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October 18, 1985

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Governor Tony Anaya
of the State of New Mexico
Capitol Round House
Fourth Floor
Santa Fe, New Mexico 87501

Dear Governor Anaya:

We are concerned that the Environmental Improvement Division (EID) is attempting to enforce regulations that have not been adopted by the Environmental Improvement Board (EIB) as required by both federal and state law. The EID recently told uranium mining and milling companies that tailings stabilization must comply with regulations of the Nuclear Regulatory Commission and United States Environmental Protection Agency, although New Mexico has its own regulations governing stabilization. Federal regulations were expressly rejected by the EIB in 1981 as impracticable for New Mexico.

The Atomic Energy Act, as amended by the Uranium Mill Tailings Radiation Control Act of 1978, requires that an Agreement State such as New Mexico shall enforce practicable standards "which shall be adopted by the state." *See* 42 USC § 2021(o). Similarly, New Mexico's Environmental Improvement Act and Radiation Protection Act authorize the EID to enforce the Radiation Protection Regulations that have been adopted by the EIB with the advice and consent of the Radiation Technical Advisory Council. *See* §§ 74-1-7.A(5) and 74-3-1 *et seq.* (NMSA 1978). Neither federal nor state law authorizes the EID to enforce regulations that have not been adopted under state law.

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The Atomic Energy Act, as amended by the Uranium Mill Tailings Radiation Control Act of 1978, requires that an Agreement State such as New Mexico shall enforce practicable standards "which shall be adopted by the state." *See* 42 USC § 2021(o). Similarly, New Mexico's Environmental Improvement Act and Radiation Protection Act authorize the EID to enforce the Radiation Protection Regulations that have been adopted by the EIB with the advice and consent of the Radiation Technical Advisory Council. *See* §§ 74-1-7.A(5) and 74-3-1 *et seq.* (NMSA 1978). Neither federal nor state law authorizes the EID to enforce regulations that have not been adopted under state law.

The "Applicable Standards for the Stabilization of Uranium Mill Tailings in New Mexico" are discussed in the enclosed memorandum prepared by counsel to the Uranium Environmental Subcommittee of the New Mexico Mining Association. I trust that, upon review of this memorandum, you will instruct the EID to enforce only regulations that have been adopted in accordance with the laws of New Mexico.

Sincerely yours,

Edward E. Kennedy

Edward E. Kennedy
Chairman
Uranium Environmental Subcommittee

EEK:ww
Enclosure
cc: Members of the Radiation Technical Advisory Council
Environmental Improvement Board
Radioactive Materials Committee

STEPHENSON, CARPENTER, CROUT & OLMSTED

Applicable Standards for the Stabilization of Uranium Mill Tailings in New Mexico

I. Introduction

As an Agreement State under the Atomic Energy Act ("AEA"), New Mexico adopted its Radiation Protection Regulations, with requirements that specifically govern the stabilization of uranium mill tailings. *See* New Mexico Environmental Improvement Board ("NMEIB"), Radiation Protection Regulations, Part 1[illegible] New Mexico's regulations are in accordance with the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA"), which provides that an Agreement State must require compliance with standards that shall be "adopted by the State" and "equivalent, to the extent practicable, or more stringent than" the standards promulgated by the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency ("EPA"). *See* 42 U.S.C. § 2021(o).

The New Mexico Environmental Improvement Division ("NMEID") now takes the position, however, that the stabilization of uranium mill tailings in New Mexico must comply with the regulations and standards adopted by the NRC and EPA. In support of its position, the NMEID cites a memorandum in which the NRC asserts that: (1) Agreement States have the responsibility "directly from the Atomic Energy Act" to enforce the EPA regulations and thus need not either wait for the NRC to adopt conforming regulations or revise their own state regulations, and (2) in reviewing Agreement States' action to terminate uranium mill licenses, NRC will use EPA and NRC standards where Agreement State standards are less restrictive. *See* Memorandum dated March 22, 1985, from Donald A. Nussbaumer, NRC, to Colorado, Texas, New Mexico and Washington.

The following memorandum examines the agencies' position in the light of applicable statutes, legislative history, case law, and previous interpretations by the agencies. The inescapable conclusion is that the imposition of federal regulations in New Mexico by the NMEID or NRC, instead of New Mexico's Radiation Protection Regulations, would be contrary to both federal and state law.

II. Provisions of the Atomic Energy Act Regarding Discontinuance Agreements and Stabilization of Uranium Mill Tailings

(A) Statutory Provisions for Discontinuance of the NRC's Authority. Section 274(b) of the AEA authorizes the NRC[1] to enter into an agreement with any state,

> providing for discontinuance of the regulatory authority of the [Nuclear Regulatory] Commission . . . with respect to any one or more of the following materials within the State -
>
> (1) byproduct materials
>
> (2) source materials;
>
> (3) special nuclear materials in quantities not sufficient to form a critical mass.
>
> During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

42 U.S.C. § 2021(b).

The NRC's authority is *not* discontinued with respect to certain specified activities, including the operation of a production or utilization facility,

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1. The safety functions of the Atomic Energy Commission are now the responsibility of the NRC. 42 U.S.C. § 5841 and Executive Order No. 11834.

imports and exports, and ocean disposal. The NRC also retains the authority "to make a determination that all applicable standards and requirements have been met prior to termination of a license for byproduct material." 42 U.S.C. § 2021(c). (The scope of the NRC's retained authority with respect to byproduct material is discussed in section II(D), below.)

The effect of a discontinuance agreement has been succinctly described as follows by the United States Court of Appeals for the District of Columbia Circuit: "Where [a discontinuance] agreement is in effect, the [Nuclear Regulatory] Commission has no residual authority over individual licensing actions." *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, No. 77-1570, slip op. at 2 (D.C.Cir. Jan. 6, 1978) (per curiam).

Contrary to its assertion that the states have "direct responsibility" under the AEA, the NRC has described the states' authority to carry out a discontinuance agreement as follows:

> Under the State Agreement Program, the States' actions are taken on the basis of their inherent police power, not on federal authority. Under the [AEA], State licensing action is not a federal action which has been "delegated" to the State and which the State carries out as a federal agent. The statute, the court decisions, and the legislative history are clear on this point.

Federal Defendants' Memorandum in Support of Motion to Dismiss and Motion for Summary Judgment (Federal Defendants' Memorandum) at 14, *Natural Resources Defense Council v. United States Nuclear Regulatory Commission*, No. CIV 77-240-B (D.N.M. 1978).

(B) Legislative History of the Discontinuance Provisions. When the AEA was adopted in 1954, federal regulation over byproduct, source and special nuclear materials preempted state regulation. In January 1957, Senator Anderson, Chairman of the Joint Committee on Atomic Energy, introduced legislation (S. 53, 85th Cong., 1st Sess.) to turn over areas of regulatory

responsibility in the atomic energy field to the states when they became competent to exercise such responsibility. *See Federal-State Relationships in the Atomic Energy Field: Hearings before the Joint Committee on Atomic Energy*, 86th Cong., 1st Sess. 27 (1959). In June 1957, the Atomic Energy Commission (AEC) proposed alternative legislation that would authorize concurrent federal-state jurisdiction but would not permit the AEC to withdraw from any of its regulatory responsibilities, even in states having very good radiation regulatory programs. *Id.* at 293. In May 1959, however, the AEC proposed legislation providing for the discontinuance of federal authority, *id.* at 294, which was the approach proposed earlier by Senator Anderson and eventually adopted by Congress.

During the 1959 hearings of the Joint Committee, Commissioner Graham was asked why he now preferred the discontinuance of authority rather than concurrent jurisdiction. He referred this question in part to Mr. Lowenstein, counsel for the AEC, who responded that concurrent jurisdiction would be wasteful of manpower and funds, would lead to divided responsibility, and might result in bad safety controls if one level of government did not have primary responsibility for regulation. He also noted that concurrent jurisdiction would subject users to the procedural burdens of dealing with different agencies on the same questions. *Id.* at 315.

After the hearings, the Joint Committee prepared a report favoring the discontinuance of authority as provided in the bill that eventually passed. The report stated:

> It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating by-product, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both. The [illegible] is intended to encourage states to increase their knowledge and capacities, and to enter into agreements to assume regulatory responsibilities over such materials.

Rep. No. 870, 86th Cong., 1st Sess., reprinted in *1959 U.S. Code Cong. & Ad. News* 2879. The report further states:

> Subsection b. is the principal substantive section of the bill. It authorizes the Commission to enter into agreements with Governors of individual States providing for discontinuance of the regulatory source material [sic], and special nuclear materials, in quantities not sufficient to form a critical mass. During the duration of such an agreement it is recognized that the State shall have authority to regulate such materials for the protection of public health and safety from radiation hazards. Prior to such an agreement, the Commission has the responsibility for the regulation of such materials. Subsection b. permits the commission to discontinue its authority and encourages states, when qualified, to assume the responsibility. The hazards from the types of materials encompass by far the greatest part of the Commission's present licensing and regulatory activities. They are areas which are susceptible to regulation by the States, after the State has established a program for the control of radiation hazards. Subsection b. provides that so long as the agreement is in effect, the State shall have regulatory authority over these materials.

Id. at 2880.

In presenting the amendment to the Senate, Senator Anderson stated:

> The bill authorizes the Commission to enter into agreements with State Governors providing for discontinuance of certain of the Commission's regulatory authority, after proper certification by the Governor and findings by the commission that the State program is adequate. The withdrawal by the commission and the corresponding assumption of responsibility by States, will be on a State-by-State basis, beginning with those States most advanced in the atomic energy field and eager to assume their responsibilities.

105 *Cong. Rec.* 19043 (1959). The discontinuance provision (section 274 of the AEA, 42 U.S.C. § 2021) was enacted on September 23, 1959. Pub. L. No. 86-373, § 1, 73 Stat. 688 (1959).

In discussions of the discontinuance provision, the NRC has stated that "the statute authorizes a cession or turnover of federal authority, rather than delegation, to avoid the existence of dual or concurrent jurisdiction," Federal

Defendants' Memorandum at 19, and that "the explicit Congressional design of section 274 [is] to restrict the [Nuclear Regulatory] Commission's authority over a State program in such a manner as to leave the Commission without authority to affect individual State licensing actions." Federal Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment and Reply to Plaintiffs' Opposition to Federal Defendants' Motion for Summary Judgment (Federal Defendants' Response) at 6, *Natural Resources Defense Council v. United States Regulatory Commission*, No. CIV 77-240-B (D.N.M. 1978). The NRC summed up the legislative history as follows:

> The legislative history of Section 274 bears out that Congress intends to recognize the growing interest and competence of the States to assume responsibility for defined regulatory areas; to provide for a discontinuance of Commission authority upon a finding that the State program is adequate; and to permit the Commission to reassert authority "only under extraordinary circumstances" involving hazards to the public health and safety and after notice and opportunity for hearing to the State. Section 274 reflects a traditional concept of "federalism" and a sensitivity to the State role in health and safety matters affecting its citizenry.

Id. at 9 (citations omitted).

(C) Statutory Provisions for Termination of a Discontinuance Agreement. Section 274(j) of the AEA establishes conditions for the termination or suspension of a discontinuance agreement and reassertion of the NRC's authority. Unless there is an emergency, this action may be taken only after reasonable notice and opportunity for a hearing or upon the request of the governor of the affected state, if the NRC finds that (i) it is necessary to protect the public health or safety, or (ii) the Agreement State has not complied with the statutory conditions for a discontinuance agreement. 42 U.S.C. § 2021(j). The Department of Justice has described these requirements as follows:

> The NRC must first notify the state of deficiencies in its program, and then grant the state an opportunity for a hearing, before revoking or suspending all or part of the program. Only after these procedural steps have been

> completed may the NRC directly enforce existing permit conditions or impose new conditions.

Brief for Respondents at 93, *Eagle-Picher Industries, Inc. v. United States Environmental Protection Agency*, 759 F.2d 905,922 (D.C.Cir. 1985).

The NRC may not suspend or terminate a discontinuance agreement in order to regulate a particular site. In this regard, the Department of Justice has stated that:

> The legislative history of section 274 confirms the congressional intent that the NRC's power of revocation or suspension in a non-emergency situation focuses on program inadequacies and *not* on individual license enforcement problems.

Id. at 94 (emphasis in original). The Department of Justice has also noted that "[n]othing in the policy statement [of the NRC on evaluation of Agreement States' programs] lends any support to the view that the NRC may reassert its authority over a specific facility in a non-emergency situation." *Id.* at 95 (footnote). The NRC itself has stated that section 274(j) "does not provide for recapture on a finding that State action on a particular license is not compatible with NRC's program." Federal Defendants' Memorandum at 23 (citations omitted).

(D) Specific Provisions Regarding Uranium Tailings. UMTRCA added to the AEA provisions regarding "state compliance requirements," codified at 42 U.S.C. 2021(o), and the NRC's retention of certain authority over the termination of a license for byproduct material, codified at 42 U.S.C. § 2021(c). Also, an amendment to UMTRCA restricted the NRC's ability to terminate an Agreement State's authority to regulate tailings under a discontinuance agreement.

Under the first of these provisions, an Agreement State must require:

> compliance with standards *which shall be adopted by the State* for the protection of the public health, safety, and the environment from hazards associated with [byproduct] material which are equivalent, *to the extent practicable*,

> or more stringent than, standards adopted and enforced by the [Nuclear Regulatory] Commission for the same purpose, including requirements and standards promulgated by the [NRC and EPA].

42 U.S.C. § 2021(o)(2) (emphasis added). Thus, the AEA, as amended by UMTRCA, recognizes that standards for the control of byproduct material in Agreement States must be adopted by the Agreement States themselves. Further, the amendment requires that the standards of the Agreement States must be equivalent or more stringent than those of the NRC - but only to the extent found practicable. The states may determine that their standards shall be less stringent because of considerations of practicability.[2]

With respect to the termination of a license for byproduct material, UMTRCA provides:

> The [Nuclear Regulatory] Commission shall also retain authority under any such agreement to make a determination that all applicable standards and requirements have been met prior to termination of a license for byproduct material.

42 U.S.C. § 2021(c). This provision has different consequences in Agreement and non-Agreement States. The reference to "applicable" standards recognizes that different standards will apply in different jurisdictions. In Agreement States, the standards that apply to byproduct materials are those adopted by the states themselves. *See* 42 U.S.C. § 2021(b) and (o)(2).

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2. The section of UMTRCA dealing specifically with enforcement of the EPA standards, 42 U.S.C. § 2022(d), provides that Agreement States shall implement those standards in accordance with 42 U.S.C. § 2021(o), *i.e.*, the Agreement States shall require compliance with standards that shall be adopted by the states themselves and that are equivalent "to the extent practicable" to the standards of the EPA.

   The NMEID and NRC cite 42 U.S.C. § 2022(d) as authority for their position that Agreement States may "directly enforce" federal standards. However, the agencies do not explain how a provision incorporating the requirement that the states adopt their own standards can support the agencies' position that the states should enforce federal standards. In fact, the significance of 42 U.S.C. § 2022(d) is just the opposite of the agencies' assertion.

Only in states where the NRC exercises regulatory authority will the NRC's own standards be applicable.[3]

The applicability of 42 U.S.C. § 2021(c) is clouded because of an omission in the final version of UMTRCA adopted by Congress.[4] Because of this drafting error, the statute does not specify the determination that the NRC must make when a stabilized site will be transferred to the affected state. Even if the statute is interpreted to require that NRC determine whether "all applicable standards" have been met in connection with *all* transfers of stabilized sites, the requirement will have different consequences in Agreement and non-Agreement States, *i.e.*, the states' own standards will apply in Agreement States, and NRC's standards will apply in non-Agreement States.

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3. NRC may argue that "applicable standards and requirements" refers to the NRC regulations even in Agreement States. However, Representative Udall acknowledged that Agreement State Standards would govern stabilization:

> The [Nuclear Regulatory] Commission *and the States*, through their enforcement of regulatory standards promulgated pursuant to *State or Federal law*, should begin with the premise that where steps can be taken to remove the necessity for long-term maintenance, they should be taken . . . . Where making long-term care unnecessary is not practicable, the Commission *and the States*, with the industry must be pledged to minimize the necessity for such care.

124 *Cong. Rec.* 38230 (1978) (emphasis added). The clear language of the statute and the committee reports on the legislation all refer to "applicable standards," not "applicable NRC standards." *See* H.R. Report. No. 95-1480, 95th Cong., 2d Sess. 21 and 45, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 7443 and 7472.

4. If the transfer of an active uranium mill tailings site is to a state, the state shall assume title "following the [Nuclear Regulatory] Commission's determination of compliance under subsection (d) of this section." 42 U.S.C. § 2113(b)(3). But 42 U.S.C. § 2113 has no subsection (d).

An amendment of UMTRCA specifies that the conditions for termination of a discontinuance agreement apply to the regulation of uranium tailings. The amendment provides that the authority of an Agreement State over byproduct material may be terminated, and the NRC may exercise authority over such material, only if the NRC has complied with the requirements for termination of a discontinuance agreement under section 274(j) of the AEA. *See* 42 U.S.C. § 2021 note, and discussion in section II(C), above.

III. New Mexico Discontinuance Agreement and Tailings Regulations

Effective May 1, 1974, Governor King and the AEC entered into an "Agreement Between the United States Atomic Energy Commission and the State of New Mexico for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended." 39 Fed. Reg. 14743 (1974). This agreement provides in part that "the Commission shall discontinue, as of the effective date of this Agreement, the regulatory authority of the Commission in [New Mexico] under Chapters 6, 7, and 8, and Section 161 of the [Atomic Energy] Act with respect to [byproduct, source and special nuclear] materials."

In June 1981, the NMEIB held hearings on the NRC regulations (subsequently withdrawn) under UMTRCA. The NMEIB found that the NRC regulations were impracticable for New Mexico, and on September 11, 1981 the NMEIB adopted somewhat different regulations that are "to the extent practicable for New Mexico, equivalent to or more stringent than the . . . NRC criteria." NMEIB, *Amended Radiation Protection Regulations and Statement of Reasons for Their Adoption* 2-5 (1981). These regulations are included in New Mexico's Radiation Protection Regulations, primarily in Part 12, "Stabilization of Radioactive Milling Waste Retention Systems."

IV. Authority of the NRC in New Mexico

In the four years since the NMEIB adopted regulations governing uranium tailings stabilization, the NRC's memorandum to New Mexico and other Agreement States is the first indication of the NRC's claim that NRC standards are applicable in New Mexico. The uranium milling companies in New Mexico have operated under the reasonable assumption that they are required to comply only with New Mexico's regulations.

The NRC never appealed New Mexico's regulations governing uranium tailings stabilization or took the steps required, under 42 U.S.C. § 2021 note, to exercise its own authority over byproduct material in New Mexico. New Mexico's Environmental Improvement Act provides that any "person who is or may be affected" by any regulation adopted by the NMEIB may appeal the regulation by filing a notice of appeal with the Court of Appeals within thirty days after the regulation has been officially filed. Section 74-1-9.H and I (NMSA 1978). The NRC participated in the hearings of the NMEIB that led to the adoption of the stabilization regulations and did not appeal those regulations. Even if the NRC is deemed a "person who is or may be affected" by the NMEIB's stabilization regulations, the time for NRC to appeal the 1981 action of NMEIB has long since expired.

As noted above in the discussion of the conditions for terminating a discontinuance agreement (section II(C)), the federal government has taken the position that the NRC may not reassert its authority over a specific facility except when there is an emergency. The power of the NRC to reassert its authority in New Mexico with respect to the regulations governing tailings stabilization, or any other aspect of New Mexico's radiation protection program, is conditioned upon the NRC's compliance with the conditions under section 274(j) of the AEA, 42 U.S.C. § 2021(j), for termination or suspension of a discontinuance agreement. NRC has not taken the steps required under

section 274(j), nor does the agency purport to have done so.

Consequently, NRC has no authority to regulate New Mexico facilities, and the operation of those facilities is governed by New Mexico's Radiation Protection Regulations. The extent of NRC's authority with respect to facilities in New Mexico is to make a determination whether the stabilization programs submitted by the operators will comply with the applicable regulations, *i.e.*, New Mexico's Radiation Protection Regulations.

V. Authority of the Environmental Improvement Division

The authority of the NMEID is limited to that conferred upon the agency by statute. "Administrative bodies can properly act only within the scope of the authority prescribed by statute." *La Jara Land Dev. v. Bernalillo Cty. Assess.*, 639 P.2d 605, 607 (N.M.App. 1982); *see also Vermejo Club v. French*, 85 P.2d 90 (N.M. 1938); *Maxwell Land Grant Co. v. Jones*, 213 P. 1034 (N.M. 1923). "Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim." 1 Am. Jr. 2d *Administrative Law* § 70 (1962).

The NMEID is a creature of New Mexico's Environmental Improvement Act and, of special relevance here, Radiation Protection Act. Thus, the NMEID must find its authority, if any, to impose the stabilization standards of the NRC or EPA within these statutes, notwithstanding NRC's unsupported claims to the contrary.

Under the Environmental Improvement Act, the NMEID is authorized to enforce the regulations promulgated by the NMEIB, with the advice and consent of the Radiation Technical Advisory Council (RTAC), and the environmental management laws for which the NMEID is responsible, and to have such other powers as may be necessary and appropriate to exercise the

powers and duties delegated to the NMEID. Sections 74-1-6.E and H, and 74-3-5 (NMSA 1978). The environmental management laws for which the NMEID is responsible are specified and include the Radiation Protection Act, but not the Atomic Energy Act. *See* section 74-1-7.A (NMSA 1978). The NMEID is directed to enforce regulations and standards in the areas of "radiation control *as provided in the Radiation Protection Act.*" *Id.* (emphasis added).

The Radiation Protection Act provides that the NMEID "shall issue licenses . . . in accordance with procedures prescribed by regulation of the [NMEIB]." Section 74-3-9.B (NMSA 1978). The director of the NMEID is authorized to issue an order to cease and desist or to revoke a license upon a finding that a person is violating or threatens to violate a condition of the license or a regulation of the NMEIB. Sections 74-3-11.A (NMSA 1978). The NMEID is authorized to seek injunctive relief from "any violation or threatened violation of regulations, rules or orders adopted pursuant to the provisions of the Radiation Protection Act." Section 74-3-11.C (NMSA 1978). Only the NMEIB, with the advice and consent of the RTAC, has authority to promulgate regulations under the Radiation Protection Act. *See* section 74-3-5 (NMSA 1978). Finally, the Radiation Protection Act provides that:

> For the duration of [a discontinuance] agreement, the [NMEIB] shall have authority to regulate the radioactive materials covered by the agreement for the protection of the public health and safety and the environment from radiation hazards.

Section 74-3-15 (NMSA 1978).

Thus, the statutory and sole authority of the NMEID with respect to providing protection from radiation hazards is limited to implementing the regulations adopted for this purpose by the NMEIB with the advice and consent of the RTAC, *i.e.* the Radiation Protection Regulations. See *Kerr-McGee Nuc. Corp. v. New Mex. Env. Imp.*, 637 P.2d 38, 46 (N.M.App.

1981). The RTAC has not given its advice and consent with respect to any regulations of the NRC or EPA, nor has the NMEIB adopted any such regulations. In fact, the NRC regulations were specifically rejected by the RTAC and NMEIB. Thus, the NMEID has no power to require compliance with regulations of the NRC or EPA. The New Mexico legislature has specifically confirmed in section 74-3-15 (quoted above) the the NMEIB has the authority to regulate radioactive materials during the duration of the discontinuance agreement with the NRC.

The NRC has stated that "[u]nder a State [Discontinuance] Agreement, federal jurisdiction is terminated, and the State assumes jurisdiction under its sovereign police power." Federal Defendant's Memorandum at 18. Indeed, an administrative agency of New Mexico does not derive its powers from a federal agency or an act of Congress. *See United States v. Butler*, 297 U.S. 1 (1936); *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 171 P.2d 838 (Wash. 1946), *app. dism.* 330 U.S. 803 (1947). Its powers must be derived from the state constitution or statutes.

The limitation of state administrative authority to that delegated by state statute has been confirmed in New Mexico in a matter similar in some respects to the current attempt by the NMEID to impose federal standards on tailings stabilization. In *Public Serv. Co. of N.M. v. New Mexico Envir. Imp. Bd.*, 549 P.2d 638 (N.M.App. 1976), the NMEIB had amended the state air quality regulations to impose more stringent federal standards. (The NMEID is currently attempting to impose more stringent federal stabilization requirements that the NMEIB has not even adopted and, indeed, has expressly rejected.) The court in *Public Serv. Co.* found that the NMEIB's mandate to prevent or abate air pollution did not authorize the adoption of regulations as strict as the federal standards for reasons not provided in the state statute.

The court rejected the NMEIB regulations on the basis that "[a]dministrative bodies are the creatures of statutes. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them." 549 P.2d at 641.[5]

IV. Conclusion

Stabilization at the "active" uranium mill tailings sites in New Mexico is subject only to the Radiation Protection Regulations adopted by the NMEIB. Neither the NRC nor the NMEID may impose federal standards in New Mexico. The NRC's assertions in its memorandum to Agreement States are both incorrect: New Mexico has the authority only to enforce its own state regulations, and any imposition by NRC of EPA and NRC regulations in New Mexico would be unlawful. The NRC's authority with respect to the stabilization of an active uranium mill tailings site in New Mexico is restricted to determining whether or not the stabilization complies with the Radiation Protection Regulations. The NMEID's authority is restricted to the enforcement of the Radiation Protection Regulations.

October 17, 1985

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5. Any order by the NMEID directing a licensee to comply with EPA or NRC regulations governing disposal of uranium mill tailings would be "licensing action" within the meaning of Section 74-3-9.E and appealable to the district court in Gallup. *See United Nuclear Corporation v. Denise Hart and Environmental Improvement Division,* No. 7878 (N.M. Court of Appeals, June 5, 1985).