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Division of Safety & Health
Radiological Health Unit
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Mr. Michael T. Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

May 9, 2003

Re: Comments on proposed agreement with the State of Wisconsin

Dear Mr. Lesar:

Thank you for this opportunity to provide comments on the proposed agreement between the Commission and the State of Wisconsin. In the following, references are to the Federal Register notice dated April 8, 2003 (68 FR 17086).

1. Sealed Source and Device Review and Registration

The proposed agreement reserves the review and registration of sealed sources and devices (SS&D) to the Commission. This would appear to be in violation of the provisions of §274 of the Atomic Energy Act (AEA).

Contrary to the assertion by Commission staff, the term "categories of materials" is not meant to encompass "activities." Section 274 of the AEA is quite explicit about both. In general, the assumption of regulatory authority over "categories of materials" under Chapters 6, 7, & 8 and §161, means the assumption of authority over all activities involving those materials as enumerated in the specified chapters and section, with certain expressly stated exceptions: e.g. the licensing of fuel cycle/utilization facilities, the licensing of the distribution of radioactive devices, and the protection of national security/safeguards information under §161 b and i. Section 274 provides no authorization for the Commission to reserve activities from state authority under an agreement save for those expressly enumerated. Consequently, the AEA does not permit the Commission to reserve the safety reviews of sealed sources and devices from state regulatory authority. In fact, since the AEA does not even mention such reviews, they cannot properly be considered as part of an agreement.

The proposed agreement will establish a system of dual regulation of manufacturers and distributors of radioactive devices in Wisconsin, a result which the agreement state program was intended to avoid. Regardless of who reviews SS&D registrations, the state of Wisconsin must still license the manufacture and distribution of radioactive devices within its borders. And, since it is the license which is legally enforceable, not the SS&D registration certificate, any requirements, restrictions or special procedures needed to ensure the safety of such devices must be included in the conditions of the license in order to be enforced. The effect of such an agreement unfairly burdens manufacturers/distributors of radioactive devices in the State of Wisconsin, vis-à-vis those located in other states, and could arguably

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be viewed as an unauthorized restriction of trade by the state of Wisconsin – ironically operating against its own citizens.

2. Cooperation with Other Agencies

The commission staff state that the proposed agreement commits Wisconsin "to use its *best efforts* to cooperate with the NRC and other agreement states" (emphasis added) in the formulation of standards and regulations "and to assure that Wisconsin's program will continue to be compatible ..." They further state that the proposed agreement "commits the Commission and Wisconsin to use their *best efforts*" (emphasis added) to accord reciprocity to each other's licensees and the licensees of other states. This language echoes the bi-lateral commitments first introduced in the Commission's agreement with the State of New York, in 1962. The intent of this wording, as expressed in then Governor Nelson A. Rockefeller's letter to the Commission, was to better reflect the fact that the relationship between the Commission and the state was to be a cooperative one. In the New York agreement both the Commission and the State commit to "use their best efforts" to cooperate for the desired result of maintaining compatible regulatory programs. They did not commit themselves to obtaining the desired result, but only to use their "best efforts" to do so. Clearly, for either party to commit to do more than use its best efforts to achieve the mutual goal would place it under the authority of the other — something that a sovereign could never do.

It is curious that the commission staff use this language in Section II to describe the commitments in the agreement, when in the text of the agreement itself this "best efforts" language is replaced by a much more one-sided set of commitments. In Article VI of the proposed agreement, the Commission agrees that it "will cooperate" to formulate standards and regulations and that it will cooperate to assure the coordination and compatibility of the State and Commission programs. Wisconsin also agrees to cooperate in the formulation of standards and regulations but then agrees that it "will assure" that the State's program will continue to be compatible — a much stronger (and unwise) commitment.

Thus by signing this proposed agreement, the State of Wisconsin will place itself under the ultimate authority of the Commission. For in practice, the Commission has reserved to itself the sole authority for determining the meaning of "compatibility." By committing itself to obtain the result, Wisconsin commits itself to operate its regulatory program in whatever manner the Commission tells it to. A sovereign cannot commit itself to the achievement of a result, the metric of success for which is controlled by another, and remain sovereign.

The proposed agreement thus short-changes the residents of the State of Wisconsin, relegating them to a second-class status vis-à-vis those of other states such as New York, as well as violates the provisions and intent of the Atomic Energy Act.

Again, thank you for this opportunity to comment. I trust the fact that this is submitted one day past the comment deadline, will not prevent due consideration by the Commission.

Sincerely,

Clayton J. Bradt, CHP
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NYS Dept. of Labor