

Sollenberger, Dennis

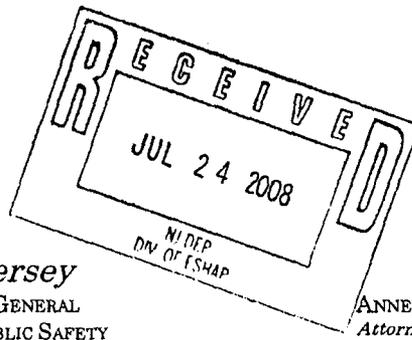
From: Patricia Gardner [Patricia.Gardner@dep.state.nj.us]
Sent: Wednesday, July 30, 2008 3:20 PM
To: Duncan White
Cc: Jenny Goodman; Paul Baldauf; Dennis Sollenberger; Torre Taylor
Subject: Questions
Attachments: NJ 8 Questions Complete.pdf

Duncan,

As requested please find attached the answers to the 8 questions posed by the NRC in the letter dated August 9, 2006.

A paper copy will follow.

Pat



JON S. CORZINE
Governor

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July 21, 2008

Janis Hoagland, Director
Office of Legal Affairs
Department of Environmental Protection
401 East State Street
P.O. Box 424
Trenton, New Jersey 08625-0424

Re: 06-0099. Are Legislative Changes
Necessary to the Radiation Protection Act
in Order for New Jersey to Become an
Agreement State?

Dear Director Hoagland:

You have requested advice on whether legislative changes to the Radiation Protection Act, N.J.S.A. 26:2D-1 et seq. ("Act") are necessary in order for New Jersey to become an Agreement State. For the reasons set forth below, you are advised that the New Jersey Department of Environmental Protection ("NJDEP") has been granted all of the necessary authorities to comply with the requirements for "Agreement State" status which were raised in your request for advice.

The Agreement State program was established by the Atomic Energy Act ("AEA"), 42 U.S.C. 2021(b). The AEA authorizes the United States Nuclear Regulatory Commission ("NRC") "to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission... with respect to any one or more of the following materials within the State: (1) byproduct materials; (2) source materials and (3) special nuclear materials in quantities not sufficient to form a critical mass." Id. The NRC grants this Agreement State status when NRC cedes to a state its authority over any of these three

types of nuclear materials used or possessed within the borders of that same state. You have indicated that New Jersey is seeking to have the NRC cede this program to the State with one exception, byproduct from mill tailings waste.

In materials subsequently submitted to this office, NJDEP indicated that this originally broad request for advice should now be interpreted as asking us to specifically address NRC's eight questions/comments which were raised after its review of New Jersey's statutory authorities. These questions/comments can be summarized as mandating an explanation of the NJDEP's authority to create, organize and operate the program and to perform seven (7) specific requisite functions.

In our opinion, the Act and other legislation and supporting case law authorize NJDEP to respond affirmatively to NRC's eight questions/comments which will allow the NRC to grant New Jersey Agreement State status. Each question or comment is analyzed and answered below.

NRC Comment:

1. NEW JERSEY STATUTES DO NOT DIRECTLY ESTABLISH A RADIOACTIVE MATERIAL PROGRAM OR DETAIL ITS STRUCTURE.

The Radiation Protection Act ("Act") is the primary statute addressing radiation protection. Even though there is no provision in the Act expressly creating a radioactive material program or detailing its structure, in our opinion, NJDEP does have the authority to create, organize and operate such a program.

In N.J.S.A. 26:2D-9, NJDEP is defined as the department of state government designated throughout the Act as the empowered agency for radiation protection. N.J.S.A. 26:2D-3 creates a Commission on Radiation Protection ("Commission"), within the NJDEP, comprised of members with specified scientific training as well as representatives of the Commissioners of the Departments of Environmental Protection, Health and Senior Services and Labor and Workforce Development. This Commission is organized in accordance with N.J.S.A. 26:2D-6. Its duties include: promulgating rules "to prohibit and prevent unnecessary radiation;" reviewing policies and programs of the NJDEP "as developed under the authority of this act;" making recommendations to the NJDEP on its policies and programs; and, providing technical advice and assistance to the DEP. N.J.S.A. 26:2D-8. These advisory roles of the Commission, and the Act's reference to NJDEP's programs, indicate that NJDEP is

authorized to have a program of radiation protection.

The NJDEP is directed by N.J.S.A. 26:2D-9 to perform 13 duties. The 7 most important of the 13 duties for the purposes of answering NRC's first question may be summarized in paraphrase as:

1. Administer the Act and regulations of the Commission;
2. Develop policies and programs for the evaluation of radiation hazards;
3. Register sources of radiation and require specified records to be kept as set forth by the Commission;
4. Review specifications and plans for the design and shielding of radiation sources according to Commission rules;
5. Enter and inspect any building to determine compliance with any Commission rule or order of the DEP, investigate actual and suspected sources of radiation, and inspect any records;
6. Subject to Commission rules, require, issue, renew, suspend and revoke licenses for construction, operation and maintenance of sources of radiation; including byproduct materials, source materials and special nuclear materials in quantities not sufficient to form critical mass.
7. Issue orders for the implementation of the Act or any Commission regulation.
[Id.] [emphasis added].

These seven critical paragraphs spell out the essential powers needed to create, organize and operate a program of radiation protection.

Paragraph (a) of N.J.S.A. 26:2D-9 calls for NJDEP to administer the Act and the regulations of the Commission. No other department of State government is granted this authority. The Commission (in the NJDEP) has the statutory authority, as explained

above, to adopt regulations.¹ These powers help set the boundaries of the area being regulated.

Paragraph (h) mandates NJDEP to require registration of sources of radiation and records concerning sources of radiation to be kept. Pursuant to Paragraph (i), NJDEP "shall" "review plans and specifications of the design and shielding for radiation resources submitted...for the purpose of determining possible radiation hazards." Paragraph (k) gives the Department the power, in accord with the rules of the Commission, to license for construction, operation and maintenance of sources of radiation including those that are the subject of this application.

Compelling registration and controlling licensing are significant powers to manage the regulated community when it is required as it is in NJDEP's program. Both of these powers assure that all potential members of the regulatory community are known to NJDEP and that all members and potential members of the regulatory community comply with the requirements of the program and orders of the NJDEP.

The power to enter and inspect found in Paragraph (j) allows NJDEP to assure compliance with the regulations and orders as well as to investigate suspected sources of radiation. Finally, Paragraph (m) empowers NJDEP to issue Orders for the implementation and enforcement of the Act and any regulation promulgated under the Act. This is an exercise of control over the operations of the regulatory community. In our opinion, these statutory powers granted to NJDEP are the primary powers needed for the operation of any regulatory program.

This conclusion is strengthened by reference to N.J.S.A. 26:2D-9.1, which authorizes the Governor to enter into agreements "with the Federal Government providing for the discontinuance by the Federal Government and assumption by the State of the authority, in the interest of the protection of the public from radiation hazards, to regulate sources of radiation including by-product material, source materials and special nuclear materials in quantities not sufficient to form a critical mass." The same

¹ As a matter of practice, the Commissioner of NJDEP signs the regulations before they are sent for publication in the New Jersey Register. NJDEP staff, which is also staff to the Commission, has input into the content of regulations.

provision goes on to state that the "regulatory authority assumed by the State by virtue of such agreements shall be exercised by the Department [of Environmental Protection]." Id. This provision therefore addresses the specific authorization for which you seek advice.

There should be no remaining question that NJDEP has been granted statutory authority to assume the NRC's radioactive material program. If any doubt persists, however, it should be satisfied by application of the well-established principle that an administrative agency holds implied, as well as express, powers. In New Jersey, when there is a grant of authority to a state department, the courts liberally interpret that grant to enable a department to perform its statutory mission. See N.J. State League of Municipalities v. Dept. of Community Affairs, 158 N.J. 211, 223 (1999); Silverman v. Berkson, 141 N.J. 412, 417, cert. denied 516 U.S. 775 (1995). The court will read the legislation so as to confer incidental powers which are necessary to effectuate express powers granted, as long as those incidental powers are not contrary to the purpose of the legislation. See, N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978), Cammarata v. Essex County Park Comm'rs, 26 N.J. 404, 411 (1958). These incidental powers are viewed as within the contemplation of the Legislature. The courts' liberal construction of implied powers is especially evident where the primary goal of the statute is to protect the public.

An agency charged with implementation of a statutory program to assure health and safety of the public must have the ability to achieve the statutory purpose, even when there is no express grant of power.

[Schedule of Rates for Barnert Mem. Hospital, 92 N.J. 31, 39 (1983)].

Additionally, rules implementing an agency's express and implied authority to regulate are viewed with a presumption of validity. N.J. League of Municipalities, supra at 222, citing In Re Township of Warren, 132 N.J. 1, 26 (1993).

Here, the legislative goal of the Act is "to prohibit and prevent unnecessary radiation." N.J.S.A. 26:2D-7. N.J.S.A. 26:2D-10 also states: "All sources of radiation shall be shielded, transported, handled, used and kept in such manner as to prevent all users thereof and all persons within effective range thereof from

being exposed to unnecessary radiation." NJDEP's mission, under the Act, is to accomplish the goals of preventing unnecessary radiation which may cause physical harm to the public and of ensuring that both the employees who handle and use radioactive materials and those persons in the effective range of the radiation are adequately protected. NJDEP's goals, at the direction of the statute, are related to the health and safety of the New Jersey population. Therefore, not only would NJDEP's powers to achieve its mission be subject to the usual liberal interpretation by the courts but the goals of protecting health and safety in the area of radiation will further imply to the courts that they should find implied powers that are necessary to accomplish the mission.

Based on all of the above, in our opinion, NJDEP has the authority to create, organize and operate a radiation materials and protection program through the express and implied powers granted by the Act.

NRC Comment:

2. IN REGARD TO THE NEW JERSEY RULEMAKING PROCESS, THE NEW JERSEY STATUTES IN N.J.S.A. 26:2D ARE VERY GENERIC AND DO NOT PROVIDE ANY SPECIFIC PROCEDURES, REQUIREMENTS OR PROVISIONS RELATING TO PUBLIC PARTICIPATION.

While the Act itself does not contain specific provisions regarding administrative procedures or public safeguards, such provisions are contained in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. ("APA"), which details all procedural rulemaking requirements for all departments and agencies in this state including NJDEP. N.J.S.A. 52:14B-2(a). The APA defines the term "rule" as a "statement of general applicability and continuing effect that implements or interprets law or policy or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2(e). See also, Metromedia v. Division of Taxation, 97 N.J. 313 (1984).

In the APA, the Legislature has specifically called for direct participation of the public and explained the goal of the statute which it said should:

Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule. [N.J.S.A. 52:14B-4(a)(3)].

It has been held by New Jersey courts that the purpose of the procedures in the APA is to give interested parties and members of the general public an opportunity to be heard. The courts have pointed out that this is not just a matter of fairness but also can provide regulators with knowledge of unknown aspects of the rulemaking. In re Protest of Coastal Permit Rules, 354 N.J. Super. 293, 354 (App. Div. 2002); Federal Pacific Elec. Co. v. Dept. of Environmental Protection, 334 N.J. Super. 323, 340-41 (App. Div. 2000)..

Before the rulemaking process formally begins, there are opportunities provided to the public to be involved in the rulemaking process. N.J.S.A. 52:14B-4(f) allows any interested person to petition for an adoption of a new rule or an amendment or repeal of an existing rule. If this is done, there must be an agency response to the petition within 60 days. Id. NJDEP's specific procedural rules on petitions for rulemaking are found at N.J.A.C. 7:1D-1.1. Since the Commission is part of NJDEP and not independent of it, NJDEP procedural regulations on rulemaking apply to it. Also, a notice of interest may be published in the New Jersey Register to solicit the views of interested parties on a rulemaking prior to formal proposal. Solicitation of viewpoints by affected parties by NJDEP may be achieved through informal conferences or consultations, the appointment of committees consisting of interested experts, affected parties or the general public. N.J.S.A. 52:14B-4(e).

Prior to adoption, amendment or repeal of any rule, the department or agency promulgating the rule must give the public at least 30 days prior published notice of the potential adoption of the rule. N.J.S.A. 52:14B-4(a)(1). This public notice must include: the proposed rule, a summary of the rule; an explanation of the purpose and effect of the rule; statutory authority that supports the rule's adoption; a description of the rule's economic and social impacts; a regulatory flexibility analysis of small business impacts; a job impact statement; a smart growth impact statement; an agricultural impact statement; and a federal rules analysis (comparison to a federal agency's rule to determine the comparative stringency of New Jersey's rule). N.J.S.A. 52:14B-

4(a)(2) and N.J.A.C. 1:30-5.1(c). All of these components of the notice help provide information to the public in order to allow it to intelligently analyze the value of the proposed rule and the potential problems that would result from adoption of the rule.

The methods of notice mandated by N.J.S.A. 52:14B-4(a) include publication in the New Jersey Register, dissemination to the media, individual notice to persons who have made timely requests for advance notice of rulemaking procedures in the subject field and notice placed on NJDEP's Webpage. Id. NJDEP, in its practice and procedure rules, has restated those mandates. N.J.A.C. 7:1D-5.3(a)(1-4).

NJDEP regulations require that there shall be public notice in at least one newspaper with a distribution area most likely to inform persons affected by the rule or interested in it. At least one of the following methods of notice is also used: (1) mailing to a distribution list of interested parties maintained by the program responsible for the rule; (2) posting in common locations on State owned property where interested persons are likely to see the notice; (3) publication in a trade industry, government or professional publication that would likely reach interested parties; or (4) distribution at a meeting of a pertinent advisory board or council. N.J.A.C. 7:1D-5.3(a)(1-4).

Additionally, a public hearing on the rule is required when it is requested by a governmental agency or a committee of the Legislature, or if there is sufficient public interest. N.J.S.A. 52:14B-4(a)(3). The request for the hearing must be made within the 30-day notice period, and at least 15 days' notice must be given of the date and place of the hearing. Id. Each department must adopt within its own rules of practice a definition of what constitutes "sufficient public interest". Id. If there is a public hearing, a verbatim record of the hearing must be maintained. N.J.S.A. 52:14B-4(g).

NJDEP, in conjunction with the Commission, will hold a public hearing based on public interest if three requirements are met.

1. There is a demonstrated public interest in the rule, which is defined by NJDEP as: (a) interest relating to a rule which is either complex or significantly changing the program; (b) the request for the hearing must encompass a broad range of interest; and, (c) a notice of public hearing must not have been included in the proposal in the New Jersey Register notice or in any subsequent

notice.

2. The hearing must be likely to raise new issues, information, data or findings. N.J.A.C. 7:1D-5.2(d)(2). The delay in the rulemaking process, caused by holding the public hearing, will not likely adversely affect public health, safety or welfare, or the environment. N.J.A.C. 7:1D-5.2(d)(3). NJDEP's rule on public hearings allows discretion to provide a public hearing whenever the Commissioner thinks it appropriate. N.J.A.C. 7:1D-5.2(a), as well as whenever required by statute, N.J.A.C. 7:1D-5.2(b), and in any of the already detailed three situations mandated by the Legislature, N.J.A.C. 7:1D-5.2(c).

It is also possible for the 30-day public comment period to be extended to 60 days when sufficient public interest is demonstrated. N.J.S.A. 52:14B-4(a)(3). The head of each department is required, in its rules of practice, to adopt definite standards for the determination of when "sufficient public interest" is exhibited for this purpose. Id. The NJDEP rule regarding granting an extension of the comment period is virtually identical to that for granting a public hearing.

All comments received by an agency, here the Commission, whether through regular submission, submission in an extension period or submission during a public hearing, must be considered by the agency and must be reflected in a document prepared by that department. This document must list all written or oral submissions along with that department's responses to these comments. N.J.S.A. 52:14B-4(a)(4). As shown above, while the Act does not contain provisions regarding public participation, the APA, its implementing regulations and NJDEP's implementing regulations are very explicit regarding public participation. They provide multiple avenues for the public to participate and multiple mandates for a department to provide detailed information to the public regarding the proposed regulations. They also provide specific and sufficient procedural requirements and provisions relating to public participation.

NRC Comment:

3. IF LICENSEES ARE PERMITTED TO BE ON THE COMMISSION FOR RADIATION PROTECTION AND PARTICIPATE IN THE RULE OR REGULATIONS FORMULATION AND PROMULGATION, A "CONFLICT OF INTEREST PROGRAM OR POLICY MUST BE IN PLACE."

New Jersey's statutory requirements to preclude conflicts of interest are found at N.J.S.A. 52:13D-12 et seq., the Conflicts

of Interest Law ("COIL"). In N.J.S.A. 52:13D-12, the Legislature explained its reasons for passing the COIL.

- (a) In our representative form of government, it is essential that the conduct of public officials and employees shall hold the respect and confidence of the people. Public officials must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
- (b) To ensure propriety and preserve public confidence, persons serving in government should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards amongst them.

Before examining the provisions of the COIL, it is important to understand the statutory definition of a "Special State officer or employee." A "Special State officer or employee" is a person:

holding an office or employment in a state agency...for which...no compensation is authorized or provided by law, or no compensation other than a sum in reimbursement whether per diem or per annum is authorized or provided by law...
[N.J.S.A. 52:13D-13(e)].

The members of the Commission are all volunteers without payment, receiving only reimbursement for necessarily incurred expenses. N.J.S.A. 26:2D-5. Therefore, Commission members qualify as special State officers subject to the COIL.

The COIL places many restrictions on special State officers. N.J.S.A. 52:13D-14 strictly prohibits any special State officer from accepting gifts of any value. A State officer is not allowed to appear, represent or negotiate for any person or entity other than the State person or entity in any negotiation for sale of State property. N.J.S.A. 52:13D-15. Similarly, N.J.S.A. 52:BD-16 prohibits a special State officer from singularly, or through an entity of which he has an interest, representing a party other than the State in any cause, proceeding, application or other matter pending before the particular office, commission, authority, fund

or system of which he is a part. N.J.S.A. 52:13D-23(e)(2) states that no special State officer should engage in any business, profession, trade or occupation which is subject to licensing or regulation by the entity which he serves without first notifying the State Ethics Commission ("SEC").

Any Special State officer found violating these statutory prohibitions will be fined not less than \$500 or more than \$10,000. The special State officer may be suspended from office for up to a period of one year. If there is a willful or continuous disregard of this statute, the special State officer may be permanently removed from office and may be barred from holding any public office for a period of up to five (5) years. There may also be an order for restitution, demotion, censure or reprimand. N.J.S.A. 52:13D-21(e). Those remedies are in addition to all other criminal and civil penalties. N.J.S.A. 52:13D-21(j).

In the licensing context or other conflict of interest situation (as opposed to a situation as to which there is a statutory prohibition), there is a procedure required by the SEC for recusal. A person is to disqualify himself or is disqualified from a matter because of that conflict under the State Ethics Code if he has:

1. Any financial interests, direct or indirect, that is incompatible with the discharge of his or her duties as a Department employee; or
2. Any personal interest, direct or indirect, that is incompatible with the discharge of his or her duties as a Department employee.
[New Jersey Uniform Ethics Code,
Section. IX, Par. 3 and 4.
(September, 2006)].

The COIL also established the SEC. N.J.S.A. 52:13D-21. It was empowered by the Legislature to promulgate a uniform code of ethics for all special State officers, State officers and employees. N.J.S.A. 52:13D-23(a)(2) and N.J.S.A. 52:13D-21(f). The SEC enforces the COIL. It may also render advisory opinions as to whether a given set of facts would constitute violations. N.J.S.A. 52:13D-21(g). It also has the authority to render advisory opinions in specific conflict situations. The SEC is advised by the Attorney General. N.J.S.A. 52:13D-21(d).

Pursuant to the COIL, the head of every agency or department may promulgate individual codes of ethics which may go beyond the uniform ethics code provisions. N.J.S.A. 52:13D-23(a). These departmental codes are to be formulated with attention to the particular needs and problems of the agency or department to which the code will apply. N.J.S.A. 52:13D(a)(1). Therefore, there are three (3) levels of requirements for ethical conduct by the special State officer: the statute; the SEC code of ethics and the specific department code.

As in the COIL, the NJDEP ethics code defines "department employee" to mean "a state officer or a special State officer or employee holding an office or employment in the Department." Provisions regarding when an ethical conflict exists are virtually identical to those of the SEC. The Commission members are subject to this same code. NJDEP Ethics Code, Sec. IV.

Advice on the propriety of participation in a matter may be sought from the NJDEP Ethics Liaison Office, the SEC or the Office of Legal Affairs in NJDEP. NJDEP Ethics Code XV(d). If it is found that there is a potential ethical conflict, there will be a written memorandum issued which includes the effect of that recusal on the NJDEP employee. However, if there is a public meeting which requires a public record to be kept, a written memorandum is not required. At that public meeting, the special State officer must place his recusal and the reason for such recusal on the record prior to any discussion of the matter. NJDEP Ethics Code, Section XV (g) (i) (g) (2).

The special State officer must be screened and may not participate in any manner in developing, considering or voting on the matter from which he has been recused. Id. Meeting materials involving a matter from which the special State officer must recuse himself will not be distributed to that special State officer, Section XV (g) (1). Further, the standard practice is that the special State officer leaves the room at a non-public portion of the meeting while the matter in question is under discussion.

In our opinion, the COIL, SEC regulations and the NJDEP code of ethics provide a strict system to eliminate conflicts of interest by Commission members as well as employees in the DEP.

NRC Comment:

4. NEW JERSEY STATUTES SHOULD AUTHORIZE THE USE OF LICENSE CONDITIONS TO ADDRESS MATTERS UNIQUE TO THE LICENSE. THE LAW SHOULD ALLOW LICENSE CONDITIONS TO IMPOSE ADDITIONAL REQUIREMENTS WHEN NECESSARY TO PROTECT PUBLIC HEALTH AND SAFETY.

The Act grants authority to NJDEP to require, issue, renew, amend, suspend and revoke licenses. N.J.S.A. 26:2D-9(k). Although the power to place conditions on licenses is not mentioned specifically, the power to amend licenses (subject to codes, rules and regulations of the Commission), along with the evident legislative design to authorize DEP to take steps to accommodate assumption by the State of portions of the federal program, may reasonably be read as authorizing NJDEP to establish conditions on licenses. Case law in similar circumstances has also interpreted the power to license to include the power to add conditions to a license.

In Lyons Farm Tavern, Inc. v. Board of Alcoholic Beverage Control, City of Newark, 68 N.J. 44 (1975), a tavern owner was appealing from the agency's placement of conditions, which were outside the usual regulatory requirements, on the license being transferred to him. While not specifically referenced in the statute or regulations, the Court noted that "The conditions are germane to the statutory scheme and are not arbitrary and capricious." Id. at 52. In Lyons, the Court said that the only question left was whether the condition will serve the good of the public. Id. at 53. Due to the fact that this question could also be answered affirmatively, the conditions on the license were upheld by the Court. Ibid.

In McGovern v. Hoffman, 73 N.J. Super 200, certif. denied 37 N.J. 230 (1962), the Office of Milk Industry imposed conditions on a license where, but there was a specific statute that said that a conditional license could be issued. However, the McGovern court noted that if an agency is authorized to issue a license and revoke it, the power to place conditions on a license lies between the two extremes and can be construed to be an implied grant of authority to issue a conditional license. Id. at 204. The court used the public interest analysis and the examination of the power of the Office of Milk Industry over the industry to further infer that such conditional licenses can be sanctioned by the courts. Id. at 205. This is the same approach used by the Supreme Court in Lyons.

There are no specific statutory provisions limiting the statutory power of NJDEP to place conditions on a license. To the contrary, the language granting NJDEP the authority to assume portions of the federal radiation program implies that NJDEP may meet the requirements necessary to be authorized as an Agreement State. N.J.S.A. 26:2D-9.1. The restrictions on NJDEP in placing conditions on a license are limited to those applied to any discretionary action of State government. The decision must neither be contrary to the statute and regulations, nor constitute an abuse of NJDEP's discretion by being arbitrary or capricious, It must also be supported by the evidence (as noted in Lyons). See, In re Musiak, 143 N.J. 206, 216 (1996). (For further discussion of this requirement, see our discussion of NRC Comment 6).

Since NJDEP would be requiring these nuclear license conditions in unique situations to protect the public, these conditions would advance the statutory mission and be germane to the statutory scheme. Therefore, under the specific authority of N.J.S.A. 26:2D-9(k) and the implied authority of N.J.S.A. 26:2D-9.1 and under the principles articulated in the Lyons and McGovern cases, it is our opinion, subject to the conditions set forth above, that NJDEP would be authorized under State law to use license conditions to deal with matters unique to the licensee when it is necessary to protect public health or safety.

NRC Comment :

5. THE NEW JERSEY STATUTES DO NOT CLEARLY PROVIDE GENERAL AUTHORITY TO MAKE IT UNLAWFUL TO USE, POSSESS, TRANSFER, DISPOSE OF OR ACQUIRE RADIOACTIVE MATERIAL WITHOUT A LICENSE OR TO VIOLATE A LICENSE PROVISION.

The prohibition on possession of radioactive material without a license is set forth in N.J.S.A. 26:2D-9 (h) and (k) which state, when read together, that NJDEP "shall require" registration of sources of radiation and shall have power to license for construction, operation or maintenance of sources of radiation. Also, NJDEP may embargo any material, machine, appliance, apparatus, or device which it finds or has probable cause to believe is a radiation hazard. N.J.S.A. 26:2D-11.1. This embargo warns all persons "not to use, remove or dispose of such article by sale or otherwise until permission for use, removal or disposal is given." Id. Additionally, transportation and storage for transportation of listed radioactive materials require a certificate of handling from DEP. N.J.S.A. 26:2D-8. Also, in N.J.S.A. 26:2D-23.1,

transportation is sometimes limited by the conjunction of the type of material and the population density of the area through which it is traveling.

By virtue of these sections of the Act, the Legislature granted NJDEP the general power to control radioactive material from its generation to the period of disposal. These basic provisions allowing NJDEP to control various stages of the possession of radioactive material manifest the Legislature's desire to grant the NJDEP powers that will allow it to reach the legislative goal of protecting the public from the ill-effects of radiation. (See our discussion of Comment 1.)

Manufacturing, producing, transferring, distributing or arranging for distribution, selling, leasing, receiving, acquiring, owning, possessing, or using naturally occurring or accelerator produced radiation materials without a specific State license is also made unlawful by N.J.A.C. 7:28-4.1(b). Violating any of these statutory provisions, regulations, or any NJDEP orders implementing the Act is made unlawful by N.J.S.A. 26:21-13, -15 and -23. NJDEP may enforce the Act, implementing regulations or its orders by bringing a civil action in Superior Court for an injunction. N.J.S.A. 26:2D-13. This request to the court may be dealt with in a summary manner. Any person who violates the Act, a rule, a NJDEP order or removes or disposes of an article under embargo shall be subject to a penalty of not more than \$2,500 per day. Any continuing action constitutes a separate and distinct offenses. Id. Additionally, the Act does not impair any existing civil or criminal remedy for any prohibited action. N.J.S.A. 26:2D-15.

Based upon the above, it is our opinion that the statutory provisions of the Act, as fully implemented by the regulations, make it unlawful to use, possess, transfer, dispose of or acquire radioactive material without a license.

NRC Comment :

6. THE NEW JERSEY STATUTES SHOULD PERMIT EXEMPTIONS FROM LICENSING REQUIREMENTS IF THE EXEMPTIONS DO NOT ADVERSELY AFFECT PUBLIC HEALTH AND SAFETY AND SHOULD ALSO INCLUDE EXEMPTIONS FROM THE REQUIREMENT TO OBTAIN A LICENSE. FOUR SPECIFIC EXEMPTIONS SHOULD BE ADDRESSED BY STATUTE OR REGULATION.

The Commission has the authority to create exemptions from licensing requirements through its regulations. As explained in

detail in our response to Comment 1, the grant of power from the Legislature will be liberally construed to allow NJDEP to fulfill the intent of the Legislature. See, N.J. State League of Municipalities, supra 158 N.J. at 223. As noted previously, NJDEP is given the power at N.J.S.A. 26:2D-9(k) to issue and amend licenses subject to regulations of the Commission. This licensing power includes the power to "require, issue, renew, amend, suspend and revoke licenses" for construction, operation or maintenance of sources of radiation including byproduct materials, source materials and special nuclear materials in quantities not sufficient to form a critical mass. Regulations may also provide for recognition of other State or federal licenses subject to the State's regulatory requirements. Ibid.

N.J.S.A. 26:2D-9(k) grants NJDEP power to license. However, the Act gives no details regarding how or when such licensing would be required. As explained in our discussion of NRC Comment Number 1, there is wide latitude in the implementation of Legislative authority through an agency's regulations. N.J.S.A. 26:2D-9(k) specifically cites the exercise of this authority, subject to the Commission's regulations. Therefore, exemptions may be created by the Commission if they are not contrary to the exact language or intent of the statute. Communication Workers of America v. Clymer, 292 N.J. Super. 138, 147-150 (Law Div. 1996). Of course, such exemptions must also be reasonable, not arbitrary or capricious and based on evidence, just as in the case of license provisions. See In re Musick, 143 N.J. 206, 216 (1996).

The four specific exemptions from licensure which the NRC has listed in the authorization requirements for Agreement State status are:

1. Prime contractors working for the U.S. Department of Energy at U.S. Government-owned or controlled sites;
2. Prime contractors researching, developing, manufacturing, storing, testing, or transporting atomic weapons or components;
3. Prime contractors using or operating nuclear reactors or other nuclear devices in a U.S. Government-owned vehicle or vessel; and,
4. Any other prime contractor (or

subcontractor) of the Department of Energy or the Nuclear Regulatory Commission when the State and the Commission jointly determine:

- a. that the terms of the contract provide adequate assurance that the contractor can accomplish the work without undue risk to public health and safety; and
- b. that the law authorizes the exemptions.
[NRC, STP Procedure Approval, Processing an Agreement, at 14 (2001) (SA-700)].

Regarding the first three exemptions, the Radiation Protection and Discharge Prevention Programs personnel in NJDEP have provided us the information that contractors working for the NRC and the Department of Energy are subject to contractual requirements that are deemed necessary to protect public health and safety. Compliance with these contractual provisions would be monitored by whichever of these federal agency is party to the contract.

In our opinion, under these conditions, there is a sufficient basis for promulgating a rule providing for an exemption from licensure in these three circumstances. These exemptions would still allow for achievement of the intent of the Act to prevent exposure to unnecessary radiation. N.J.S.A. 26:2D-10. This is because regulatory restrictions would be placed on the contractor's work through the contract provisions. Due to the fact that New Jersey is going to run the federal program, the regulatory restrictions are the same whether the NRC or NJDEP imposes them. These restrictions will also be monitored by an agency, with at least an equivalent knowledge of NJDEP personnel in protecting workers and other exposed persons from the dangers of excess radiation.

Additionally, the Act specifically provides for the recognition of federal licenses. N.J.S.A. 26:2D-9(k). While not involving a federal license, this situation is analogous because a federal contract is drafted in accord with federal radiation protection regulations that are applicable and then there is monitoring for compliance with the contract. Also, N.J.S.A. 26:2D-

9.2 allows NJDEP to enter into agreements, with the approval of the Governor, with the federal government for inspection on a cooperative basis.

The fourth exemption required for authorization, set forth above, is for federal subcontractors and contractors, who fall outside the three situations first listed. They are to be subject to a joint NRC-State process of determining whether the work can safely be done. In our opinion, there is authority to promulgate a rule establishing this exemption. Granting an exemption would be based upon three guidelines: first, that the contract provide adequate insurance that the work can be accomplished without undue risk to public health and safety; second, the fact that the NRC is retaining some authority in this situation, and; third, the authority granted to NJDEP in N.J.S.A. 26:2D-9.1 to enter into agreements with the federal government. Consistent with state laws requiring regulation for waivers from licensure, there should be regulatory criteria which would set out the factors that would be used to decide whether the exemption or waiver should be granted. The criteria need not be detailed. See SMB Associates v. NJDEP, 137 N.J. 58, 60 (1994). See also, In Re Six Month Extension, 372 N.J. Super. 61, 69 (App. Div. 2004).

Therefore, in our opinion, there is legal authority to create, by regulations, the four regulatory exemptions which NRC requirements for recurring status recognition as an Agreement State. Any exemptions or waivers not specifically detailed can be granted if there is sufficiently clear criteria to guide the decision by NJDEP.

NRC Comment:

7. WHILE INSPECTIONS OF PROPERTY ARE PROVIDED FOR IN THE NEW JERSEY STATUTES, THEY DO NOT CLARIFY THAT SUCH INSPECTIONS MAY TAKE PLACE AT ALL REASONABLE TIMES.

NJDEP has general authority to "enter and inspect a building or place for the purpose of investigating an actual or suspected source of pollution of the environment and ascertaining compliance and non-compliance with any codes, rules or regulations of the Department." N.J.S.A. 13:1D-9(d). In addition, the Act has a similar provision to allow the NJDEP to:

Enter and inspect any building or place for the purpose of investigating an actual or suspected source of radiation and ascertaining compliance with this act or any rule, regulation or order promulgated or issued pursuant thereto and inspect radiation sources, their shielding and immediate surroundings and records concerning their operation for the determination of any possible radiation hazard.
[N.J.S.A. 26:2D-9(j)].

Neither of these provisions includes the phrase "at all reasonable times." But, as discussed more fully below, this authority may reasonably be read to allow such inspections at all reasonable times.

While there is no case law interpreting the Act's provision on entry and inspection specifically, there is case law that interprets the phrase "enter and inspect" to include "at all reasonable times." In In the Matter of NJDEP Certification Approving Vineland Chemical Company, 177 N.J. Super. 304 (App. Div. 1981), Vineland Chemical Company received a permit from NJDEP to construct and operate an industrial wastewater treatment facility. Vineland challenged a condition in the permit allowing NJDEP the right to enter. The court conducted an extensive analysis of the federal case law allowing warrantless administrative searches when a pervasively regulated industry is involved, citing U.S. v. Biswell, 406 U.S. 311 (1972). The Vineland court set forth the evolution of New Jersey case law which adopted the conclusion of federal courts on warrantless searches.

The Vineland court stated that acceptance of a license constitutes implied consent to supervision and inspection. The Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., which was the pertinent statute in the Vineland case, contained a provision granting NJDEP the right to enter and inspect without a warrant "at all reasonable times." N.J.S.A. 58:10A-6. The court concluded that even if there were not a direct reference to "at all reasonable times," such a phrase could be incorporated into license provisions in order to allow NJDEP to implement its statutory mission to protect the public from water pollution.

In another case outside the environmental area, a New Jersey court upheld a warrantless, unscheduled inspection of a regulated auto-body repair facility to help preclude disassembly of stolen autos. The court quoted the United States Supreme Court in

United States v. Biswell, supra at 316, which had explained that if inspections are to be effective and serve as a credible deterrent, unannounced and frequent inspections are essential. State v. Bromwell, 251 N.J. Super. 85, 95 (Law Div. 1991).

A third case warrants mention. State v. Bonaccorso, 227 N.J. Super. 159 (Law Div. 1988) arose from a violation of the Water Pollution Control Act by a meat packing plant. There, the defendants challenged the validity of the inspection under the authority of the Water Pollution Control Act because the inspected plant did not require a NJDEP permit for discharge to water and the inspection was without notice. The inspector was looking for the source of the pollution in a nearby small stream. Defendants maintained that they were not subject to regulation by NJDEP and, therefore, the search should not have been conducted without a warrant. The court upheld the warrantless search as valid because the Legislature had announced, in the Water Pollution Control Act, its intent to "restore, enhance, and maintain the chemical, physical and biological integrity of its waters", (N.J.S.A. 58:10A-2), making the waters of the State subject to pervasive regulatory protections. As for the protest that the inspection was without notice, the court noted that "implicit in the statutory right of entry is a requirement that the entry be reasonable in terms of its time, place and manner." Id. at 170 (emphasis added).

In our opinion, the phrase "enter and inspect" should be interpreted here to allow inspections by DEP "at all reasonable times."

NRC Comment:

8. IF THE STATE PLANS TO REQUEST LOW-LEVEL RADIOACTIVE WASTE AUTHORITY, THE NEW JERSEY STATUTES MUST AUTHORIZE APPROPRIATE RESTRICTIONS ON LAND OWNERSHIP AND USE OF SITES UTILIZED FOR DISPOSAL OF LOW LEVEL RADIOACTIVE WASTE FOR AN INDEFINITE PERIOD AFTER CLOSURE OF SITE.

New Jersey is a party to the Atlantic Interstate Low-Level Radioactive Waste Management Compact, pursuant to the Regional Low Level Radioactive Waste Disposal Facility Siting Act, N.J.S.A. 13:1E-177 et seq. This allows New Jersey to dispose of low-level radioactive waste at Barnwell, South Carolina, for at least 35 years. Under the compact, South Carolina is responsible for any restriction of land use after the disposal site is closed. There are no disposal sites in New Jersey.

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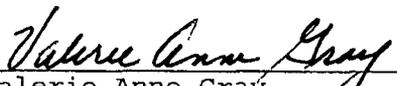
Conclusion

In our opinion, based on the above analysis of state law, the New Jersey Department of Environmental Protection, in conjunction with its Commission on Radiation Protection, has the legal authority to comply with the eight requirements on which you sought clarification in your letter. No legislative changes are necessary.

Sincerely yours,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By:



Valerie Anne Gray
Deputy Attorney General

VAG:mcp

F:vag:opinion - Assumption of federal radiation program