NUCLEAR ENERGY INSTITUTE

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PRM-8-1

April 17, 2002

Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

SUBJECT: Nuclear Energy Institute Petition for Rulemaking Regarding Amendments to 10 CFR Parts 8 and 150 Relating to the Application of Federal Preemption Law

Dear Ms. Vietti-Cook:

In accordance with 10 CFR § 2.802 of the Nuclear Regulatory Commission's (NRC or Commission) regulations, the Nuclear Energy Institute (NEI), on behalf of the commercial nuclear energy industry, hereby submits a Petition for Rulemaking Regarding Amendments to 10 CFR Parts 8 and 150 Relating to the Application of Federal Preemption Law.

The petition requests that the NRC amend its regulations to accurately state the governing principles of federal preemption and to clarify the appropriate boundaries between NRC authority and that of non-Agreement States and local governments. The petition also requests that the NRC General Counsel's formal interpretation of the preemptive scope of the Atomic Energy Act (AEA) be updated to reflect the Supreme Court's determinations in *Pacific Gas and Electric v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) and in a number of other important decisions rendered since its original publication over 30 years ago. Finally, the petition requests that the NRC implement a preemption determination process to enable interested persons to obtain timely and practical advice from the NRC on whether a particular state or local requirement is preempted by the AEA. The preemption determination process outlined in the petition is patterned after a similar process in use by the U.S. Department of Transportation for the transportation of hazardous materials.

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Adoption of the requested amendments and implementation of the preemption determination process is particularly important at this point because unauthorized regulatory activities by non-Agreement States and local governments are occurring throughout the country, contrary to both the Supremacy Clause of the United States Constitution and the Atomic Energy Act (AEA). These activities involve direct regulation of radiological hazards of AEA materials. They create confusion, place unnecessary burdens on industry, jeopardize the consistent and effective regulation of materials subject to NRC regulation, and may adversely impact public health and safety. Because existing NRC regulations and interpretations do not state current principles of federal preemption law, they do not adequately address the problem. As such, there is a pressing need to take the action identified in the rulemaking petition to reduce the potential for the unauthorized regulation of activities and materials subject to exclusive NRC regulation under the AEA.

NEI believes that by establishing rules clearly articulating current principles of federal preemption law, updating the General Counsel's legal interpretation of the law, and implementing a preemption determination process the NRC can promote greater understanding by the public and state and local policymakers of the NRC's exclusive authority under the AEA. This greater understanding should result in a reduction of unauthorized state and local regulation of AEA materials, and enhance the NRC's ability to ensure that the goals of the AEA are fulfilled.

If you have any questions regarding this Petition for Rulemaking, please contact me at 202.739.8139 or rwb@nei.org or Ellen Ginsberg, NEI Deputy General Counsel, at 202.739.8140 or ecg@nei.org.

Respectfully submitted,

Robert W. Bishop/ECG

Robert W. Bishop

c: Karen D. Cyr, General Counsel

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of a Proposed Rulemaking Regarding Amendments to 10 CFR Parts 8 and 150 Relating to the Application of Federal Preemption Law	)))))	Docket No. PRM-8-1

PETITION FOR RULEMAKING

I. INTRODUCTION

Through this petition for rulemaking ("Petition"), the Nuclear Energy Institute ("NEI") respectfully requests that the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), following notice and opportunity for comment: (1) add a provision to 10 CFR Part 150 clearly articulating applicable principles of federal preemption under the Atomic Energy Act of 1954, as amended ("AEA");[1] (2) update the NRC General Counsel's formal interpretation regarding NRC jurisdiction over nuclear facilities and materials under the AEA, as set forth in 10 CFR § 8.4; and (3) establish a process in 10 CFR Part 150 by which interested persons may obtain an NRC Staff determination as to whether a particular state or local requirement is preempted under the AEA.

NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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[1] Pub. L. No. 83-703, 68 Stat. 919.

NEI believes that this petition presents compelling evidence of the need for the NRC to amend its regulations in order to reduce the potential for unauthorized state and local government regulation of activities and materials subject to exclusive NRC regulation under the AEA. The unauthorized imposition of regulatory requirements by non-Agreement States and localities is occurring throughout the country, contrary to the Supremacy Clause of the United States Constitution[2] and the AEA. These activities create confusion, place unnecessary burdens on industry, and jeopardize the consistent and effective regulation of materials subject to NRC regulation under the AEA. This situation persists, at least in part, because the agency's interpretive regulations do not reflect the current state of the law.

Existing NRC regulations, including the General Counsel's formal interpretation of what is preempted under the AEA, should be clarified to conform to the current governing principles of federal preemption. This petition specifically discusses the need for the proposed regulatory changes, the legal principles of federal preemption under the AEA, the NRC General Counsel's formal interpretation of those principles, and the NRC's Agreement State Program. The petition also provides examples of unauthorized state and local regulatory actions that this petition is intended to address and remedy. Finally, the petition includes suggested text for the proposed rules and explains how the proposed revisions will help prevent future problems in this area.

II. NEED FOR THIS RULEMAKING

Since Congress passed the Atomic Energy Act in 1946, the field of nuclear energy has been under exclusive federal control.[3] The AEA retains its preemptive force today, ensuring that the federal government is capable of maintaining uniform standards governing the possession and use of source material, byproduct material, and special nuclear material ("AEA materials")

[2] U.S. Const. Art. VI, cl. 2.

[3] *See* Pub. L. No. 79-585, 60 Stat. 755 (1946).

nationwide. The AEA expressly permits states to regulate the radiation hazards of AEA materials only pursuant to the strictures of Section 274 (i.e., the NRC's "Agreement State" Program)[4]. The AEA also expressly provides that non-Agreement states and local governments may regulate AEA materials only "*for purposes other than* protection against radiation hazards."[5]

Despite the NRC's clear authority over the radiological hazards of AEA materials, there are numerous examples throughout the country where *non*-Agreement States and local governments have undertaken to regulate the radiological hazards of AEA materials. In some instances, these actions by non-Agreement States and local governments have resulted in litigation.[6] We believe such litigation could be averted in the future by a clearer NRC statement of federal preemption under the AEA and by providing a process for interested persons to obtain an NRC determination on whether a particular state or local requirement is preempted.

One of the principal purposes of providing the NRC with exclusive authority to regulate AEA materials is to ensure that decisions related to protection of public health and safety are made by an agency with the requisite expertise and resources. The NRC and Agreement States (with NRC assistance) have the resources and expertise to protect the public from the potential dangers associated with AEA materials. In contrast, non-Agreement States and local governments may not be equipped to effectively regulate these materials. The regulation of AEA materials by inexperienced and unqualified regulatory bodies may adversely impact public health and safety.

[4] Codified at 42 U.S.C. § 2021.

[5] AEA, § 274 (codified at 42 U.S.C. § 2021(k)) (emphasis added).

[6] *See, e.g.*, United States v. Kentucky, 252 F.3d 816 (6th Cir. 2001); Interstate Nuclear Services Corp. v. City of Santa Fe, No. CIV 98-1224, slip op. (D.N.M. Jan. 27, 2000).

Additionally, regulation by non-Agreement States and local governments results in non-uniform and inconsistent regulation of AEA materials. Although permissible in some cases, regulatory differences between localities have the potential to, in effect, force industry to move elsewhere to operate their businesses. Agreement States may, in some cases, establish more stringent regulations than the NRC, but they may not do so if the state regulations "preclude[] a practice authorized by the Atomic Energy Act, in the national interest."[7] Even if a local regulation does not actually bar an activity involving AEA materials, non-uniform regulations place unnecessary burdens on industry and create confusion and uncertainty in the overall national regulatory scheme.

More than 30 years ago the NRC General Counsel issued a formal interpretation of the preemptive scope of the AEA.[8] The NRC General Counsel has not updated its formal interpretation since its original publication in 1969. Therefore, that interpretation does not reflect the United States Supreme Court's determinations in *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*[9] or the Supreme Court's rulings in a number of other important decisions rendered after 1969. Thus, the agency's official position on preemption, on which licensees, the public, and states and localities rely, no longer fully reflects applicable principles of federal preemption under the AEA.

Since Congress amended the AEA in 1959 by adding Section 274, "Cooperation with States," the NRC has implemented a carefully controlled program to permit "Agreement States" to assume some of the Commission's exclusive regulatory authority under the AEA. That fact

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[7] Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs, 62 Fed. Reg. 46517 (Sept. 3, 1997); *see also* Final Recommendations on Policy Statements and Implementing Procedures for: Statement of Principles and Policy for the Agreement State Program and Policy Statement on Adequacy and Compatibility of Agreement State Programs, SECY 97-054 (March 3, 1997).

[8] *See* 10 CFR § 8.4.

notwithstanding, non-Agreement States and local governments have intruded into the field occupied by the AEA without any NRC oversight or supervision and, indeed, without NRC awareness in some cases. This has resulted in a patchwork quilt of unauthorized and conflicting state and local requirements.

Furthermore, no readily available process exists for interested persons (such as state and local governments and licensees) to obtain timely and practical advice from the NRC on whether a particular state or local requirement is preempted by the AEA. Such a process would not only provide the agency's view of the requirement at issue, but also would serve as a mechanism to make the agency aware of actions by a state or locality that intrude into a federally preempted area. While the agency's determinations presumably would not be binding on a court, these determinations are likely to provide useful guidance both to the party requesting the determination, the nonfederal government entity involved, and all other interested parties. Although the determination process could take several forms, precedent exists for instituting a process that provides for stakeholder notice and comment and requests for correction or reconsideration.[10]

By updating the NRC's legal interpretation, revising its regulations to clearly articulate principles of federal preemption law, and implementing a preemption determination process, the NRC can clarify that it retains exclusive authority under the AEA and, thereby, reduce the potential for unauthorized state and local regulation of AEA materials. This action also would enhance the NRC's ability to ensure that the overall goals of the AEA are fulfilled.

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[9] 461 U.S. 190 (1983).

[10] *See* 49 CFR Part 107.

III. LAW OF FEDERAL PREEMPTION

A. *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983).

The Supreme Court addressed federal preemption under the AEA in the landmark case *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983). In that case, utilities challenged a state statute conditioning future nuclear power plant construction on findings by the California State Energy Resources Conservation and Development Commission that "adequate storage facilities and means of disposal are available for nuclear waste."[11] The utilities argued that the state law was invalid because it was preempted by the AEA.[12]

Before determining whether the California statute was preempted, the Court evaluated whether Congress had preempted the entire field of nuclear health and safety regulation. The Court noted that Congress may preempt state authority in one of three ways: (1) express preemption; (2) implied field preemption; or (3) implied conflict preemption. Express preemption occurs when Congress states that it is preempting state law directly -- in "express terms." In contrast, implied field preemption occurs through the creation of a "scheme of federal regulation so pervasive that Congress left no room to supplement it."[13] Finally, implied conflict preemption occurs "where Congress has not entirely displaced state regulation in a specific area, [but] state law is preempted to the extent that it actually conflicts with federal law."[14] The Court

[11] *Pacific Gas & Electric*, 461 U.S. at 194.

[12] *See id.* at 198.

[13] *Id.* at 203-204 (citations omitted).

[14] *Id.* at 204 (citations omitted).

determined that Congress had preempted state and local regulation of the entire field of the health and safety aspects of AEA materials through implied field preemption.[15]

The Court also stated that despite the federal government's preemptive authority in a given area -- such as the health and safety aspects of AEA materials -- state and local governments may regulate in an area if the state and local requirements serve a *different purpose* than the purpose furthered by the federal regulations.[16] For instance, in *Pacific Gas and Electric*, the Court determined that the state statute was *not* preempted by the AEA because the rationale for the statute was *strictly economic and not the protection of the public from radiation hazards*.[17] Indeed, if the state's purpose was protection of the public from radiation hazards, the state statute would have been preempted by the AEA. Thus, *Pacific Gas and Electric* established that a state or local requirement is preempted if its *purpose* is to regulate matters within the occupied field.

B. The Law Since *Pacific Gas & Electric*

Since 1983, a number of Supreme Court decisions have refined further the principles of federal preemption. Subsequent Supreme Court precedent clearly stands for the following principles: (1) a state or local requirement may still be preempted under the AEA even if it has a purpose other than, or in addition to, protection of the public from the radiological hazards of AEA materials; (2) a state or local requirement regulating the health and safety aspects of AEA materials is preempted, *regardless* of its purposes or the motivation behind it, if it has a "direct and substantial" *effect* on the health and safety aspects of AEA materials; and (3) state and local

[15] *Id.* at 206-07; *see also* G.J. Leasing Co., Inc. v. Union Elec. Co., 825 F. Supp. 1363, 1381 (S.D. Ill. 1993).

[16] *See Pacific Gas*, 461 U.S. at 212.

[17] *See id.* at 212-14. Likewise, the Seventh Circuit has noted that the NRC has "exclusive authority to regulate radiation hazards associated with the materials and activities covered by the AEA," and that

regulation of the health and safety aspects of AEA materials, without approval of the Commission under its Agreement State program, clearly is preempted by the AEA.

A state or local requirement may be preempted by the AEA even if it is motivated by purposes other than, or in addition to, protection of public health and safety from AEA materials. *Gade v. National Solid Wastes Management Association*,[18] involved a challenge to regulations promulgated by the Illinois Environmental Protection Agency ("Illinois EPA") which provided for the training, testing, and licensing of hazardous waste site workers. The utilities argued that the federal Occupational Safety and Health Act ("OSH Act") preempted the regulations.[19]

In *Gade*, the Court considered whether the Illinois regulations were saved from the preemptive effect of the OSH Act since they had a purpose other than, or in addition to, occupational safety and health.[20] Illinois argued "if the state legislature articulates a purpose other than (or in addition to) workplace health and safety, then the OSH Act loses its preemptive force."[21]

The Supreme Court rejected this argument. The Court found that legal "precedents leave no doubt that a dual impact state regulation cannot avoid OSH Act pre-emption simply because

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"state and local agencies retain the right to regulate non-radiation hazards." Kerr-McGee Chem. Corp. v. City of Chicago, 914 F.2d 820, 826 (citing Illinois v. Kerr-McGee, 677 F.2d 571, 580-81 (7th Cir. 1982).

[18] 505 U.S. 88 (1992).

[19] Specifically, the OSH Act grants the Secretary of Labor authority to promulgate rules related to worker health and safety. This authority is delegated to the Occupational Safety and Health Administration ("OSHA"). In this case, the Superfund Amendments and Reauthorization Act of 1986 ("SARA") required the Secretary of Labor to implement standards for the training of hazardous waste workers. *See Gade*, 505 U.S. at 92-94. The utilities argued that these standards preempted state regulations and laws, because SARA's implementing rules were promulgated pursuant to the OSH Act, which grants the federal government preemptive authority in the area of worker safety and health. *Id.* at 92-95. The Illinois EPA responded that the Federal OSH Act's "pre-emptive effect should not be extended to state laws that address public safety *as well as* occupational safety concerns." *Id.* at 104 (emphasis added). In other words, the Illinois agency argued that, so long as its regulations served legitimate purposes in addition to those preempted by a federal statute, the regulations should be upheld.

[20] *Id.* at 105-06.

[21] *Id.* at 105.

the regulation serves several objectives rather than one."[22] If that were the case, the purposes of the federal OSH Act regulation would be defeated if a state could "enact measures stricter than [the OSH Act's] and largely accomplished through regulation of worker health and safety simply by asserting a non-occupational purpose for the legislation."[23] Consequently, federal law can preempt a state or local requirement if there is even one purpose among many that conflicts with the federal law.[24] The principle enunciated in *Gade* appears time and again in federal case law.[25].

The Supreme Court also has concluded that the AEA preempts state and local requirements if they have the *effect* of infringing upon the NRC's regulatory authority, regardless of the purpose or motivation behind the requirement. In *English v. General Electric Co.*,[26] the issue was whether a state tort claim for intentional infliction of emotional distress, brought by an employee of a nuclear fuel fabrication facility against her employer, was preempted by a federal whistleblower provision. The Court determined that the state law was not preempted, but in explaining its decision, clarified that *Pacific Gas and Electric* "did not suggest that a finding of safety motivation was *necessary* to place a state law within the preempted field."[27] The Court explained that a local law is preempted if it has a "direct and substantial effect" on nuclear health

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[22] *Id.* at 106.

[23] *Id.*

[24] *See id.* at 106 (citing *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

[25] Several district courts have relied on *Gade* and *Perez v. Campbell* in finding that local smoking ordinances are preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA") *See, e.g., Philip Morris, Inc. v. Harshbarger,* 122 F.3d 58, 67 (1st Cir. 1997); *Rockwood v. City of Burlington*, 21 F. Supp.2d 411, 418 (D. Vt. 1998); *Chiglo v. City of Preston*, 909 F. Supp. 675, 677 (D. Minn. 1995). These cases also have been cited for the same principles in decisions concerning other federal statutes that preempt local and state laws. *See, e.g., Grant's Dairy-Maine, LLC v. Comm'r of Maine Dept. of Ag.*, 232 F.3d 8, 15 (1st Cir. 2000); *Blue Circle Cement, Inc. v. Board of County Comm'r*, 27 F.3d 1499 (10th Cir. 1994).

[26] 496 U.S. 72 (1990).

[27] *English*, 496 U.S. at 84 (emphasis in the original).

and safety, even if the local requirement was not enacted or promulgated for health and safety purposes.[28]

To further illuminate the issue, the Supreme Court in *English* explained that state laws affecting "tangentially some of the resource allocation decisions that might have a bearing on radiological safety" such as "state minimum wage and child labor laws" are not preempted by the AEA.[29] Likewise, a state tort claim may have a tangential relationship to the health and safety aspects of radiological safety, but not necessarily a "direct and substantial effect" on the health and safety aspects of radiological safety.[30] Therefore, the Court in *English* found that the state law in question was not preempted because it was not enacted to regulate the health and safety aspects of AEA materials nor did it have a "direct and substantial effect" on the health and safety aspects of AEA materials. Although, in *English,* the Court did not determine that the state law was preempted, the Court's written opinion provides helpful guidance that is still applicable today.

In fact, the Court in *Gade* relied on the principles set forth in the *English* decision. In *Gade*, the Court reemphasized that "[t]he key question is . . . at what point the state regulation *sufficiently interferes* with federal regulation that it should be pre-empted under the Act."[31] The Court stated that while "part of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part of the field is defined by the state law's actual effect."[32] The Court in *Gade* held:

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[28] *English,* 496 U.S. at 85.

[29] *Id.*

[30] *Id.*

[31] *Gade*, 505 U.S. at 107; *see also Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

[32] As support for this statement, the Court cited *English v. General Electric Co* 496 U.S. 72 (1990).

> In sum, a state law requirement that directly, substantially, and specifically regulates occupational safety and health is an occupational safety and health standard within the meaning of the Act. That such a law may also have a nonoccupational impact does not render it any less of an occupational standard for purposes of pre-emption analysis.[33]

The Supreme Court also has considered whether the OSH Act preempts "nonconflicting state regulations . . . ."[34] The *Gade* case, previously discussed, is particularly instructive in this regard because of the very close parallels between: (1) the provisions of the OSH Act permitting delegation to the states of federal authority for occupational safety and health; and (2) the AEA's Agreement State program authorizing states to assume certain of the NRC's regulatory responsibilities. The *Gade* decision pointed out provisions of the OSH Act that authorize states to assume responsibility for the development and enforcement of occupational safety and health standards after review and approval of the state's plan by OSHA.

The Court held as follows:

> [W]e hold that nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly preempted as in conflict with the full purposes and objectives of the OSH Act. The design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that *the only way a state may regulate an OSHA regulated occupational safety and health issue is pursuant to an approved plan that displaces the federal standards.*[35]

The parallels between the OSH Act provisions that the Court analyzed in *Gade*, and the comparable AEA provisions demonstrate that the Court's holding in *Gade* is directly applicable to state (and local) regulation under the AEA:

- Under Section 18(b) of the OSH Act, a state "shall" submit a plan for OSHA review and approval if it develops and enforces

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[33] *Gade*, 505 U.S. at 105.

[34] 505 U.S. at 96.

[35] *Id.* at 98-99 (citation omitted) (emphasis added).

occupational safety and health requirements under that Act. The Court held that the "unavoidable implication of this provision is that a state may not enforce its own . . . standards without obtaining the Secretary's approval . . . ."[36]

Similarly, under Section 274(d) of the AEA, the Commission may not enter into an agreement to discontinue its regulatory authority and permit a state to assume such authority unless it approves the state program, finding that it is both adequate to protect public health and safety and compatible with the Commission's program. The "unavoidable implication" is that no state (and certainly no local government) may regulate AEA materials without first obtaining NRC approval.

- Section 18(c) of the OSH Act "sets forth conditions that must be satisfied before the Secretary can approve a [state] plan . . . . State standards that affect interstate commerce will be approved only if they 'are required by compelling local conditions' and 'do not unduly burden interstate commerce.'"[37] The Court in *Gade* stated that "[i]f a state could supplement federal regulations without undergoing the § 18(b) approval process, then the protections that § 18(c) offers to interstate commerce would easily be undercut."

  Likewise, under Section 274(d) of the AEA, conditions are established before the Commission can approve an agreement with a state, including requirements to ensure the "compatibility" of the proposed state requirements that are based primarily on interstate commerce considerations. As in the case of the OSH Act, a state or local government may not supplement the Commission's regulations without undergoing the Section 274 approval process, and thus, so "easily undercut" the protections of the AEA.

- Section 18(f) of the OSH Act, which gives the Secretary of Labor authority to withdraw approval of a state plan, "also confirm[ed the Court's] view that states are not permitted to assume an enforcement role without the Secretary's approval . . . ."[38]

  Similarly, under Section 274(j), the Commission may terminate or suspend an Agreement with a state and reassert its regulatory authority.

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[36] *Id.* at 99 (emphasis added).

[37] *Id.* at 100.

[38] *Id.* at 101.

The Court in *Gade* concluded that, "[l]ooking at the provisions of § 18 as a whole . . . the OSH Act precludes *any* state [occupational safety or health] regulation . . . unless a state plan has been . . . approved . . . . Congress sought to promote occupational safety and health while at the same time avoiding duplicative, and possibly counterproductive, regulation. . . . We cannot accept [the] argument that the OSH Act does not preempt nonconflicting state laws because those laws, like the Act, are designed to promote worker safety. In determining whether state law 'stands as an obstacle' to the full implementation of a federal law . . . 'it is not enough to say that the ultimate goal of both federal and state law' is the same . . . ."[39] These same principles apply in the context of the AEA.

IV. THE GENERAL COUNSEL'S INTERPRETATION OF NRC JURISDICTION UNDER THE ATOMIC ENERGY ACT

10 CFR Part 8 contains various formal NRC General Counsel interpretations of the NRC's authority under the AEA. 10 CFR § 8.4, in particular, sets forth the General Counsel's interpretation of the Commission's jurisdiction over nuclear facilities and materials under the AEA. This interpretive rule was promulgated in 1969, before the Supreme Court's decision in *Pacific Gas and Electric*,[40] and therefore, presents the General Counsel's interpretation of the law as it existed in 1969.

Section 8.4 correctly states that the "Atomic Energy Act of 1954 had the effect of preempting to the Federal Government the field of regulation of nuclear facilities and byproduct,

[39] *Id.* at 102-03 (citations omitted).

[40] Section 8.4 cites several authorities in support of the General Counsel's interpretation, including two published state court opinions, two opinions of state attorneys general, and a document prepared by the New York State Bar Association. In addition to the lack of significant weight such citations should be given in light of more recent United States Supreme Court decisions, these cases and legal authorities all preceded *Pacific Gas and Electric*. Thus, the "judicial precedents and legal authorities" relied on by the General Counsel are out of date, and do not provide an accurate discussion of federal preemption law to state and local governments, as well as to industry and the public-at-large. This, itself, warrants updating Section 8.4. Furthermore, while Section 8.4 generally is accurate as far as it goes, it does not provide a complete summary of applicable federal preemption principles.

source, and special nuclear materials." Additionally, the rule correctly describes the Agreement State program under Section 274b of the AEA.[41] However, because the principles embodied in *Pacific Gas and Electric, Gade, English,* and other cases decided since 1969 are absent from the analysis, misunderstandings of the NRC's authority have occurred and can be expected to continue.

Confusion about the AEA's preemptive effect is readily apparent from correspondence between the NRC and the City of Laramie, Wyoming. In September 1993, the City of Laramie became concerned about potential liability for radiation levels in its municipal sludge. In an attempt to address its concerns, a Laramie city official asked the NRC whether "a municipality lawfully [may] regulate or prohibit the discharge of radioactive materials into its wastewater treatment system, with or without an industrial pretreatment program mandated by the EPA[.]"[42] In what has become known as the "Laramie Letter," the NRC simply restated 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."[43] The Laramie Letter stated that Laramie was thus "not compel[led]" to accept radioactive discharges, so long as it had "sound reasons, other than radiation protection," for its regulations.[44] The letter noted that materials regulated under the AEA were exempt from regulation under the Clean Water Act, but

[41] *See* discussion, *infra* Part V.

[42] *See* Letter from Martin G. Malsch, NRC Deputy General Counsel for Licensing and Regulations, to Hugh B. McFadden, Laramie City Attorney (Nov. 9, 1993).

[43] *Id.*

[44] *Id.*

that new NRC regulations, revised to address potential reconcentration of radioactive materials in sewage sludge, would take effect in January 1994.[45]

The City of Laramie decided not to implement the regulation it was considering. As the General Accounting Office noted in a 1994 report: "[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 treatment system."[46]

Since 1993, states and local governments have misconstrued the Laramie Letter to justify broader regulatory authority than the law actually allows. The Laramie Letter also has been used as authority for the passage of laws in the preempted field of nuclear health and safety, using pretextual economic considerations as a basis.

For example, in 1996, the City of Santa Fe, New Mexico, sought to enact local ordinances regulating radionuclide discharges into its sewers.[47] Although Santa Fe officials were aware that such a regulation would be preempted by the AEA,[48] Concerned Citizens for Nuclear Safety ("CCNS") used the Laramie Letter as a basis for suggesting that Santa Fe could avoid preemption if it regulated radionuclides for economic -- as opposed to health and safety -- reasons.[49] According to CCNS, the Laramie Letter advises that municipalities like Santa Fe "have the legal authority to regulate discharges of radionuclides in furtherance of the economic interests of the City, without running afoul of the NRC's preemption of regulation for safety

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[45] *Id.* at 2.

[46] *GAO Report: Action Needed to Control Radioactive Contamination at Sewage Treatment Plants*, GAO/RCED-94-133 (May 1994).

[47] *See Interstate Nuclear Services Corp. v. City of Santa Fe*, CIV 98-1224 BB/LFG, slip op. at 3-9 (D.N.M. Jan. 27, 2000).

[48] *See id.*

purposes."[50] Within days of receiving a copy of the Laramie Letter forwarded to the city by CCNS,[51] Santa Fe officials drafted a resolution authorizing drafting or revision of the sewer code to restrict the discharge of radioactive materials.[52] The Laramie Letter apparently served as the basis for Santa Fe's incorrect belief that it had the authority to regulate AEA materials. Misuse of the Laramie Letter -- even if inadvertent -- is likely to continue if the NRC does not clarify the General Counsel's interpretation of NRC jurisdiction under the AEA to make it consistent with the current state of preemption law.

V. THE AGREEMENT STATE PROGRAM

As explained above, the AEA grants the NRC exclusive authority to regulate the health and safety aspects of AEA materials. The only exception to this rule of law is that, pursuant to Section 274 of the AEA, the NRC may enter into Agreements with individual states for the state to assume regulatory responsibility over certain AEA materials.

The NRC has developed a stringent process by which states receive authorization to regulate AEA materials. This process is designed to ensure, among other things, that the state program is adequate to regulate the health and safety aspects of AEA materials. An Agreement State's radiation control program is "adequate to protect the public health and safety if administration of the program provides reasonable assurance of protection of the public health and safety in regulating the use of source, byproduct, and small quantities of special nuclear

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[49] *See* Letter from Caron Balkany, Concerned Citizens for Nuclear Safety, to Patricio Guerreroritz, Santa Fe Public Utilities Director (May 31, 1996).

[50] *Id.*

[51] The copy of the Laramie Letter provided as an Exhibit during the *Interstate Nuclear Services Corp. v. City of Santa Fe* trial, bore fax signatures showing the Laramie Letter had been sent to CCNS from the NRC on June 6, 1996, and then forwarded to Royallen Allen, a Santa Fe public works official.

[52] City of Santa Fe Resolution 1996-35. The passage of the Santa Fe Ordinance and the ensuing litigation are discussed in Section VI.

materials . . . as identified by Section 274b of the AEA."[53] In order to ensure "adequacy" of a potential Agreement State program, the NRC evaluates the state's: (1) legislation and legal authority; (2) licensing process; (3) inspection and enforcement procedures; (4) personnel; and (5) response to events and allegations.[54]

The NRC also must determine that a potential Agreement State's regulatory program is "compatible with applicable NRC regulations."[55] The legislative history of Section 274 indicates that the purpose of the "compatibility" requirement is to ensure uniform national standards.[56] According to the NRC, a state regulation is compatible with NRC regulations if it "does not create conflicts, duplications, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement materials on a nationwide basis."[57] In executing this directive, the NRC has determined that certain NRC requirements, including basic radiation protection standards, are so critical to the fulfillment of the NRC's health and safety mission that Agreement States must adopt them essentially verbatim.[58]

As the NRC has noted:

> The concept of compatibility does not directly address matters of health and safety within a particular Agreement State; such matters are addressed directly under adequacy. However, many program elements for compatibility may affect public health and safety; therefore, they also may be considered program elements for adequacy. Further, basic radiation protection standards and program elements with transboundary implications, although

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[53] *See* Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs, 62 Fed. Reg. at 46524.

[54] *See id.* at 3.

[55] 42 U.S.C. § 2021(d)(2).

[56] *See id.*

[57] *See* Statement of Principles and Policy for the Agreement State Program; Policy Statement on Adequacy and Compatibility of Agreement State Programs, 62 Fed. Reg. at 46524.

[58] *See* NRC Handbook 5.9, Adequacy and Compatibility of Agreement State Programs, (Feb. 27, 1982) at 2.

> important for health and safety within the [s]tate, should be uniform nationwide for compatibility purposes.[59]

Following NRC review of an Agreement State's proposed regulatory program, the state's Governor and the Chairman of the NRC enter into an agreement outlining the state's responsibilities and authority to regulate one or more types of AEA material. Once the agreement is signed, the Agreement State is subject to continuing oversight by the NRC, which must "periodically review" the state's actions and can "terminate or suspend all or part" of the agreement.[60] While an Agreement State regulates AEA materials, the NRC continues to oversee the state's implementation of its program and provides aid to the state by rendering various services to ensure that the health and safety aspects of AEA materials are adequately regulated.[61]

This system of careful oversight is to be contrasted with the *complete absence* of NRC controls over non-Agreement State and local regulatory programs. The underlying assumption apparently is that states and local governments understand the exclusive nature of the NRC's authority over the radiological hazards of AEA materials, and that they avoid establishing regulations within the preempted field. As discussed in Section VI below, that assumption has proven to be incorrect.

VI. EXAMPLES OF IMPROPER ACTIONS BY STATES/LOCALITIES

There are numerous instances throughout the country in which local governments and non-Agreement States are, without any statutory authority and without any NRC oversight, regulating the radiological hazards of AEA materials. This section provides five such examples

[59] *Id.* at 2-3.

[60] 42 U.S.C. § 2021(j).

[61] For example, the NRC provides training courses and workshops, evaluates technical licensing and inspection issues raised by Agreement States, and evaluates proposed state rule changes. Additionally, the NRC coordinates with Agreement States on the reporting of event information and on responses to allegations reported to the NRC involving Agreement States.

to highlight the fact that unauthorized state and local regulation of AEA material is not an isolated problem, and thus, is in need of generic resolution by the agency.[62]

A. Santa Fe, New Mexico Sewer Discharge Ordinance

In 1997, the City of Santa Fe, New Mexico adopted Ordinance 1997-3 barring all industrial users of its sanitary sewer system that handle "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. Further, Santa Fe's Ordinance specifically referenced the NRC's discharge limits at 10 CFR Part 20, Appendix B, Table III, and imposed limits *fifty times* more stringent.

UniTech Services Group, Inc. ("UniTech"),[63] which owns a nuclear laundry facility in Santa Fe, filed a lawsuit alleging that the Ordinance was preempted by the AEA.[64] Discovery disclosed that the City's real purpose in passing the Ordinance was to regulate UniTech's discharge of radioactive wastewater to the local sewer system[65] -- a perceived radiation hazard. UniTech argued that the Santa Fe Ordinance was preempted by federal and state law. The court ruled that state law preempted the ordinance.[66] The court, in dictum, however, stated that

[62] The examples in this section are not intended to be an exhaustive list of unauthorized state and local efforts. In addition, there are local National Pollutant Discharge Elimination System ("NPDES") permits under the Clean Water Act, interstate commission water quality regulations, and other local and state requirements that directly regulate AEA materials. Thus, it is essential that any effort by the NRC to clarify its exclusive regulatory authority be broad enough to encompass other types of unauthorized state and local regulation.

[63] Formerly, "Interstate Nuclear Services Group, Inc."

[64] *See Interstate Nuclear Services Corp. v. City of Santa Fe*, No. CIV 98-1224, slip op. (D.N.M. Jan. 27, 2000).

[65] In the weeks preceding the enactment of the Santa Fe Ordinance, the City had been focusing on UniTech. *See* Admin. Compliance Order, May 14, 1996; City Council Resolution 1996-31, May 29, 1996. City Council minutes demonstrate that the purpose of the Ordinance was to prevent radionuclide discharges, such as those discharged by UniTech. *See, e.g.,* City Council Minutes, Feb. 12, 1997.

[66] *See id.* at 14.

"substantial legal precedent might . . . support federal preemption."[67] Ultimately, the City of Santa Fe consented to a judgment against it on UniTech's federal preemption claim.[68] Nevertheless, the City's actions resulted in an interruption of UniTech's federally-licensed activities at Santa Fe for well over two years.

The clear purpose of the Santa Fe Ordinance was to regulate the radiological hazards of AEA materials. Its clear effect was to impose restrictions on discharges of AEA materials fifty times more stringent than those of the NRC.

B. Commonwealth of Pennsylvania Solid Waste Facility Regulations

Although the Commonwealth of Pennsylvania is not an Agreement State,[69] Pennsylvania's Department of Environmental Protection ("DEP") has adopted rules regulating AEA materials.[70] These rules require solid waste facilities to: (1) install radiation monitoring equipment at the entrance to solid waste facilities; (2) implement and obtain approval of a radiation protection action plan in the event of a radiation alarm; (3) monitor for radiation in accordance with a DEP Guidance Document;[71] (4) conduct radiological surveys of vehicles; and (5) notify the DEP of a radiation alarm or if certain dose rates are detected.

The DEP's Guidance Document states that the DEP "has the responsibility of protecting the *health and safety* of the citizens of the Commonwealth and the environment from toxic and hazardous materials in the environment. This includes most sources of radiation."[72] The

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[67] *Id.*

[68] *See* Settlement and Release Agreement, Offer of Judgment, and Notice of Acceptance of Judgment, *Interstate Nuclear Services Corp. v. City of Santa Fe*, No. CIV 98-1224, slip op. (D.N.M. Jan. 27, 2000).

[69] Pennsylvania has taken steps to become an Agreement State, but has not yet entered into an Agreement with the NRC.

[70] 25 Pa. Code §§ 273.140a; 273.223.

[71] DEP, Guidance Document on Radioactivity Monitoring at Solid Waste Processing and Disposal Facilities (Sept. 16, 2000) ("DEP Guidance Document").

[72] *Id.* at 6 (emphasis added).

Guidance Document additionally states that a primary impetus for the regulations is that radioactive material often has been detected at municipal waste facilities. Radiation is defined as "[t]he ionizing particles (alpha, beta, others) or photons (x or gamma ray) emitted by radioactive materials in the process of decay or nuclear transformation."[73] This definition encompasses AEA materials. Thus, Pennsylvania -- a non-Agreement State -- is regulating AEA materials for health and safety purposes, and the effect of the regulations is to directly control AEA materials.

C. Oak Ridge, Tennessee Sewage Sludge Radionuclide Limits

The City of Oak Ridge, Tennessee also is regulating AEA materials. This is particularly problematic because no statutory authority exists for any local government to regulate AEA materials -- regardless of whether the state in which the locality is located is an Agreement State. Nevertheless, Oak Ridge has implemented a site-specific, risk-based methodology for establishing limits for its sewage sludge.[74] The methodology was promulgated because Oak Ridge's Wastewater Treatment Plant receives "radionuclides from state-licensed facilities, a local hospital, and the Department of Energy (DOE) Y-12 Plant" that may be disposed into the sewage sludge.[75] At the center of this methodology is the Industrial Pretreatment Program ("IPP"). According to the Oak Ridge Department of Public Works, the IPP was adopted pursuant to the Clean Water Act.[76] Oak Ridge used the sewage sludge criteria outlined in the IPP to establish facility specific discharge limits for entities that discharge radioactive materials

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[73] *Id.*

[74] *See* Guidance on Radioactive Materials in Sewage Sludge and Ash at Publicly Owned Treatment Work, Interagency Steering Committee on Radiation Standards (Sewage Sludge Subcommittee), June 2000, at F-2 through F-3.

[75] Task 8 Report: Development of Radionuclide Discharge Criteria for the Oak Ridge Sewer, at 1.

[76] Conversation with Kenneth Glass, Wastewater Treatment Facility, Oak Ridge, Tennessee, June 6, 2001. *See also* Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976) (holding that the Clean Water Act does not provide authority to regulate AEA materials).

to the Publicly Owned Treatment Works ("POTW").[77] The IPP includes limits on discharges of individual radionuclides and general quantity limits that are more stringent than the NRC limitations.[78] For example, Oak Ridge's "total annual limit for discharges of cobalt-60 for all dischargers in Oak Ridge, combined, is 0.04 Curies, while the NRC . . . allows *each individual discharger* up to 1 Curie per year."[79] Thus, Oak Ridge regulates discharges of AEA materials in a manner significantly more restrictive than the NRC.

Although the methodology's stated purpose is to "ensure the treatment plant sludge remains acceptable for land application"[80] (generally, an area that a local government may regulate), the inclusion of radionuclides at the same time results in regulation of AEA materials. Thus, Oak Ridge has mixed a permitted purpose together with an impermissible purpose and effect, bringing the methodology within the ambit of the field preempted by the AEA.

D. St. Louis, Missouri Sewer District Ordinance

The City of St. Louis, Missouri has enacted a local ordinance, Metropolitan Sewer District Ordinance No. 8472, Article V(A)(13), limiting, among other things, radioactive discharges.[81] The purpose of this local ordinance is:

> to comply with [s]tate and Federal laws *and to protect the public health and safety* by abating and preventing pollution through the regulation and control of the quantity and quality of residential and nonresidential wastewater, industrial wastes, stormwater, and other

[77] *See* Guidance on Radioactive Materials in Sewage Sludge and Ash at Publicly Owned Treatment Works, Interagency Steering Committee on Radiation Standards (Sewage Sludge Subcommittee), June 2000, at F-2 through F-3; *see also* Affidavit of Elisabeth Stetar, *Interstate Nuclear Services Corp. v. City of Santa Fe*, CIV 98-1224 (D.N.M. Oct. 13, 1999) at 6-8.

[78] *See id.*

[79] Affidavit of Elisabeth Stetar, *Interstate Nuclear Services Corp. v. City of Santa Fe*, CIV 98-1224 (D.N.M. Oct. 13, 1999) at 6-8 (citing 10 CFR § 20.2003; 20 NMAC 3.1 § 435) (contrasting the Oak Ridge requirements with the NRC's and New Mexico Administrative Code's requirements).

[80] Task 8 Report: Development of Radionuclide Discharge Criteria for the Oak Ridge Sewer.

[81] *Id.* at Article V(A)13.

wastes discharged into the District's wastewater system, stormwater system and watercourses.[82]

The District's Ordinance does not distinguish between AEA materials and non-AEA materials.[83] The Ordinance prohibits the discharge of "[a]ny radioactive material except those wastes that are authorized for disposal into sanitary sewers under applicable State and Federal regulations *and as specifically authorized by the Director* [of the sewer district.]"[84] Additionally, the Ordinance contains a limit of one curie per year *for the aggregate discharge from all users* to each of the sewer district's treatment plants.[85] In contrast, the NRC permits *each individual discharger to discharge* up to 1 Curie per year.

The Ordinance also sets forth procedural requirements to be followed by dischargers. Licensees are required to write the sewer district requesting approval to discharge materials and indicating the isotopes and the amounts to be discharged annually.[86] The district then approves or disapproves the discharges.[87] Additionally, the district requires quarterly reports from the licensees to ensure compliance with the Ordinance and state and federal regulations.[88] Both the purpose and the direct effect of the St. Louis Ordinance are to regulate the hazards of, among other things, AEA materials.

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[82] Metropolitan St. Louis Sewer District Ordinance No. 8472, Article I, § 1 (emphasis added).

[83] *Id.*

[84] *Id.* (emphasis added).

[85] *See id.*

[86] *See* Guidance on Radioactive Materials in Sewage Sludge and Ash at Publicly Owned Treatment Works, ISCORS, Revised Draft, June 2000, at F2.

[87] *See id.*

[88] *See id.*

E. The Secretary of the Kentucky Natural Resources and Environmental Protection's Cabinet's Permit Conditions Imposed on the Paducah Gaseous Diffusion Plant.

In 1994, the Department of Energy (DOE) submitted an application for permits to construct and operate a contained solid waste landfill at the Paducah Gaseous Diffusion Plant, in Paducah, Kentucky. The "Cabinet" of the Kentucky Natural Resources and Environmental Protection issued the requested permits to DOE in 1995 for the construction of the plant, and in 1996 for the operation of the plant. The 1996 permit limited the disposal of "solid waste that exhibits radioactivity above de minimis levels" and prohibited DOE from placing in the landfill "solid waste that contains radionuclides . . . until a Waste Characterization Plan for radionuclides has been submitted to the Division of Waste Management for review and approval." These restrictions eventually resulted in litigation before the Sixth Circuit, which ruled that "[t]he permit conditions . . . represent an attempt by the Cabinet to regulate materials covered by the AEA based on the Cabinet's safety and health concerns, and are thus preempted."[89]

VII. TEXT OF PROPOSED RULE CHANGES

Based upon the above, NEI hereby requests that the NRC modify its regulations as follows:

A. 10 CFR § 150.15(c)

1. <u>Proposed Language</u>

A new subsection 10 CFR § 150.15(c) should be added to the Commission's regulations stating:

> "(c) No local government or non-agreement State may license or regulate the radiological hazards of source material, special nuclear

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[89] *Id.* at 823. While the Paducah case did not involve a state intruding into the portion of the field of nuclear safety occupied by the NRC, it did involve an effort by a state to impose radiological health and safety based restrictions on AEA materials, subject to oversight by DOE. Thus, it provides another example of the applicability of federal preemption principles governing the regulation of AEA materials.

> material, or byproduct material. Exclusive authority to regulate such radiological hazards resides with the Commission, except and only to the extent that the Commission has delegated its authority to a state pursuant to an agreement under subsection 274b of the Act. The Commission's interpretation of its jurisdiction over nuclear facilities and materials under the Act is provided in section 8.4 of this chapter."

2. Rationale

10 CFR Part 150, "Exemptions and Continued Regulatory Authority in Section 274," establishes the regulatory framework for the NRC's Agreement State program. These regulations explain the basic apportionment of responsibilities between an Agreement State and the NRC. However, neither Part 150 nor the remainder of the NRC regulations addresses the responsibility and authority of non-Agreement States and local governments.

The addition of a new subsection clarifying the boundary between NRC authority and the authority of non-Agreement States and local governments would provide a helpful and accessible guidepost for future state and local regulatory initiatives. The proposed language refers the reader for more guidance to the General Counsel's formal interpretation in 10 CFR § 8.4.

B. 10 CFR § 8.4

1. Proposed Language

10 CFR § 8.4 should be modified by adding a new subsection (k), by redesignating the existing subsection (k) as subsection (l), and by modifying new subsection (1) as follows:

> "(k) Any local or non-Agreement State requirement that: (1) is established, in whole or in part, for the purpose of regulating the radiological hazards of source material, special nuclear material, or byproduct material; or (2) has a direct and substantial effect on the field of regulation of the radiological hazards of source material, special nuclear material, or byproduct material; or (3) conflicts with, or stands as an obstacle to the full accomplishment of the purposes of the Act; or (4) precludes, or effectively precludes a practice or activity in the national interest on the basis of regulating the radiological hazards of source material, special nuclear material, or byproduct material, is preempted by the Commission's authority under the Act.

(l) The following judicial precedents and legal authorities support the foregoing conclusions: *Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88 (1992); *English v. General Elec. Co.*, 469 U.S. 72 (1990); *Pacific Gas & Electric Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983); *Perez v. Campbell*, 402 U.S. 637 (1971); *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001); *see also Hines v. Davidowitz*, 312 U.S. 52 (1941). No precedents or authorities to the contrary have come to our attention."

2. Rationale

The proposed language would update the General Counsel's interpretation to reflect current judicial precedent and provide enhanced guidance for all interested parties on the scope of the NRC's exclusive authority.

C. 10 CFR ☎ 150.22-.29

1. Proposed Language

A new subpart should be added to 10 CFR Part 150 as follows:

"Preemption Determination

§ 150.22 Purpose and scope

This subpart prescribes procedures by which any person may apply for a determination as to whether a federal, state or local requirement is preempted by the Act or the Commission's regulations promulgated thereunder.

§ 150.23 Standards for determining preemption

The standards for determining whether a federal, state or local requirement is preempted are set forth in subsection (k) of 10 CFR § 8.4.

§ 150.24 Application

(a) Any person may apply to the appropriate Office Director for a determination of whether a particular federal, state or local requirement is preempted under the Act or the Commission's regulations.

(b) Each application filed under this section must:

(1) Be submitted to the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards as appropriate and the office of the entity issuing the subject requirement;

(2) Set forth the text of the federal, state or local requirement for which the determination is sought;

(3) Specify each requirement of the Act and the Commission's regulations issued thereunder with which the applicant seeks the federal, state or local requirement to be compared;

(4) Explain why the applicant believes the federal, state or local requirement should or should not be preempted under the standards set forth in § 8.4 of this chapter; and

(5) State how the applicant is affected by the federal, state or local requirement.

(c) The filing of an application for a determination does not constitute grounds for noncompliance with any requirement of the Act or the Commission's regulations issued thereunder.

(d) Once the Director has published notice in the *Federal Register* of an application received under paragraph (a) of this section, no applicant for such determination may seek relief with respect to the same or substantially the same issue in any court until final action has been taken on the application or until 180 days after filing of the application, whichever occurs first. Nothing in § 150.24(a) prohibits a person directly affected by any federal, state or local requirement from seeking a determination of preemption in any court of competent jurisdiction in lieu of applying to the Director under paragraph (a) of this section.

§ 150.25 Notice

(a) If the applicant is other than a federal agency or state or local government, the applicant shall mail a copy of the application to the agency or state or local government concerned, accompanied by a statement that the agency or state or local government may submit comments regarding the application to the Director. The application filed with the Director must include a certification that the application has complied with this paragraph and must include the names and addresses of each federal, state or local government official to whom a copy of the application was sent.

(b) The Director will publish notice of, including an opportunity to comment on, an application in the *Federal Register* and may notify in writing any person readily identifiable as affected by the outcome of the determination.

(c) Each person submitting written comments to the Director with respect to an application filed under this section shall send a copy of the comments to the applicant and certify to the Director that he or she has complied with this requirement. The Director may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond. Late-filed comments are considered so far as practicable.

§ 150.26 Processing

(a) The Director may initiate an investigation of any statement in an application and utilize in his or her evaluation any relevant facts obtained by that investigation. The Director may solicit and accept submissions from third parties relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Director may consider any other source of information. The Director on his or her own initiative may convene a hearing or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application.

(b) The Director may dismiss the application without prejudice if:

(1) He or she determines that there is insufficient information upon which to base a determination; or

(2) He or she requests additional information from the applicant and it is not submitted.

§ 150.27 Determination

(a) Upon consideration of the application and other relevant information received, the Director will issue a determination.

(b) The determination will include a written statement setting forth the relevant facts and the legal basis for the determination, and provides that any person aggrieved thereby may file a petition for reconsideration with the Director.

(c) The Director will provide a copy of the determination to the applicant and to any other person who substantially participated in the proceeding or requested in comments to the docket to be

notified of the determination. A copy of each determination is placed on file in the public docket. The Director will publish the determination or notice of the determination in the *Federal Register*.

(d) A determination issued under this section constitutes an administrative determination as to whether a particular federal, state or local requirement is preempted under the Act or the Commission's regulations issued thereunder. The fact that a determination has not been issued under this section with respect to a particular federal, state or local requirement is not dispositive as to whether the requirement is preempted under the Act or Commission regulations issued thereunder.

§ 150.28 Petition for reconsideration

(a) Any person aggrieved by a determination issued under § 150.27 may file a petition for reconsideration with the Director. The petition must be filed within 30 days of publication of the determination in the *Federal Register*.

(b) The petition must contain a concise statement of the basis for seeking review, including any specific factual or legal error alleged. If the petition requests consideration of information that was not previously made available to the Director, the petition must include the reasons why such information was not previously made available.

(c) The petitioner shall mail a copy of the petition to each person who participated, either as an applicant or commenter, in the preemption determination proceeding, accompanied by a statement that the person may submit comments concerning the petition to the Director within 20 days. The petition filed with the Director must contain a certification that the petitioner has complied with this paragraph and include the names and addresses of all persons to whom a copy of the petition was sent. Late-filed comments are considered so far as practicable.

(d) The Director's decision constitutes final agency action.

§ 150.29 Judicial review

A party to a proceeding under § 150.24(a) may seek review by the appropriate district court of the United States of a decision of the Director by filing a petition with the court within 60 days after the Director's determination becomes final. The determination becomes final when it is published in the *Federal Register*."

2. **Rationale**

A Preemption Determination Process would permit interested persons to obtain an NRC Staff determination as to whether a particular state or local requirement is preempted under the AEA. The proposed process is based on a similar process in place within the Department of Transportation's ("DOT") regulations for the transportation of hazardous materials ("DOT regulations").[90] This procedure has proven useful to DOT and, likewise, will prove useful to the NRC by permitting interested parties, whether they be state or local governments, industry, or concerned citizens, to obtain the NRC Staff's opinion of the validity of a local or state requirement. This opinion will permit interested parties to receive guidance before resources are invested in the promulgation of a proposed regulation of AEA materials by a state or local government.[91]

Further, although the petition principally focuses on unauthorized state and local regulation of AEA materials, it would be useful to include within the proposed Preemption

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[90] *See* 42 CFR §§ 107.201-.227 (2000). The DOT regulations, unlike those proposed here, are explicitly required by statute. *See* 49 U.S.C. §§ 5101-5127 (2000). The NRC, however, does not need further explicit statutory authority to establish the proposed preemption determination process. Instead, Section 161 of the AEA provides the NRC with authority to:

> establish by rule, regulation, or order, *such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary* or desirable to promote the common defense and security or to protect health or to minimize danger to life or property[.]

(emphasis added). Section 161's broad grant of authority has been characterized as creating "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." State of Ohio v. NRC, 868 F.2d 810, 813 (6th Cir. 1989) (quoting Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968)). Therefore, this broad delegation of authority empowers the NRC to promulgate a rule -- such as the preemption determination process -- so long as the agency determines it to be "necessary."

[91] Unlike the DOT regulations, the proposed NRC preemption determination process does not include a procedure by which a state or local government may obtain a federal waiver permitting the state or local government to regulate within the preempted area because DOT's authority to issue such waivers is explicitly conferred by statute.

Determination Process a mechanism for the review of requirements imposed by other federal agencies as well. Therefore, the proposed process also includes references to requirements of "federal agencies" as well as state and local governments.

VIII. PAPERWORK REDUCTION ACT CONSIDERATIONS

This petition for rulemaking contains no information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1955 (42 U.S.C. § 3501 *et seq.*).

IX. CONSIDERATION OF THE ECONOMIC IMPACT ON SMALL ENTITIES UNDER THE REGULATORY FLEXIBILITY ACT

There is no economic impact on small entities as a result of the proposed changes contained in this petition for rulemaking.

X. CONCLUSION

The AEA provides the NRC with the exclusive authority to regulate AEA materials. The only exception to this exclusive grant of authority is the NRC's Agreement State program, which is implemented pursuant to Section 274 of the AEA. However, as explained in this rulemaking petition, non-Agreement States and local governments have put in place requirements governing the use of AEA materials. The Supreme Court clearly has stated that the AEA preempts state and local regulation of AEA materials. As such, any regulation of AEA materials by non-Agreement States and local governments is not consistent with federal law.

Therefore, NEI requests that, following notice and opportunity for comment, the NRC: (1) add a provision to 10 CFR Part 150 clearly articulating applicable principles of federal preemption; (2) update the NRC General Counsel's formal interpretation regarding NRC jurisdiction over nuclear facilities and materials under the AEA as set forth in 10 CFR § 8.4; and

(3) establish a process in 10 CFR Part 150 by which interested persons may obtain an NRC Staff determination as to whether a particular state or local requirement is preempted under the AEA.

Respectfully Submitted,

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