



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 28, 1990

The Honorable Robert S. Walker
United States House of Representatives
Washington, D. C. 20515

Dear Congressman Walker:

I am responding to your letter of August 10, 1990, which forwarded a letter from Mr. Samuel A. Trythall, Jr., expressing concern about the preemption of state laws regarding low-level nuclear waste.

The courts have consistently held that the Atomic Energy Act of 1954, as amended, (Act) has preempted the field of radiation health and safety in the use of source, byproduct, special nuclear material, and production and utilization facilities, as these terms are defined in the Act. Since low-level radioactive waste is composed of any combination of one or more of source, byproduct, and special nuclear material, and is subject to radiation health and safety regulation by the Federal Government, Federal law is therefore preemptive. The most recent leading case is *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U. S. 190 (1983).

The preemption situation is, however, more complicated in some areas because of the NRC's Agreement State program and the Clean Air Act. In 1959 the Congress added Section 274 to the Atomic Energy Act. Section 274 allows the Commission to relinquish Federal regulatory authority over source, byproduct, and special nuclear material in quantities not sufficient to form a critical mass, to States that develop a regulatory program that meets the criteria of Section 274. To date, 29 States have entered into a Section 274 agreement. These Agreement States, as they are called, exercise full authority under State law and regulation. Federal preemption in these states is limited essentially to special nuclear material in critical mass quantities, high-level radioactive waste, distribution of consumer products containing nuclear materials, and production and utilization facilities (primarily reactors). Practically all of these Agreement States regulate low-level radioactive waste. A State may also enter into an agreement to regulate just low level radioactive waste.

With regard to the State of Pennsylvania, the Commission staff is presently considering a draft application for an Agreement to relinquish regulatory authority to the State covering the disposal of low-level radioactive waste. When such an Agreement is executed, the State will have regulatory authority over low-level waste disposal within its boundaries. However, the State program is expected to be compatible with NRC's licensing program.

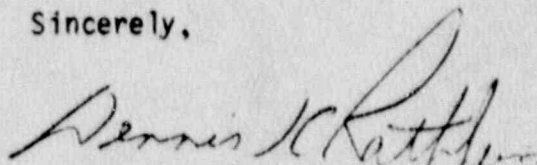
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Mr. Trythall raises the issue of disposal of low level radioactive waste in sanitary landfills. In some cases the level of radioactivity in waste is so low that it is trivial or hardly detectable from the radioactivity that naturally occurs in all materials. In terms of radiation health and safety there may be no good reason to not put some waste in landfills. The Commission's recent Below Regulatory Concern policy raises the future possibility of an NRC standard, which may be applicable to Agreement States allowing disposal of such very low-level waste in landfills. But the policy itself has no preemptive effect; future rulemaking would be needed. The Commission recognizes, moreover, that radiation is only one of many valid concerns regarding the acceptability of any waste in a landfill. State action on grounds other than radiation health and safety is not preempted by the Atomic Energy Act. Finally, it is recognized that the owner and operator of a landfill, as proprietor, may impose limits on the nature of the waste acceptable for disposal.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dennis K. Rathbun".

Dennis K. Rathbun, Director
Congressional Affairs
Office of Governmental and
Public Affairs