July 9, 2010

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Dear Mr. Webster:

I am responding to your letter to the Commission of May 25, 2010, which suggests that the Office of the General Counsel (OGC) has attempted, "under the guise of federal preemption", to "handcuff state governments" in their efforts to protect groundwater. You were prompted to write this letter because it came to your attention during a public meeting the U.S. Nuclear Regulatory Commission (NRC) held recently that OGC had written to the office of the Illinois Attorney General four years ago to express OGC's concerns about actions the State was taking onsite at the Braidwood plant to protect groundwater from unplanned releases of tritium. You ask the agency to "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."

The NRC has certainly never denied that States have some authority over groundwater. There is, for example, nothing in the 2006 letter that even suggests that Illinois had no authority to take some action against the Braidwood licensee. Indeed, some years ago, when the NRC was considering what form of regulation would be best for in situ leach mining facilities, the NRC initially sought to have the States regulate groundwater at such facilities. *See*, *e.g.,* Regulatory Issue Summary 2004-09, June 7, 2004. But NRC cannot set forth, in writing, just which actions the State could take, and under what circumstances there is no interference with our regulatory authority. As your letter observes, "the ability of the states to enforce these laws against licensed nuclear facilities has not been tested."

Over the years, the NRC has generally avoided making declarations about what States, or other Federal agencies, can and cannot do. For example, when the Nuclear Energy Institute in 2002 petitioned the agency to restate Federal preemption law, and to provide procedures whereby any person could request an NRC staff determination as to whether a particular State or local requirement was preempted by NRC's requirements, the NRC denied the petition, partly because any opinion the agency issued would be at best only guidance as to how a court might rule when faced with a preemption challenge to a State or local action. *See* 67 Fed. Reg. 66074, 66076 (Oct. 30, 2002). As far as I know, only once, when the City of New York was requiring Columbia University to get a radiological safety permit from the City, has the NRC appeared in court as a plaintiff seeking a ruling that the Atomic Energy Act preempted State or local action. *See U.S. v. City of New York*, 463 F.Supp. 604 (S.D.N.Y., 1978). Even when the controversy has been over releases of tritium from nuclear power plants, the agency has generally avoided statements about what a State can and cannot do.

The exceptions to the NRC's general policy of not making declarations in regard to preemption have arisen in situations that demanded some clarification of lines of authorities. For example, when, in the mid-1990s, the U.S. Environmental Protection Agency (EPA) rescinded its regulation of nuclear power plants under the Clean Air Act, the question arose whether States exercising authority under the same Act retained any authority over those same plants. Both the EPA and the NRC agreed that, yes, the States did retain such authority, even though EPA no longer exercised its own authority. Indeed, the EPA and the NRC said that the States could set more stringent standards for radionuclide air emissions from these plants than did the NRC. 60 Fed. Reg. 46206, 46210 (September 5, 1995). Another case in which lines of authorities demanded clarification was the case, already mentioned, in which New York City sought to require that Columbia have a radiological health and safety permit from the City. The Atomic Energy Act clearly reserves to the NRC the regulation of the radiological health and safety aspects of nuclear reactors. *See*, *e.g.,* section 274c.(1) of the Act, 42 U.S.C. 2021(c)(1).

The letter OGC sent to Illinois is another such case. Each of the seven specific concerns that the letter raised had to do with actions the State sought to take onsite, for radiological health and safety reasons, sometimes in ways that had safety implications for plant operations. The Atomic Energy Act clearly reserves such actions to the NRC. True, the letter said that the NRC might "seek leave to participate in the [then already existing county] lawsuit to raise the Commission's preemption concerns." But a government agency must be free to request such participation if that agency determines that it needs to convey its views to a court. The alternative is a doctrine that an agency must always depend on private litigants or other governmental entities to seek to draw boundaries of its own authority. OGC's letter did not deny that the State had authority to take some action toward the licensee, and indeed the letter did not assert that the State was entirely without authority to take even action that could affect plant operations. The EPA, for example, has Clean Water Act authority over water intake structures at nuclear power plants, but, for nuclear safety reasons, the EPA exercises such authority only in consultation with the NRC. *See* 69 Fed. Reg. 41576, 41585 (July 9, 2004). The same is reasonably to be expected of States acting in similar circumstances. In the end, as a result of the consultations between OGC and the Illinois Attorney General's Office, the NRC did not intervene in the lawsuit, and Illinois proceeded with its action against the NRC licensee.

Preemption law is far too complex for easy generalization. The distribution of authorities among Federal and State governmental entities is one thing under the Clean Water Act, another under the Clean Air Act, another under the Atomic Energy Act, and yet another under the Coastal Zone Management Act. Consultations among governments on environmental matters are often essential, and States frequently initiate such consultations. You "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." However, the sentence misses the mark on several grounds -- for example, in its suggestion that the NRC would seek preemption in order to protect the industry, and the implication that the NRC has expansive preemptive authority that it can exercise unilaterally. But the sentence is especially troubling to the extent it suggests that Congress should prevent one government agency from expressing concerns about where the line is between its and another government agency's respective jurisdictions. Such consultations are a necessary part of the attentive implementation of complex statutes enacted in the public interest.

With respect to the general issue of groundwater, I am sure you are now aware that the report of the NRC's Groundwater Task Force has been issued and the Executive Director of Operations has formed a senior management review group to evaluate the report and make recommendations for Commission consideration later this year.

Please do not hesitate to contact me if you have questions about NRC's legal framework.

Sincerely,

/RA/

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