

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 8, 150

[Docket No. PRM-8-1]

Nuclear Energy Institute; Denial of a Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of a petition for rulemaking.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking submitted by the Nuclear Energy Institute (NEI) (PRM-8-1). The petitioner requests that the Commission amend its regulations to supplement a formal opinion by NRC's General Counsel that the Atomic Energy Act of 1954 (AEA) has the effect of preempting to the Federal Government the field of regulation of nuclear facilities and byproduct, source, and special nuclear material. The supplement would state the principles of Federal preemption law and would include criteria governing the determination of when NRC regulations preempt requirements of non-Agreement States and local governments. The petitioner also requests that the Commission add a regulation explicitly stating that no local government or non-Agreement State may license or regulate the radiological hazards of source material, special nuclear material, or byproduct material, and provide procedures whereby any person could request an NRC staff determination as to whether a particular state or local requirement is preempted by NRC's requirements. The NRC is denying the petition because the original General Counsel opinion remains correct and the expenditure of NRC resources that would be involved in granting the petitioner's request is not justified when balanced against the minimal benefits to be anticipated from a supplement to the opinion and the proposed regulations and procedures.

ADDRESSES: Copies of the petition for rulemaking and the NRC's letter to the petitioner are available for public inspection or copying in the NRC Public Document Room, 11555 Rockville Pike, Room 01-F21, Rockville, Maryland.

FOR FURTHER INFORMATION CONTACT: Stuart A. Treby, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-1644, e-mail: sat@nrc.gov.

SUPPLEMENTARY INFORMATION:

The Petition

On April 17, 2002, NEI submitted a "Petition for Rulemaking Regarding Amendments to 10 CFR Parts 8 and 150 Relating to the Application of Federal Preemption Law" (Petition). The main thrust of the petition is to request a change to 10 CFR 8.4: "Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Atomic Energy Act." Part 8 of the Commission's regulations contains formal interpretations by NRC's General Counsel of provisions of the AEA or NRC regulations. Section 8.4, published on May 3, 1969 (34 FR 7273), contains an interpretation of the scope of the Atomic Energy Commission's (AEC) regulatory jurisdiction over nuclear facilities and materials under the AEA, as modified by section 274 of the AEA which Congress added to the AEA in 1959.¹ Pub. L. 86-373, 73 Stat. 688. Congress established, in section 274, a program wherein the AEC was permitted to relinquish its authority over byproduct, source and special nuclear material in quantities not sufficient to form a critical mass to States who have established and agreed to maintain adequate and compatible programs for the regulation of these materials. The General Counsel's opinion states, in relevant part:

¹The Energy Reorganization Act of 1974 abolished the AEC and transferred to the NRC the AEC's licensing and regulatory authority over the commercial use of nuclear facilities and materials. 42 U.S.C. 5801 et seq.

It seems completely clear that the Congress, in enacting section 274, intended to preempt to the Federal Government the total responsibility and authority for regulating, from the standpoint of radiological health and safety, the specified nuclear facilities and materials; that it stated that intent unequivocally; and that the enactment of section 274 effectively carried out the Congressional intent, subject to the arrangement for limited relinquishment of AEC's regulatory authority and assumption thereof by states in areas permitted, and subject to conditions imposed, by section 274.

10 CFR 8.4(i) (footnote omitted). Thus, States which have not entered into agreements with the AEC, the General Counsel concluded, "are without authority to license or regulate, from the standpoint of radiological health and safety, byproduct, source, and special nuclear material or production and utilization facilities" (10 CFR 8.4(j)).

The petitioner recognizes that "[s]ection 8.4 generally is accurate as far as it goes," but is concerned that "it does not provide a complete summary of applicable Federal preemption principles." Petition at 13, n.40. The petitioner also notes that the judicial precedents and legal authorities relied upon by the General Counsel in 1969 (see 10 CFR 8.4(k)) are now out-of-date. What is needed, in the petitioner's view, is clarification of the General Counsel's opinion to conform to what the petitioner believes to be the current governing principles of Federal preemption. The petitioner believes that these principles, which the petitioner has culled from an examination of a number of Supreme Court cases and other Federal law, should be placed in a new section of § 8.4 to read as follows:

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.

Petition at 25.² The Petitioner also requested the NRC to update § 8.4(k) to include more contemporary legal authority as the basis for the opinion.

The petitioner also requested changes to 10 CFR Part 150 "Exemptions and Continued Regulatory Authority in Agreement States and in Offshore Waters Under Section 274." The petitioner requested that a new paragraph be added (10 CFR 150.15(c)), to summarize the General Counsel's opinion as it applies to local governments and non-Agreement States:

No local government or non-Agreement State may license or regulate the radiological hazards of source material, special nuclear 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.

Petition at 24-25.

Finally, the petitioner requested that a new section be added to Part 150 which would establish procedures by which any person may apply for a determination by the Director of the Office of Nuclear Reactor Regulation (NRR) or the Director of the Office of Nuclear Material

²Although petitioner has suggested what petitioner believes to be the governing principles of Federal preemption law, if the petition were to be granted the General Counsel would need to undertake an independent legal review of this subject and reach conclusions which might, or might not, agree with petitioner's proposal.

Safety and Safeguards, (NMSS) as appropriate, as to whether a Federal³, State, or local requirement is preempted by the Act or the Commission's regulations promulgated thereunder. Petition at 26-29. The standards for determining preemption would be those set forth in the section added to § 8.4. The procedures would include notice in the *Federal Register* of receipt of an application for a preemption determination and an opportunity for public comment; a potential investigation by the Director of NRR or NMSS of any statement in an application; an opportunity for the applicant to respond to comments; a hearing or conference at the discretion of the Director of NRR or NMSS; a written determination published in the *Federal Register*; a right for an aggrieved person to file a petition for reconsideration and for any persons who have participated in the proceeding to comment on the petition for reconsideration; and a right of a party to the proceeding to seek judicial review of the Director's decision in a district court of the United States.⁴

The petitioner asserts that the General Counsel needs to supplement the interpretation expressed in § 8.4 to include the principles of Federal preemption law because "misunderstandings of the NRC's authority have occurred and can be expected to continue." Petition at 14. The examples of these misunderstandings provided by the petitioner concern a number of States and municipalities which have attempted to regulate, or have actually

³The petitioner states that "it would be useful to include within the proposed Preemption Determination Process a mechanism for the review of requirements imposed by other federal agencies as well [and therefore] the proposed process also includes references to requirements of 'federal agencies' as well as state and local governments." Petition at 30-31. The petitioner, however, cites no legal authority in support of the proposition that NRC regulations could preempt those of other federal agencies.

⁴The proposed procedures are based on similar procedures in place within the Department of Transportation's (DOT) regulations for the transportation of hazardous materials. See 49 CFR 107.201-107.227 (2001). The DOT procedures are explicitly required by statute. See 49 U.S.C. 5125(d).

regulated, the discharge of radioactive materials into sewage systems. For example, the petitioner asserts that the City of Santa Fe, New Mexico, adopted an ordinance in 1997 regulating the discharge of radioactive elements into its sewer system on the mistaken assumption that it could avoid preemption if it enacted the ordinance for the purpose of furthering the economic interests of the City. Ultimately, however, the City consented to a judgment against it on a Federal preemption claim brought by a user of the sewer system. Petition at 15-16; 19-20. The petitioner believes that unauthorized State and local regulation of AEA materials is not an isolated problem and is in need of generic resolution by NRC.⁵

Reasons for Denial

The crux of the petition is the request that the General Counsel clarify the opinion stated in 10 CFR 8.4 that non-Agreement States “are without authority to license or regulate, from the standpoint of radiological health and safety, byproduct, source, and special nuclear material or production and utilization facilities.” The petitioner requested the General Counsel to refine this opinion by adding that local governments and non-Agreement States are without such authority when the requirement in question (1) is for the purpose of regulating the radiological hazards of AEA materials and facilities; (2) has a direct and substantial effect on the field of regulation of the radiological hazards; (3) conflicts with, or stands as an obstacle to the full accomplishment of, the purposes of the AEA; or (4) precludes, or effectively precludes, a practice or activity in the national interest on the basis of regulating the radiological hazards. These statements are derived from what the petitioner views as the governing principles of Federal preemption law.

⁵NRC, in conjunction with the Environmental Protection Agency, is in the process of revising draft “Guidance on Radioactive Materials in Sewage Sludge and Ash at Publically Owned Treatment Works,” issued in July 2000. NRC anticipates that the final guidance will contain a discussion of Federal preemption case law as it applies to requirements of publicly owned treatment works.

The General Counsel has exercised the authority conferred in the Commission's regulations to issue legal opinions on the meaning of statutes and regulations which will be binding on the Commission very sparingly and only in instances involving major legal or policy questions. The petitioner's request does not involve determining unresolved legal issues; rather it simply involves restating existing law. This is not the type of question that has merited issuance of a formal legal opinion in the past and there are good reasons, explained below, for not departing from past precedent in this case.

First, and most fundamentally, the General Counsel's opinion on AEC/NRC jurisdiction over nuclear facilities and materials under the AEA is correct as it stands. The petitioner does not contend that subsequent Federal case law has rendered any part of the opinion erroneous and in need of correction; rather, the petitioner's concern is that the opinion does not provide a complete summary of applicable Federal preemption principles which have evolved in Federal case law since the opinion was issued in 1969. But case law on a general legal issue such as preemption is constantly being fine-tuned as new fact-specific situations are resolved by the courts. Absent case law rendering a formal General Counsel opinion erroneous, expending resources to update an opinion is not necessary given that developing case law is available to all interested persons, including local and State governments and the attorneys who represent them, from sources outside NRC.

Second, a General Counsel opinion on the governing principles of Federal preemption law would not be definitive and thus would be of limited value to NRC, its licensees, and the general public. The petitioner requested a formal General Counsel opinion not on the proper interpretation of one of NRC's governing statutes, or of an NRC regulation, but rather on "the governing principles of Federal preemption." Petition at 1. The General Counsel is not being asked to reexamine the legislative history of § 274 of the AEA or any other provision of one of NRC's governing statutes to determine whether Congress has spoken more fully to the

question of NRC's preemption of the field of nuclear regulation than is reflected in the present General Counsel opinion. The General Counsel, instead, was asked to render an opinion on the broad question of what present Federal case law points to as the governing principles of Federal preemption. The petitioner acknowledges that "the agency's determinations presumably would not be binding on a court," Petition at 5, and it is not evident that the General Counsel's opinion on this broad question would be entitled to the same weight as would be given to an agency's interpretation of its governing statute. Thus, a General Counsel opinion on this issue is unlikely to obtain for the agency an important benefit that normally would be expected to attach to a formal opinion. Similarly, the procedures for seeking an NRC staff determination as to whether State or local requirements are preempted by NRC's requirements would result only in guidance as to what, given current Federal preemption case law, a court might determine with respect to a State or local requirement challenged on preemption grounds. Agency procedures are wholly unnecessary because those persons subject to State or local requirements are free to take their preemption arguments to a Federal court for definitive resolution regardless of the NRC's views or even without seeking these views.

Finally, while the General Counsel's views on the subject of Federal preemption might provide guidance, this benefit must be balanced against the expenditure of agency resources that would be necessitated by the petitioner's request. In addition to the resources needed to undertake a legal review of judicial case law on the subject of Federal preemption and to undertake a rulemaking proceeding, the resources needed to implement the procedures requested by the petitioner for rendering NRC staff determinations on preemption could be considerable. These procedures include *Federal Register* notices, potential hearings, the need to respond to comments both on the initial application for a determination of preemption and for any petition for reconsideration, a formal written decision, and, potentially, the need to defend the NRC'S decision in court if judicial review is sought. The nature of the problem described by

the petitioner does not warrant the expenditure of resources that would likely be involved. Local governments and non-Agreement States might be expected to look to their own counsel for competent advice on the state of Federal preemption law, particularly because a General Counsel opinion would not be definitive on this issue. Persons harmed by the occasional unwarranted assertion of authority by a local government or non-Agreement State into the regulatory field reserved to the NRC have a ready remedy in the judicial system which can strike down requirements which are preempted by NRC regulations. In short, the petitioner's request is likely to require substantial expenditure of NRC resources with little benefit to either NRC or its licensees or the broader public.

For all the reasons stated above, the NRC denies the petition in its entirety.

Dated at Rockville, Maryland, this 24th day of October, 2002.

For the Nuclear Regulatory Commission,

/RA/

Annette Vietti-Cook

Secretary of the Commission