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**OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET**

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AUTHOR: Jim Riccio
AFFILIATION: ID
ADDRESSEE: Gregory Jaczko
SUBJECT: Groundwater contamination and preemption

ACTION: Appropriate
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LETTER DATE: 05/25/2010

ACKNOWLEDGED No
SPECIAL HANDLING: Reference June 10th meeting with the Chairman and Commissioners

NOTES:

FILE LOCATION: ADAMS

DATE DUE: **DATE SIGNED:**

Champ, Billie

From: Jim Riccio [jim.riccio@greenpeace.org]
Sent: Tuesday, May 25, 2010 8:01 AM
To: NRCExecSec Resource
Subject: Letter to Chairman & Commissioners re groundwater contamination and preemption
Attachments: Final Letter to NRC re Preemption & Groundwater.pdf; NRC to IL AG re Preemption & Braidwood.pdf

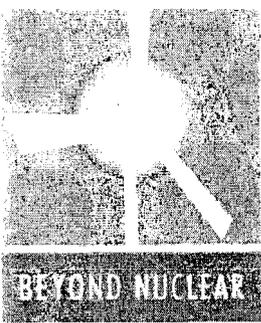
Dear Ms. Vietti -Cook,

Attached is a letter from Greenpeace, Beyond Nuclear, Eastern Environmental Law Center, Natural Resources Defense Council, Riverkeeper and the Union of Concerned Scientists to Chairman Jaczko and the Commissioners regarding groundwater contamination and preemption. Accompanying our letter as an attachment is a July 5, 2006 letter from NRC's OGC to the Illinois Attorney General.

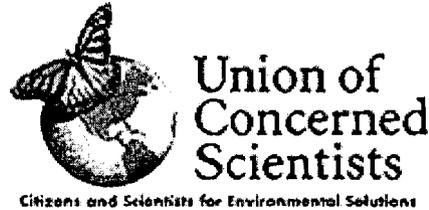
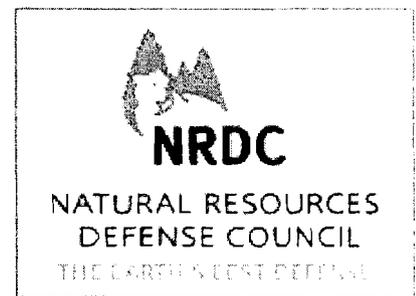
Please forward these on to Chairman Jacko and the Commission.
Several of us will be meeting with the Chairman and other commissioners the June 10 and will be addressing this issue.

Sincerely,

Jim Riccio
Greenpeace
202-319-2487



GREENPEACE



May 25, 2010

Chairman Gregory B. Jaczko
Commissioner George Apostolakis
Commissioner William D. Magwood, IV
Commissioner William C. Ostendorff
Commissioner Kristine L. Svinicki

Dear Chairman Jaczko & Commissioners

On April 20th, the U.S. Nuclear Regulatory Commission (NRC) held a meeting seeking public input into the NRC's handling of groundwater contamination at nuclear reactor sites across the United States.

During the meeting, it was brought to our attention that on July 5, 2006, the NRC's Office of General Counsel (OGC) issued a letter to the Illinois Attorney General threatening to intervene in Illinois v Exelon Corp., No. 06 MR 248 (Will County Court) (Attached). The NRC's OGC wrote that, "if the lawsuit moves forward one option for us is to seek leave to participate in the lawsuit to raise the Commission's preemption concerns."

Today we seek further clarification regarding the NRC's intent with respect to similar situations. In situations where States find that their drinking water resources are being affected by inadvertent discharges from licensed nuclear facilities, we hope that the NRC already recognizes that States have an obligation to protect their citizens that is not preempted by the Atomic Energy Act. Although we are gratified that recent comments by the NRC in the press have recognized the "states have a role to play" in such situations, this is somewhat vague. Please confirm in writing that the NRC recognizes that it is both legal and appropriate for the States to take action against licensees when drinking water is under threat.

This recognition of State powers in this area would not deprive the NRC of the means to regulate such situations. Congress has made it clear that the specific language of the AEA expressly prohibits the NRC from licensing source, special nuclear, or byproduct materials if the operation “would be inimical to the common defense and security or the health and safety of the public.” 42 USC § 2099; 42 USC § 2034; and 42 USC § 2077(c)(2). Put simply, the NRC may not allow a nuclear facility to operate in an unsafe manner. We presume the Commission would agree with such a characterization of its obligations and takes a broad view of those powers. We also presume the Commission is equally troubled that there have been dozens of instances in the recent past of contaminated groundwater at licensed NRC reactor facilities. If the Commission had been taking sufficient action pursuant to these powers, we believe States would not have felt an obligation to intervene. We believe that the recent trend of increasing State involvement with nuclear facilities can be traced to a lack of adequate action by the NRC.

Rather than enforcing regulations governing the unmonitored and uncontrolled release of radiation into groundwater, the NRC endorsed a voluntary industry initiative run by the industry’s trade association, the Nuclear Energy Institute. We think it is time for the Commission to take a different path. At the very least, we urge that the NRC should not try to handcuff states performing the work that the agency should have been doing in the first instance. Indeed, we think it notable and deserving of Congressional attention if the NRC were to exercise its preemptive authority on behalf of the nuclear industry in order to block state regulators from holding nuclear corporations accountable for the contamination of drinking water resources. Indeed, the NRC’s actions in the Illinois case referenced above clearly illustrate that clarification of the AEA’s apportionment of regulatory authority to protect important economic and environmental resources – such as a State’s vital interest in protecting its groundwater – is long overdue. We can assure you that any further attempts to handcuff state governments under the guise of federal preemption will precipitate greater controversy.

When drinking water is not under threat, the regulatory situation is less clear. The nuclear industry has already aggressively exploited this lack of regulatory clarity in what state regulators can and cannot do. And equally important, the industry finds comfort in the assurance that the NRC has, thus far, required little and even threatened to preempt those States that have the temerity to enforce requirements protective of public health and the environment.

This lack of regulatory clarity was illustrated at the April 20th meeting. Even the nuclear industry’s advocates admitted “[t]he plants did not have legal authorization to release radioactive material to groundwater.” But on the other hand, an industry advocate at the Morgan Lewis firm stated that while “(t)he Clean Water Act requires a permit to discharge any pollutant into a water of the United States,” he/she points out that “groundwater is NOT a water of the United States.” (Both presentations were provided to NRC by Greenpeace after the April

20th meeting but are still unavailable for public review in the NRC's publicly accessible ADAMS database.) Many states' laws prohibit unpermitted discharges of radioactive substances to groundwater, but the ability of the states to enforce these laws against licensed nuclear facilities has not been tested.

It is evident that the nuclear industry and its attorneys recognize that they lack the legal authority to release radiation or any pollutant into groundwater. We believe such action is clearly "inimical to the health and safety of the public." We are therefore dismayed that the NRC remains reluctant, at best, to act on such matters. Given the lack of NRC action in this area, the public is at a loss to understand why the NRC's OGC would countenance interference with State efforts to protect groundwater.

As a result of the groundwater contamination issues at dozens of operating nuclear reactor sites across the country, NRC's credibility as a regulator of the public health and safety has been called into question. Since the NRC has chosen not to enforce its mandate to protect human health and safety with respect to the multiple groundwater contamination issues, we strongly urge the NRC to cease any attempts to preempt state governments from exercising their authority to protect important economic and environmental resources within their borders.

Sincerely,

Paul Gunter
Beyond Nuclear

Richard Webster
Eastern Environmental Law Center

Jim Riccio
Greenpeace

Geoffrey H. Fettus
Natural Resources Defense Council

Phillip Musegaas
Riverkeeper

Dave Lochbaum
Union of Concerned Scientists

CC: Senator Bernie Sanders, Senator Patrick Leahy, Senator Charles Schumer, Senator Kirsten Gillibrand, Senator Frank Lautenberg, Senator Robert Menendez, Congressman Edward J. Markey, Congressman John Adler, Congressman John Hall, Congressman Dennis Kucinich, Congressman Christopher H. Smith, Congressman Peter Welch

July 5, 2006

Mr. Matthew J. Dunn
Assistant Attorney General
Chief Environmental Enforcement and
Asbestos Litigation Division
Office of the Illinois Attorney General
188 W. Randolph Street, 20th Floor
Chicago, IL 60601

Re: *Illinois v. Exelon Corp.*, No. 06 MR 248 (Will County Court)

Dear Mr. Dunn:

I would like to thank you and your colleagues for participating in our June 15, 2006, telephone discussion about the above-captioned lawsuit. In the lawsuit Illinois seeks judicial relief concerning unplanned tritium releases at the Braidwood Nuclear Generating Station. As we indicated during the phone call, certain aspects of a recently-entered "Agreed Preliminary Injunction Order" raise the question whether Illinois is taking (or contemplating) regulatory action in a preempted area – *i.e.*, regulating radioactive emissions from nuclear power reactors, a function the Atomic Energy Act assigns exclusively to the U.S. Nuclear Regulatory Commission. See, Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). See *generally*, Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976); Pacific Gas & Electric v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190 (1983).

We understand that the parties will present the Court with a status report in August. As we discussed, if the lawsuit moves forward one option for us is to seek leave to participate in the lawsuit to raise the Commission's preemption concerns. We urge the State to consider the Commission's preemption concerns when determining a path forward in this litigation. We also encourage the State to keep the preemption issue in mind when pursuing the violation notices issued by the Illinois Environmental Protection Agency for the unplanned radioactive releases at Exelon's Byron and Dresden facilities.

During our June 15 call, we discussed specific provisions of the Agreed Preliminary Injunction Order entered into by Illinois and Exelon. We expressed some of the Commission's preemption concerns, and you explained the terms of the Order from the State's perspective. The seven provisions of the Order that we discussed primarily address activities occurring within the boundaries of the Braidwood facility. These provisions also relate to the regulation of radioactive effluents and implicate general plant operations.

First, paragraph 11 requires Exelon to implement alternatives that it finds reasonably feasible to limit the amount of tritium generated at and discharged through the blowdown line at

Braidwood, "following any required approvals." You explained that these "approvals" specifically refer to NRC-approvals in recognition of our agency's regulatory oversight of nuclear power plant operation.

Second, paragraph 14(e) of the Order requires Exelon to "operate the blowdown line in a flooded condition." This requirement raises preemption concerns, in our view, because it seemingly attempts to govern operations of an NRC-licensed facility for radiological health and safety purposes.

Third, paragraph 34 of the Order prohibits Exelon from discharging tritiated wastewater through its blowdown line without giving the State 28 days written notice. You informed us that this provision was intended to apply only to the first occurrence of Exelon resuming tritiated water discharges through the blowdown line, and not for each subsequent release. You also stated that the State interprets this provision to give the State the power to stop Exelon from this discharge if it believes Exelon cannot perform it safely. This interpretation raises preemption concerns because it gives the State authority to regulate the use of Braidwood's blowdown line – an activity that is licensed by the NRC under the Commission's exclusive authority to regulate radioactive effluent. Furthermore, as we discussed, the specific use of the blowdown line could have safety implications for plant operations.

Fourth, paragraph 21 of the Order requires Exelon to develop action plans to address tritium in groundwater at levels above 200 pCi/L. We noted that 200 pCi/L is well below the NRC's dose standard for radiological releases, and that this provision raises preemption concerns, at least to the extent that it is applied within the facility's NRC-licensed site boundary.

Fifth, paragraph 24 requires Exelon to provide the State with a plan detailing all measures that have been or will be implemented to prevent the reoccurrence of releases from the onsite fixed rear-axle container (FRAC) tanks in which Exelon is currently storing tritiated wastewater. We stated that our preemption concern with this requirement is based on the extent to which the State seeks to exercise control over onsite plant operations. You informed us that the State's objective embodied in this paragraph is not to direct Exelon's usage of the tanks, but rather to gain information on them.

Sixth, we discussed paragraph 37 of the Order, which allows the State's representatives to enter the Braidwood facility, subject to the NRC's access requirements, to conduct inspections regarding the requirements of the Order. Our concern stems from the types and extent of inspections that the State's representatives would be conducting, as well as the ability to take photographs during these inspections. You responded that this provision was taken from standard language used in many of the State's environmental enforcement cases, and that you do not expect that any such inspections will be conducted.

Lastly, paragraph 18 requires Exelon to notify the State of any unlicensed radionuclide release at the Braidwood facility, "regardless of whether the amount is below the reportable quantity and not otherwise reportable." However, due to the enactment of a new state law (HB 1620) – which establishes reporting requirements for unpermitted releases of radionuclides at nuclear power plants to the extent not preempted by federal law or regulation – it is our

understanding that this provision of the Order is now moot.

During our discussion, you requested that the NRC share any information as to the current status of the FRAC tanks. As of June 30, 2006, 8 of Braidwood's 21 tanks are full. Beginning on May 22, 2006, Exelon began processing the contents of these tanks to meet primary water standards and transferred the processed water to the primary water storage tanks. Exelon will continue to process these tanks each week, and estimates that the process will be completed by August 2006.

As we mentioned in our phone call, the Commission has established a task force ("Liquid Radioactive Release Lessons-Learned Task Force") to examine the issue of inadvertent, unmonitored releases of radioactive liquids containing tritium from NRC-licensed commercial nuclear power plants. The Task Force's goal is to recommend areas for improvement applicable to the NRC and/or the industry by August 31, 2006. More information about the Task Force and the NRC's actions regarding unplanned tritium releases can be found on our website:

<http://www.nrc.gov/reactors/operating/ops-experience/grndwtr-contam-tritium.html>

Again, thank you for your time. Open lines of communication with the State are crucial for effectively and efficiently dealing with unplanned releases of radioactive effluent in your state, and we appreciate the opportunity to discuss our concerns with you. Please contact me (301-415-1956) or Darani Reddick (301-415-3841) should you have any questions.

Sincerely,

John F. Cordes
Solicitor

cc: Charles Gunnarson, Illinois Environmental Protection Agency
Bill Buscher, Illinois Environmental Protection Agency
James W. Glasgow, Will County State's Attorney
Joan Fencik, Exelon Corporation
Bradley Fewell, Exelon Corporation

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