ordered to allow Plaintiff, Northeast Ohio Regional Sewer District, to conduct a full inspection(s) of defendant's facility (pursuant to all applicable Nuclear Regulatory Commission regulations) on or before November 28, 1994, to ensure that all discharges from the 1020 London Road facility are addressed by the above-described actions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, this Temporary Restraining Order shall become effective without the filing of a bond, as plaintiff is a political subdivision not required to post a bond under law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Clerk of this Court shall deliver sufficient certified copies of this Temporary Restraining Order to Counsel for Plaintiff who, for purposes of serving this Temporary Restraining Order, is appointed by this Court to make service upon Defendants and their counsel.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that service of this Order be made as soon as possible.

Dated: 15 NOV. 94

JUDGE STUART A. FRIEDMAN

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	)	CASE NO. 1:94 CV 2555
	)	
	)	JUDGE GEORGE W. WHITE
Plaintiff,	)	
	)	
v.	)	
	)	
ADVANCED MEDICAL SYSTEMS, INC., *et al.*,	)	TEMPORARY RESTRAINING ORDER
	)	
Defendants.	)	

This cause came on for hearing and was heard on the 13th day of December, 1994, before the Honorable Judge George W. White, upon motion of Plaintiff for a Temporary Restraining Order restraining Defendant Advanced Medical Systems, Inc., and their agents, employees and those persons acting in concert or association with them (collectively "Defendant"), from certain conduct and activity, pending further hearing on Plaintiff's Motion for a Temporary Restraining Order and Application for a Preliminary Injunction.

Upon consideration, the Court finds that Defendant was given notice of Plaintiff's intention to move for a Temporary Restraining Order, through its counsel, and further finds Plaintiff's Motion for a Temporary Restraining Order is well-taken because it clearly appears Plaintiff's Code of Regulations will be violated contrary to Ohio law unless a Temporary Restraining Order issues.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that until January 17, 1995, on which date the Court shall hold a hearing on Plaintiff's Application for a Preliminary Injunction:

(1) Plaintiff is hereby permitted to maintain the existing plugs in the public sewers at or near the connections of the 1020 London Road facility with the London Road Interceptor;

(2) At its option, Plaintiff may collect into tanks the discharges of stormwater from the upper portion of the roof above the northern portion of the facility so as to allow Plaintiff to conduct testing of such discharges to determine whether any Cobalt-60 is present.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, this Temporary Restraining Order shall become effective without the filing of a bond.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Clerk of this Court shall deliver sufficient certified copies of this Temporary Restraining Order to Counsel for Plaintiff who, for purposes of serving this Temporary Restraining Order, is appointed by this Court to make service upon Defendants and their counsel.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that service of this Order be made as soon as possible.

Dated: 12/14/94

JUDGE

EXHIBIT "C"

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

NOV 1 1 1993

Martin J. Fitzgerald, Esq.
Associate General Counsel
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Fitzgerald:

In your letter of October 6, 1993, addressed to the General Counsel of the Nuclear Regulatory Commission, you requested our response to a number of questions regarding the concentration of radioactive materials in publicly owned treatment works. Your questions and our responses are contained in the enclosure to this letter. If you have further questions, please call me at (301) 504-1740, or Robert L. Fonner at (301) 504-1643.

Sincerely,

Martin G. Malsch
Deputy General Counsel for
Licensing and Regulation

Enclosure: As stated

cc: W. Parler
R. Bernero

Enclosure 3

QUESTION 1 Does the NRC have the authority to require publicly-owned treatment works (POTWs) to test for concentrations of radioactive materials subject to the jurisdiction of the Atomic Energy Act? If so, under what authority? Would the POTWs be responsible for the payment for such tests?

ANSWER

Sections 161b. and 161i. of the Atomic Energy Act of 1954, as amended, authorize the NRC to promulgate rules and issue such orders as the Commission may deem necessary to protect health and safety with regard to regulated radioactive materials. This authority may be applied to unlicensed persons if necessary (see 10 CFR 2.202). The POTWs would be responsible for the payment for such tests if ordered. The NRC has no appropriated funds to pay for licensee or nonlicensee testing.

QUESTION 2. Under what authority and on what conditions does the NRC test for concentrations of radioactive materials subject to regulation under the Atomic Energy Act at POTWs? Who is responsible for the payment for such tests? Please explain.

ANSWER

The NRC may itself conduct sampling and testing under the authority of 161c. of the Atomic Energy Act of 1954, as amended. Such

sampling and testing may be done as the consequence of an inspection where the NRC inspectors take samples in order to ascertain regulatory compliance or need for regulatory action. The NRC inspectors use standard sampling techniques and normally split samples with the affected person. The stimuli for such inspections or investigations are varied. They may be routine, stem from allegations, or result from survey overflights based upon other evidence of contamination in the area being surveyed. The NRC bears the cost of its own testing, unless, in the case of licensees, the underlying inspection is subject to a fee pursuant to 10 CFR Part 170.

QUESTION 1. Does the NRC have the authority to require that the POTWs periodically report to the NRC any buildup of radioactive materials at their facilities? If so, under what authority?

ANSWER

The NRC has authority under section 161c. of the Atomic Energy Act of 1954, as amended, to obtain such information as the Commission may deem necessary to assist it in exercising any authority under the Act, enforcement or administration of the act, or any regulation or order issued thereunder. Pursuant to 10 CFR 2.204 a Demand For Information may be issued to a licensee or an unlicensed

person. If the POTW is a licensee, section 161c. also provides authority to require reports.

QUESTION 4. Does the NRC have any authority to regulate the concentration of radioactive materials subject to the Atomic Energy Act at a POTW if the concentration of such materials is not of a licensable amount? Please explain.

ANSWER

The NRC has no general regulations establishing de minimis quantities or concentrations of material not subject to regulation. However, certain kinds and quantities of radioactive materials have been exempted by rule from regulation when possessed by unlicensed persons. For example, 10 CFR 40.13 establishes exemptions for source material when it does not exceed .05% by weight of the compound or mixture in which it is found, in bulk untreated ore, in gas lamp mantles, and certain metallurgical alloys and counterweights. Exempt quantities and concentrations of byproduct material are limited to specific items, such as smoke detectors, which are manufactured or distributed under license. In these cases, the safety of the product in the hands of unlicensed persons has been carefully evaluated. Thus, the concept of "licensable amount" is inappropriate. The circumstances of each situation have to be reviewed against the codified regulations to determine if the regulatory requirements for exemption have been met. If these

requirements have not been met, the material remains subject to regulation.

QUESTION 5. Does the NRC have the authority to require that its licensees notify the POTWs prior to the disposal of any radioactive materials? If so, under what authority? What are the pros and cons of such a requirement?

ANSWER

The NRC has authority under section 161o. of the Atomic Energy Act of 1954, as amended, to require licensees to submit such reports as may be necessary to effectuate the purposes of the Act. It is not possible without considerable study of the implications of such a reporting requirement to identify meaningful pros and cons. However, the agency must comply with the requirements of the Paperwork Reduction Act in establishing the need for such reporting. One example may illustrate the complexity of the issue. Currently excreta from patients undergoing diagnostic or therapeutic treatment with isotopes (e. g. iodine 131 for certain thyroid conditions) may be flushed to sanitary sewers without restriction. Implementation of a reporting requirement for such occurrences may be difficult to achieve.

QUESTION 6. What authority, if any, do the POTWs have to refuse to allow NRC licensees to make disposals of radioactive materials into their systems? Please explain.

ANSWER

A recent letter to the city attorney for Laramie, Wyoming, discusses the issue raised in this question. A copy of the letter is attached. As the letter explains, a POTW may under certain circumstances refuse to allow disposals of radioactive materials into the treatment system.

QUESTION 7. To address the problem of excessive concentrations of radioactive materials at POTWs, how should the NRC and the Environmental Protection Agency coordinate their efforts?

ANSWER

The NRC and the EPA have established a coordinating committee of senior officials to discuss matters of mutual concern on an ongoing basis. A Memorandum of Understanding between the agencies, dated March 16, 1992, establishes the basic charter for cooperation between the agencies. A copy of the MOU is attached. This matter has not been the subject of discussions by the coordinating committee and there is no reason to believe that lack of coordination has contributed to the type of problem suggested.

Nonetheless, both NRC and EPA have a regulatory interest in waste water treatment sludges and incinerator ash and this matter will be placed on the committee's agenda.

EXHIBIT "D"

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C.

NOV 1; 1993

Hugh B. McFadden, Esq.
Laramie City Attorney
Corthell and King
221 South Second Street
P. O. Box 1147
Laramie, Wyoming 82070

Dear Mr. McFadden:

In your letter to the NRC of September 9, 1993 you requested an expression of views on the following question: "Can a municipality lawfully regulate or prohibit the discharge of radioactive materials into its wastewater treatment system, with or without an industrial pretreatment program mandated by EPA?" We understand the context of your question to be a city plan to begin producing sludge in 1996, and the related facts that Laramie has a hospital with a nuclear medicine department and that the University of Wyoming does some research with radioisotopes.

By necessity our response has to be general, limited to the principles of law that govern this agency and its relationships with states and municipalities. The primary legal principle is that the Atomic Energy Act of 1954, as amended, occupies the field with respect to issues of radiation protection in the use of source, byproduct, and special nuclear material, as these terms are defined in the Act. If, however, the basis for the state or local governmental action is something other than the protection of workers and public from the health and safety hazards of regulated materials, the action is not preempted. See, e.g. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U. S. 190 (1983). As a consequence of the Atomic Energy Act occupying the field dual Federal-State regulation of the radiation hazards associated with use of these materials is not allowed. See 10 C.F.R. 8.4 and 10 C.F.R. Part 150.

However the extension of these general Federal preemption principles to actions of State or Local government entities i their proprietary capacity (say as owners of POTWs) raise additional issues which have not been resolved definitely. Mos important here, however, is that if the city of Laramie were t have sound reasons, other than radiation protection, to requi pretreatment of wastes from the hospital or university to elimina or reduce radioactivity, such pretreatment would not fall afoul the Atomic Energy Act. Thus, NRC regulations that allow users regulated materials to discharge to sanitary sewers do not compel a waste water treatment operator to accept those radioactive materials. We note, however, that the materials regulated by thi agency are exempted from regulation under the Federal Wate

Enclosure 4

Pollution Control Act and the Resource Conservation and Recovery Act. Thus pretreatment to eliminate or reduce the regulated isotopes would not be required by these environmental statutes.

In January of 1994 new rules take effect in 10 C.F.R. Part 20 that will limit the discharge to sanitary sewer systems to only those licensed materials which are soluble in water or which are readily dispersible biological material (such as may be found in a university research laboratory), see 10 C.F.R. 20.2003. Finally, there is no limit on radioactivity that may be discharged to a sanitary sewer in excreta from patients undergoing medical diagnosis or therapy. You may wish to consult with the radiation safety officers of the hospital and university to gain an understanding of the technical characteristics of the isotopes used in these institutions and their fate in waste water treatment.

The problem of certain radioactive materials ending up in the sludges from waste water treatment, or in ash from the incineration of sludges, is well known to the staff of the NRC. A generic study is underway to understand the dimensions of the issue and whether it poses a particular health and safety matter that needs to be dealt with by more specific regulation. The Atomic Energy Act encourages the useful and beneficial uses of radioisotopes in medicine and research, at the same time the NRC is highly cognizant of the health risks to third parties that may result from such uses. We believe that our regulation is appropriately balanced between the need to protect the public from the undue hazards of the regulated materials and also to allow their beneficial use in a controlled manner.

I hope that this response will be helpful to you. If you have any further questions you may call either me at area code 301-504-1740, or Robert L. Fonner at area code 301-504-1643.

Sincerely yours,

Martin G. Malsch
Deputy General Counsel for
Licensing and Regulation

EXHIBIT "E"

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C.

JAN 18 1994

Docket No. 030-16055
(10 CFR § 2.206)

William B. Schatz
General Counsel
Northeast Ohio Regional Sewer District
3826 Euclid Avenue
Cleveland, Ohio 44115-2504

Dear Mr. Schatz:

This letter is in response to your Petition, dated August 2, 1993, on behalf of the Northeast Ohio Regional Sewer District. The Petition requested that the U.S. Nuclear Regulatory Commission take action with respect to Advanced Medical Systems, Inc., (AMS) to modify the AMS license to require, *inter alia*, that AMS provide adequate financial assurance to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended.

Your request was referred to the staff for consideration pursuant to 10 CFR § 2.206 of the Commission's regulations. For the reasons stated in the enclosed "Director's Decision Under 10 CFR § 2.206," the Petition has been denied.

Three items of interest should be noted. First, the revision of 10 CFR Part 20 no longer permits non-biological, dispersible material, such as the cobalt-60 used at AMS, to be disposed into the sanitary sewer. In connection with this revision, the NRC has published an advance notice of proposed rulemaking requesting comment and/or information as to whether an amendment to the new regulations in effect is needed. Second, the Commission has expressed its view that the Atomic Energy Act of 1954 does not prohibit actions by state or local authority on bases other than protection of public health and safety from radiological hazards. This is explained in a letter dated 11/9/93 from M. G. Malsch, NRC, to M. J. Fitzgerald, GAO, and a letter dated 11/9/93 from M. G. Malsch, NRC, to M. B. McFadden, Laramie, Wyoming, City Attorney, both of which are enclosed with this letter and referenced in the enclosed Director's Decision. Third, in a Staff Requirement Memorandum dated June 28, 1993, the Commission has requested the NRC staff to address the issue of rulemaking on the subject of financial assurance for cleanup of an accident for material licensees with a potential for significant contamination.

With regards to the petition dated March 3, 1993, you filed pursuant to 10 CFR § 2.206, we intend to consider your consultant's report on the cobalt-60 characterization at the Southerly Treatment Center, which is currently expected to be completed in June, 1994, before issuing our decision on that Petition. Please forward a copy to me within two weeks after your

consultant submits it to you. Accordingly, we will make a decision on your March 3, 1993, Petition within a reasonable time after receiving your consultant's report.

A copy of the Decision will be filed with the Secretary of the Commission for its review in accordance with 10 CFR § 2.206 of the Commission's regulations. As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

A copy of the Notice which is being filed with the Office of the Federal Register for publication is enclosed.

Sincerely,

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

Enclosures:
1. Director's Decision DD-94-06
2. Federal Register Notice
3. Ltr dtd 11/9/93 from
   M. Malsch, NRC, to
   M. Fitzgerald, GAO
4. Ltr dtd 11/9/93 from
   M. Malsch, NRC, to
   M. McFadden, Laramie, WY

cc: Advanced Medical Systems, Inc.
ATTN: Ms. Sherry Stein, Dir.
of Regulatory Affairs
1020 London Road
Cleveland, Ohio 44110

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
Robert M. Bernero, Director

In the Matter of	)	
	)	
ADVANCED MEDICAL SYSTEMS, INC. (Cleveland, Ohio)	)	Docket No. 030-16055
	)	
	)	(10 C.F.R. § 2.206)

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated August 2, 1993, addressed to Mr. James M. Taylor, Executive Director for Operations, U. S. Nuclear Regulatory Commission ("NRC"), William B. Schatz, on behalf of Northeast Ohio Regional Sewer District ("District"), requested that the NRC take action with respect to Advanced Medical Systems, Inc. ("AMS"), of Cleveland, Ohio, an NRC licensee. The District requested, pursuant to 10 C.F.R. § 2.206, that the NRC institute a proceeding to modify the license of AMS to require AMS to provide adequate financial assurance, available in the form of insurance, to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended. The District alleges the following bases for the request: (1) There is a large volume of evidence indicating prior discharge of cobalt-60 to the sanitary sewer, and (2) hundreds of curies of loose cobalt-60 remain in the London Road facility.

By letter dated November 24, 1993, I formally acknowledged receipt of the

Petition and informed the Petitioner that its request was being treated pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. A notice of the receipt of the Petition was published in the Federal Register on Monday, December 6, 1993 (58 Fed.Reg. 64,341). The NRC staff sent a copy of the letter dated November 24, 1993, with the Petition, to AMS.

I have completed my evaluation of the matter raised by the Petitioner and have determined that, for the reasons stated below, the Petition should be denied.

II. BACKGROUND

The NRC issued License No. 34-19089-01 to AMS on November 2, 1979. The licensed operation, facilities and equipment had been previously owned and operated by Picker Corporation since 1959. From 1979 to mid-1991, the AMS License authorized the possession of 150,000 curies of cobalt-60 in solid metal form for the purpose of manufacturing of sealed sources for distribution to authorized recipients for use in teletherapy units (used at medical facilities for treatment of medical conditions). The License currently authorizes AMS to possess cobalt-60 in solid metal form in storage and to use this material in training of Licensee personnel in the manufacture of NRC approved sealed sources; the current License does not authorize manufacture of sealed sources for distribution. In addition, the License continues to authorize possession of large quantities of cobalt-60 and cesium-137 in sealed sources, and plated depleted uranium shielding, incident to teletherapy and industrial radiography installation, maintenance, and service. The AMS License currently limits possession to 300,000 curies of cobalt-60 (150,000 curies as solid metal and 150,000 in sealed sources; although the solid metal

can be used to manufacture sealed sources, no manufacturing is authorized at present), 40,000 curies of cesium-137, and 4000 kilograms of depleted uranium. Based on NRC interviews and review of records, AMS stopped releases of processed radioactive liquids to the sewer system in 1989, and since then has generated little radioactive liquid waste, which it holds on site. See US NRC Report No. 030-16055/93002(DRSS) dated July 29, 1993. The facility that houses the licensed material is located on London Road in Cleveland, Ohio.

The Northeast Ohio Regional Sewer District is responsible for operating three wastewater treatment facilities in and around the Cleveland, Ohio, metropolitan area. Its Southerly Wastewater Treatment Center ("SWTC") has been operating since 1927 to remove grit and debris from wastewater generated in the District's service area. This process involves incineration of sludge, transport of the residual ash in a slurry to settlement and evaporation ponds, and eventual transfer of the dried ash to landfills.

In April 1991, the NRC identified cobalt-60 at the SWTC by chance during an aerial radiation survey of an unrelated site, namely, the Chemetron Corporation facility located in Newburgh Heights, Ohio. Surveys were subsequently performed at SWTC in September 1991 and March 1992, by Oak Ridge Institute for Science and Education ("ORISE") at the request of NRC, to determine the extent of the cobalt-60 contamination at the facility. The results of the ORISE surveys are reported in "Radiological Characterization Survey for Selected Outdoor Areas, Northeast Ohio Regional Sewer District, Southerly Wastewater Plant, Cleveland, Ohio," Final Report, August 1992 (hereafter referred to as "ORISE report"). The results of the ORISE surveys

indicated that there were elevated direct radiation readings that were caused by cobalt-60, with elevated soil and sediment sample concentrations. With background averaging 9 microroentgens per hour, exposure rates ranged from 6 to 580 microroentgens per hour. (ORISE report at 6.) The activity of background soil samples was less than 0.2 picocuries per gram; soil and sediment sample activity ranged from less than 0.1 to 9,990 picocuries per gram. (ORISE report at 6.)

It was originally deduced (memorandum for Carl J. Paperiello, Deputy Regional Director from Loren J. Hueter, Radiation Specialist on the subject of Report on Trip to General Chemical Corporation (Non-licensee) 5000 Warner Road, Cleveland, Ohio and to Northeast Ohio Regional Sewer District, 6000 Canal Road, Cleveland, Ohio (Docket No. 030-18276; License No. 34-17726-02) dated June 13, 1991), based on the history and analysis of layers of incinerator ash in the fill areas, that the cobalt-60 began entering the treatment facility in the late 1970's or early 1980's. The history of SWTC revealed that, after renovation of the incinerators between 1975 and 1978, the current ponds were put into use for the first time. The ponds were then cleaned for the first time from December 1982 to March 1983, and all the excavations placed in the north fill area. The ash from the evaporation ponds was removed in vertical sections, and spread horizontally in the fill areas. The only timing sequence that can be determined is that cobalt-60 contamination entered SWTC prior to the 1982 cleaning. The contamination apparently originated from discharges to the sewer system in the Cleveland area that is serviced by the District.

The District removes ash from the ponds every few years so that the facility

can continue to use the ponds and continue its water treatment process. The District has transferred the dried ash from the evaporation ponds to an onsite fill area at SWTC. The NRC approved the site characterization strategy for the ash removal and has conducted confirmatory surveys along with ORISE following the transfer of ash from the evaporation ponds. Radiological characterization of the facility is ongoing to better determine the amount of cobalt-60 that is actually present on the SWTC site.

III. DISCUSSION

The District's petition requests the NRC to require AMS to provide adequate financial assurance, available in the form of insurance, to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended, to cover any contamination that might be caused by loss of control of radioactive material by AMS. While applying to any contamination resulting from a future release from the AMS operation, the request in the Petition also appears to apply to the contamination already present at the District's SWTC. The NRC has treated the request in broad terms, i.e., as applying to possible future events resulting in offsite contamination as well as the currently existing contamination on the AMS site. (The District had filed a petition (dated March 3, 1993) pursuant to 10 C.F.R. § 2.206, requesting that the NRC require AMS to assume all costs resulting from the off-site release of cobalt-60 that has been deposited at the SWTC. That Petition is currently pending before the NRC.) The concerns which form the bases for the Petitioner's request and the evaluation of the staff are provided below.

A. Regulatory Framework.

1. Summary of Price-Anderson provisions

The Petitioner requests that the NRC apply the provisions of section 170 of the Atomic Energy Act of 1954, as amended ("Act"), 42 U.S.C. § 2210 ("Price-Anderson provisions"), to require AMS to obtain insurance for public liability. Section 170a. in part provides that:

> Each license issued under section 103 and 104 and each construction permit issued under section 185 shall, and each license issued under section 53, 63, or 81 may, for the public purposes cited in section 21., have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amount as the [Commission] in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection [170]b. to cover public liability claims.

Thus, section 170a. provides that the Commission must require all of its power reactor licensees to have and to maintain financial protection (e.g., liability insurance) to cover public liability claims. Nuclear reactors are licensed pursuant to either section 103 or 104 of the Act. Reactors at nonprofit educational institutions are exempt from the provisions of section 170a., but are subject to the provisions of 170k. Section 170a., however, also authorizes the Commission to exercise its discretion to determine whether materials licensees should be required to have and maintain financial protection.

2. Commission Application of Price-Anderson to Material Licensees

Because the Commission issued the AMS license under section 81 of the Act, the Commission may exercise its discretion under the Price-Anderson provisions, as discussed above, in determining whether to require AMS to have and to maintain

financial protection (i.e., liability insurance). As a matter of policy, the Commission generally has chosen not to require financial protection of a licensee whose license has been issued pursuant to sections 53, 63, or 81 of the Act. The rationale for this policy rests on the NRC's determination that the magnitude of compensation for potential personal injury or property damage associated with activities conducted under materials licenses is significantly less than that associated with the operation of facilities licensed pursuant to sections 103 or 104 of the 1954 Act (i.e., nuclear reactors). Not only is the quantity of radioactive material much less for material licensees than that contained in the inventories at reactor sites, but there are other significant differences. For example, the material licensee's radioactive material is in a non-pressurized, ambient-temperature state compared to a reactor's inventory, which is maintained in a highly energized condition or environment, characterized by high temperature and pressure. Accordingly, an accidental release of radioactive material from a material licensee's facility will be relatively confined compared to a reactor facility. This, in turn, leads to much lower potential for the need for involvement of offsite support for a material licensee's accidental release, as compared to an accidental release from a reactor.

In 1976, however, the Commission determined that there was a significant radiological hazard associated with the operation of some "plutonium processing and fuel fabrication plants." (Compare the definition of "plutonium processing and fuel fabrication plant" in 10 C.F.R. § 70.4 with that in 10 C.F.R. § 140.3(h). Not all such plants licensed pursuant to 10 C.F.R. Part 70 are required to have financial protection pursuant to

10 C.F.R. § 140.13a.) The Commission exercised its discretionary authority under the Price-Anderson provisions to require licensees of "plutonium processing and fuel fabrication plants" (as defined in 10 C.F.R. 140.3(h)), licensed under section 53 of the 1954 Act, to have financial protection in an amount equal to the maximum amount of liability insurance available from private sources. (See 10 C.F.R. §§ 70.4, 140.3(h), and 140.108.) Currently, no person holds a license to operate such a facility.

Finally, in order to assure that all licensees within a particular class are treated uniformly, it has been the policy of the Commission, in implementing the Price-Anderson provisions, to impose requirements upon a defined class of licensees by promulgating regulations of general applicability, rather than issuing orders to individual licensees. Notwithstanding the above, the Commission requires that licensees, and not the public, bear the burden of prompt cleanup of accidental contamination from releases in violation of Commission requirements.

8. Application of Price-Anderson to Existing Conditions

That discharge of cobalt-60 to the sanitary sewer has occurred is well established. Records of licensees in the District service area that were licensed for cobalt-60 indicate that licensees were authorized to discharge cobalt-60 to the sanitary sewerage under controlled conditions.

Insurance coverage in general, and under Price-Anderson in particular, however, is *prospective*, and does not cover pre-existing conditions such as

property damage that has already occurred. Any insurance required now could not be used to satisfy a claim by the District to pay for cleanup of the cobalt-60 contamination now on the District's site. Accordingly, the imposition of financial protection requirements (e.g., liability insurance) pursuant to section 170 on AMS would not provide the District with a remedy for the bases it asserts. Likewise, any contamination on the AMS site is also a pre-existing condition and would not be covered by any insurance required pursuant to section 170. Accordingly, the District's bases for its request do not warrant the NRC granting the request.

Moreover, with respect to AMS' onsite contamination, the scope of the Price-Anderson coverage is limited to claims for public liability, i.e., legal liability arising out of or resulting from a nuclear incident or precautionary evacuation except, *inter alia*, claims for loss of, or damage to, or loss of use of property which is located at the site and used in connection with the licensed activity (*See* section 11.w of the Act, 42 U.S.C. § 2014(w)); it does not provide funds for cleanup *per se*. (In general, a "nuclear incident" means any occurrence causing bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. *See* section 11.q of the Act, 42 U.S.C. § 2014(q).) With regard to the onsite contamination alleged by the District, therefore, requiring insurance pursuant to section 170 would be to no avail. In view of the foregoing, even if it were not a pre-existing condition, the contamination on the AMS site in and of itself does not provide a basis for requiring insurance pursuant to Price-Anderson.

In exercising its authority to protect the public health and safety pursuant to section 161 of the Act, 42 U.S.C. § 2201, the Commission has imposed requirements on its licensees to provide financial assurance for decommissioning which require the licensees to set aside funds to pay for remediation of any onsite contamination prior to license termination. See 10 C.F.R. § 30.35. With regard to the contamination on the AMS site and AMS' continued possession of byproduct material, funding of onsite cleanup is covered by the Commission's decommissioning funding plan requirements, which provide adequate protection for the public health and safety. On July 7, 1992, AMS provided decommissioning financial assurance by certification as permitted by 10 C.F.R. 30.35(c)(2), and will be required to include a decommissioning funding plan in its next application for license renewal; the current AMS license expires in December 1994. In view of the above, the District has not provided a basis for imposing additional requirements under Price-Anderson on AMS with regard to existing contamination on the AMS site or at the District's SWTC.

C. Possible Future Public Liability Claims

The possibility remains, nevertheless, that the contamination existing on the site might be spread to areas offsite or that future operations could result in offsite contamination. As set forth below, however, the District has not provided a basis for granting its request.

As discussed above, the Commission has adopted a policy of exercising its discretionary authority to apply the Price-Anderson provisions with respect to

classes of licensees rather than to individual licensees. The circumstances presented by the possibility of offsite contamination by AMS do not provide sufficient justification to deviate from that policy. The likelihood of accidental release of cobalt-60 from the AMS facility has diminished and continues to do so for several reasons, including the following: First, AMS is no longer authorized to manufacture sealed sources, and the use of raw material for this process has ceased. Second, efforts are being made by AMS to contain and dispose of loose radioactive material presently at the facility, decreasing their inventory substantially. Third, AMS is listed on the Site Decommissioning Management Plan, which provides for heightened NRC attention toward an objective of timely decontamination of the site to unrestricted use criteria and the eventual removal of the site from the list. Fourth, present disposal regulations allow disposal of only soluble radioactive material into the sanitary sewer, as discussed further below. In addition, the bases the District alleges in support of the Petition do not distinguish AMS from other materials licensees for the purposes of application of the Price-Anderson provisions. The District has not provided sufficient information, nor are we aware of information at this time, which would warrant extension of Price-Anderson to all materials licensees similar to AMS. In view of the above, the District's request concerning Price-Anderson coverage is denied. Moreover, because the Commission requires each licensee to be responsible for any remediation of offsite contamination resulting from a release of byproduct material in violation of regulations or license conditions, no action is required to modify the AMS License as requested by the District. In view of the foregoing, the District has presented no basis warranting the granting of its request.

The NRC notes that the 1991 revision to 10 C.F.R. Part 20, which became mandatory January 1, 1994, included several revised criteria for permissible release of radioactive material into the sanitary sewer. Since insoluble material was involved in a number of sewage treatment facility cases, the new rule eliminates the options to release either insoluble, or readily dispersible material, unless it is biological material, into a sanitary sewer system. Revised Part 20 also lowers allowable concentrations of radionuclides released into the sanitary sewer. Because a 1992 NRC study demonstrated that, under certain conditions, the potential to exceed the Part 20 public dose limit exists, NRC has contracted with Pacific Northwest Laboratory to perform additional studies on possible mechanisms at sewage treatment facilities that could lead to reconcentration of radionuclides. This multi-task contract began in October 1993; a report is due later this year. In connection with this study, the Commission has issued an advanced notice of proposed rulemaking in which the Commission has requested comments on whether an amendment to the current regulations governing the release of radionuclides from licensed nuclear facilities to sanitary sewer systems is needed. (59 Fed. Reg. 9146 (Feb. 25, 1994)). The facts regarding the District's SWTC were one set of circumstances prompting the Commission to issue the notice.[1]

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[1] The Commission recently expressed its views that although the Atomic Energy Act of 1954 preempts dual Federal-State regulation of radiation hazards, it does not prohibit actions by state or local authority on bases other than protection of public health and safety from radiological hazards. See letter dated 11/9/93 form M. Malsch, NRC to M. Fitzgerald, GAO; and letter dated 11/9/93 from M. Malsch, NRC, to M. McFadden, Laramie, Wyoming, City Attorney. The above matters do not provide a basis for granting the District's request, nor change the results of the analysis in this Decision.

Finally, it should be noted that the Commission has requested the NRC staff, in a Staff Requirement Memorandum dated June 28, 1993, to address the issue whether financial assurance for materials licensees for cleanup of an accident with the potential for significant contamination should be required. The staff will recommend that rulemaking be initiated if it appears that the benefit of such requirements outweighs the costs.

IV. CONCLUSION

The staff has carefully considered the request of the Petitioner. In addition, the staff has evaluated the bases for the Petitioner's request. For the reasons discussed above, I conclude that no substantial public health and safety concerns warrant NRC action concerning the request.

As provided by 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become final action of the Commission twenty-five (25) days after issuance unless the Commission on its own motion institutes review of the Decision within that time.

Dated at Rockville, Maryland, this 16th day of June 1994.

FOR THE NUCLEAR REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

DD-94-06

U.S. NUCLEAR REGULATORY COMMISSION

DOCKET NO. 030-16055

ADVANCED MEDICAL SYSTEMS, INC.

ISSUANCE OF DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

Notice is hereby given that the Director, Office of Nuclear Material Safety and Safeguards, has issued a decision concerning a Petition dated August 2, 1993, submitted by the Northeast Ohio Regional Sewer District regarding Advanced Medical Systems, Inc. (AMS).

By letter dated November 24, 1993, the NRC staff formally acknowledged receipt of the Petition and informed the Petitioner that their Petition would be treated as a request under 10 CFR § 2.206. The Petition requested the U.S. Nuclear Regulatory Commission to take action to require AMS to provide adequate financial assurance to cover public liability pursuant to section 170 of the Atomic Energy Act of 1954, as amended.

The Director of the Office of Nuclear Material Safety and Safeguards has determined to deny the Petition. The reasons for this Decision are explained in a "Director's Decision Under 10 CFR § 2.206" (DD-94-06), which is available for public inspection in the Commission's Public Document Room located at 2120 L Street, NW, DC 20555, and at the Local Public Document Room, Perry Public Library, 3753 Main Street, Perry, Ohio 44081.

A copy of this Decision will be filed with the Secretary for the Commission's review in accordance with 10 CFR § 2.206. As provided by this regulation, the

Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission on its own motion institutes a review of the Decision within that time.

Dated at Rockville, Maryland, this 16th day of June 1994.

FOR THE NUCLEAR REGULATORY COMMISSION

Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards