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MINERALS & MINING PROGRAM

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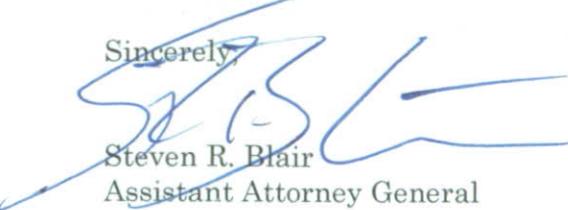
Mike Cepak
Minerals and Mining Program
Foss Building
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Pierre, SD 57501

Re: *Powertech (USA) Inc., Application for Large Scale Mine Permit*

Gentlemen:

Enclosed please find true and correct copies of the Mineral and Mining Program's Brief as requested by the Hearing Chair, including attachments, and an accompanying Certificate of Service. The originals have been sent to the Department. Copies of these documents have also been sent to "A" status parties as evidenced by the mailing list attached to the Certificate of Service.

Sincerely,


Steven R. Blair
Assistant Attorney General

Enclosures

Cc/encl: All Parties of Record Noted in Certificate of Service Mailing List

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NOV 05 2013
MINERALS & MINING PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

| | | |
|-----------------------------|---|------------|
| IN THE MATTER OF POWERTECH |) | M&MP BRIEF |
| (USA), INC. APPLICATION FOR |) | |
| LARGE SCALE MINING PERMIT |) | |
| (Dewey-Burdock Project) |) | |

The Minerals & Mining Program (M&MP) of the South Dakota Department of Environment and Natural Resources hereby files this brief at the request of the Hearing Chair.

Powertech (USA) Inc. (Powertech) has applied for a Large Scale Mine permit to be issued by the Board of Minerals and Environment (Board) under the provisions of SDCL ch. 45-6B, and any rules promulgated thereunder. The M&MP reviewed Powertech's application and recommended conditional approval. Several of the recommended conditions require that Powertech apply for and receive various local, state and federal permits, including a Source and Byproduct Material License from the United States Nuclear Regulatory Commission (NRC), as well as an Aquifer Exemption and Underground Injection Control (UIC) Class III and Class V permits from the United States Environmental Protection Agency (EPA).

Powertech has taken steps to substantially comply with the process to receive these federal permits. Through the course of the testimony and argument heard thus far in the proceedings the question has arisen as to whether Powertech must receive those federal permits before the Board can grant a Large Scale Mine permit.

The parties were asked to respond to the following questions:

- 1.) Whether SDCL 45-6B-32 requires compliance with "all applicable local, state, and federal laws" (i.e. permits under the jurisdiction of the NRC and EPA etc.) as a condition precedent to the granting of a state permit?

And,

2. If so, what are those "laws" that need to be complied with?

I. Necessary Permits

Starting with the second inquiry, the permits that Powertech needs to obtain at either the local, state or federal level were detailed in table 1.4-1 of Powertech's Large Scale Mine Permit application. Based upon table 1.4-1, and consultation with M&MP staff, it is believed that the permits currently outstanding are as follows:

1. Custer County:
 - Building
 - Grading
 - Floodplain Construction
 - Sign
 - Septic System
2. S.D. Water Management Board:
 - Groundwater Discharge
 - Inyan Kara Water Rights
 - Madison Water Rights
3. S.D. Brd. Minerals & Environment: - Large Scale Mine
4. S.D. DENR:
 - Construction Stormwater
 - Industrial Stormwater
 - Certificate of Approval for a Nontransient Noncommunity Water System
5. U.S. Bureau of Land Management: - Plan of Operations
6. U.S. NRC: - Source and Byproduct Materials License

7. U.S. EPA: - Class III Underground Injection Control
- Class V Underground Injection Control
- Aquifer Exemption

II. The Permits Discussed Above are not Conditions Precedent to the Grant or Denial of a State Large Scale Mine Permit

SDCL 45-6B-32 states that “the Board of Minerals and Environment shall grant a permit to an operator if the application complies with the requirements of this chapter and all applicable local, state, and federal laws.” The intention of a statute is ascertained primarily from the language used in the statute. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 15, 757 N.W.2d 756, 761 (citing *Martinmaas v. Engleman*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611). In interpreting a statute, one must determine what the Legislature said, rather than what is believed the Legislature should have said. *Id.* The examination of a statute should be confined to the language used. *Id.* “Words and phrases in a statute must be given their plain meaning and effect.” *Id.* (quoting *Martinmaas*, 2000 S.D. 85, ¶ 49). When the language in a statute is clear, certain, and unambiguous the meaning of the statute must be declared as it is clearly expressed. *Id.*

From the outset one could argue that the plain language of the statute has been met. No evidence has been introduced, and no information has been presented, establishing that Powertech is not in compliance with, in that it is in violation of, any local, state or federal law. However, ambiguity regarding the statutory language arises when one expands the phrase “all local, state and federal laws” to include consideration of pending permits.

When the language used in a statute is unclear or ambiguous then a person should look beyond the express language to determine the Legislature's intent. *MGA Insurance Company, Inc. v. Goodsell*, 2005 S.D. 118, ¶ 17, 707 N.W.2d 483, 487. The intent of a statute can be determined from the statute as a whole, as well as enactments relating to the same subject. *Martinmaas*, 2000 S.D. 85, ¶ 49. "But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result." *Id.*

In regards to local "laws," or permits, the question has already been determined. SDCL 45-6B-4 states:

The Board ... may not grant a permit for a mining operation "unless the applicant has complied with all county or city ordinances and requirements and obtained necessary county or city permits. However, if the applicant has substantially complied with the procedure for obtaining any necessary county or city permits but has not obtained such permits due to administrative delay, the Board ... may grant a mining permit which is conditioned on the issuance of all necessary county or city permits within [60] days of the date of the Board's issuance of the conditioned mining permit.

Following this legislative directive, ARSD 74:29:02:02 states that a permit application is not procedurally complete until an applicant can provide proof of compliance with all city and county zoning ordinances or proof of substantial compliance with the procedure for obtaining any necessary city and county permits. The receipt of any applicable local permit is not a condition precedent to the granting of a conditioned Large Scale Mine permit.

Turning to compliance with federal and state laws, state law appears to be silent regarding whether other state and federal permits must be obtained before a

state applicant can be considered to be in compliance with all “local, state and federal laws.” There is no statutory language directing that no state permit may be issued until all other necessary state and federal permits have been obtained.

SDCL 45-6B-4 (discussed above) was originally passed by the Legislature in 1982 as part of the Mined Land Reclamation Act. This same act created SDCL ch. 45-6B, and included the operative language found in SDCL 45-6B-32 regarding compliance with local, state and federal laws. Session Laws 1982, ch. 305 § 4. The original language of 45-6B-4 stated that the Board could not grant a permit in violation of any city or county zoning or subdivision regulation unless the applicant had received a waiver from the affected governing body. *Id.* In 1987, SDCL 45-6B-4 was substantially amended and the language requiring an applicant to have complied with all city or county ordinances, or be in substantial compliance with the same, before a permit could be granted was included. Session Laws 1987, ch. 319. No language regarding federal permits was included.

The primary sources for declarations of public policy in South Dakota are the state constitution, statutes and case law. *Sanford v. Sanford*, 2005 S.D. 34, ¶ 19, 694 N.W.2d 283, 289. “The Legislature knows how to include and exclude specific items in its statutes.” *Id.* (citing *State v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89). One must assume that the Legislature, in enacting or amending a statute, had in mind previously enacted statutes relating to the same subject. *Meyerink v. Northwestern Public Service Company*, 391 N.W.2d 180, 184 (S.D. 1986).

From its inception, the Mined Land Reclamation Act included language requiring in some form compliance with local regulations before the Board could issue a mining permit. No corresponding language regarding federal permits was included. At the time the Legislature amended SDCL 45-6B-4 to include the operative language discussed above, it could have also added requirements regarding federal permits. It did not. One could presume that the Legislature acted purposefully when it enacted the local permit requirements of SDCL 45-6B-4 and did not enact any corresponding requirement regarding other state or federal permits. This inaction by the Legislature can be interpreted as legislative intent to not require that other state and federal permits be obtained before the Board grants a conditioned Large Scale Mine permit.

The above interpretation is only strengthened when one considers the public policy of the State as expressed by the Legislature elsewhere in SDCL ch. 45-6B.

SDCL 45-6B-2 states:

The relatively unknown and as yet largely undeveloped mineral resources of this state consist in major proportion of minerals below the surface. The development and extraction of these minerals ... are necessary for the economic development of the state and nation. Every effort should be used to promote and encourage the development of mining as an industry, but to prevent the waste and spoilage of the land....

In SDCL 45-6B-30, the Legislature established that the Board should hold hearings on any large scale mining application “not more than [90] days after the date of filing.” The statute allows for certain extensions of that time frame, but ultimately states that “a final decision on the application shall be made within [120] days of

the receipt of the application unless a time extension occurs....” The Legislature mandated a tight schedule for the hearing of an application and a final determination of its merit. The public policy of the State is to encourage development of mineral resources in a manner that protects the natural resources of the state, and to resolve applications to develop these resources in a timely manner.

The M&MP has recommended approval of Powertech’s Large Scale Mine application conditioned in part on receipt of all other applicable state and federal permits. The M&MP has historically recommended approval of Large Scale Mine permits conditioned on the receipt of other applicable permits. Putting a state large scale mine permit application on hold while the regulatory process of other state entities and federal agencies unfolds would be contrary to the public policy of the State and the intent of the Legislature. The receipt of other applicable state and federal permits is not a per se condition precedent to the grant or denial of a state Large Scale Mine permit.

Specifically regarding the federal permits at issue in this matter, they are also not conditions precedent due to the doctrine of federal preemption. The United States Constitution states that federal law “shall be the supreme Law of the Land.” US Const. Art. VI § 2. Preemption is grounded in this command, and thereby state law that conflicts with federal law should have no effect. *In re Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation*, 621 F.3d 781, 791 (8th Cir. 2010); *Dakota Systems, Inc. v. Viken*, 2005 S.D. 27, ¶ 25, 694 N.W.2d 23, 33. In examining potential preemption, the courts should “start with the assumption that

the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *In re Aurora Dairy*, 621 F.3d at 792 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S.Ct. 2240 (1996)). “Preemptive intent may be indicated ‘through a statute’s express language or through its structure and purpose.”’ *Id.* (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S.Ct. 538 (2008)). There are three types of preemption:

- 1) “express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law;”
- 2) “field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it;” and
- 3) “conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1324 (10th Cir. 2010)(quoting *Mount Olivet Cemetery Association v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998)).

The United States Congress’ enactment of the Atomic Energy Act operates to preempt certain state regulations under the principles of field and conflict preemption. Before the enactment of the Atomic Energy Act, the “use, management, control and ownership of nuclear technology remained a federal monopoly.” *Missouri v. Westinghouse Electric, LLC.*, 487 F.Supp.2d 1076, 1082 (E.D. Mo. 2007) (citing *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 206-207, 103 S.Ct. 1713 (1983)). In order to encourage private sector development of nuclear energy for peaceful purposes, in 1954, Congress gave the Atomic Energy Commission (now the

NRC) exclusive jurisdiction to “license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials.” *Pacific Gas*, 461 U.S. at 207 (citations omitted). With regard to these matters, no jurisdiction for regulation was left to the states. *Id.* This preemptive effect applies equally to regulation by the NRC as well as regulation by the EPA.

Because Congress intended to occupy the field of nuclear regulation, any state law purporting to operate within these areas is preempted by federal law and has no effect. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615 (1984). Additionally, even in areas where Congress has not entirely displaced state regulation by field preemption, conflict preemption exists if state law conflicts with federal law in that “it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *Id.* As applied here, issues of public health and safety as well as the “nuclear” aspects of energy generation are clearly governed exclusively by federal regulation. *Pacific Gas*, 461 U.S. at 212-213; *see also* Opinion of the Attorney General of South Dakota, AGR 1963-64, pp. 373-74.

Under the 1959 amendment to the Atomic Energy Act, however, Congress allowed the NRC to turn some of its regulatory jurisdiction over to states adopting a “suitable regulatory program.” *Silkwood*, 464 U.S. at 250. These states are referred to as “agreement states.” South Dakota is not an agreement state and has not been granted any regulatory authority otherwise possessed by the NRC. In determining the extent of the State’s regulatory authority it is “appropriate to

accord respectful consideration to the [NRC's] construction [of statute].”

Westinghouse Electric, 487 F.Supp.2d at 1087 (citing among others, *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1153 (8th Cir. 1971)). As construed by the NRC, non-agreement states such as South Dakota are “without authority to license or regulate, from the standpoint of radiological health and safety, byproduct, source, and special nuclear material or production and utilization facilities” under the Atomic Energy Act. 10 CFR 8.4(j) (Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Atomic Energy Act).

This limitation on State authority reflects Congress’ intent to prevent “dual regulation” by the State and federal government with regard to the “radiation hazards” associated with nuclear materials. *Id.* at (f)(h); *see also Northern States Power*, 447 F.2d at 1154 (“dual system of licensing and regulation...would create ‘an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”). The prohibition against dual regulation extends not only to the nuclear materials themselves but also to issues that are “inextricably intertwined” with the radioactive aspects of effluents, and the planning, construction and operation of a NRC permitted facility. *Northern States Power*, 447 F.2d at 1153; *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1240 (7th Cir. 1985)(holding “...when the radiation and non-radiation hazards are inseparable, federal law preempts a state-law injunction ordering removal of wastes.”)¹ Stated another way,

¹ The Nuclear Regulatory Commission, in SECY-99-277 (August 11, 2000), goes a step further and finds that “Congress intended to establish a comprehensive regulatory regime over the nonradiological hazards of mill tailings that is exactly parallel to the NRC’s jurisdiction over radiological hazards.”

State regulation is preempted if “the matter on which the State asserts the right to act is in any way regulated by the Federal Act.” *Westinghouse Electric*, 487 F.Supp.2d at 1088. In practice, to the extent that a federal agency is operating within the confines of the power granted to it by the Atomic Energy Act, the Board cannot regulate in a manner that interferes with activities specifically permitted by that agency.

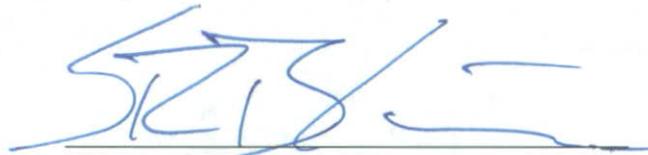
Under the doctrine of federal preemption it is clear that the Board cannot act in those areas controlled by the Atomic Energy Act, or under the exclusive jurisdiction of a federal agency. The M&MP only conducted a substantive review of Powertech’s application as to those areas where it felt the M&MP, and the Board, were not preempted by federal regulation. To that end, the M&MP’s Recommended Conditions in this matter reflect the tolling provisions of SDCL §34A-2-126, and generally reflect the regulatory authority that the State, including the Board, continues to maintain after the preemptive effect of the Atomic Energy Act is applied. Considering this jurisdictional limitation, receipt of the federal permits at issue is not a condition precedent to the Board entering findings as to the matters that remain under its authority, and are covered by the recommended conditions.

CONCLUSION

The local, state and federal permits Powertech needs to obtain for the Dewey-Burdock project have been detailed in Section I. above. It is the M&MP’s conclusion that these permits are not conditions precedent to the grant or denial of a Large Scale Mine permit. Public policy as espoused through the enactments of SDCL ch.

45-6B indicates that a mine permit may be granted without delaying the proceedings for receipt of these other permits. Further, the operation of federal preemption results in the conclusion that the federal permits at issue are not conditions precedent in that the Board has no jurisdiction to regulate in the areas covered by those permits. The M&MP recognizes that issuance of the final federal permits may more clearly define the areas in which the federal agencies are asserting jurisdiction. This additional clarity may provide the Board with additional guidance in crafting any decision or findings in a manner that avoids dual regulation in the permitting process while helping to ensure that the Board's decision fills any potential regulatory gaps that may occur between federal and state law. The Board of Minerals and Environment, however, retains jurisdiction to consider those areas that remain under its authority without prior issuance of the federal permits.

Dated this 1st day of November, 2013

A handwritten signature in blue ink, appearing to read 'S. Blair', written over a horizontal line.

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Counsel for Minerals and Mining Program, DENR

August 11, 2000

COMMISSION VOTING RECORD

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NOV 05 2013
MINERALS & MINING PROGRAM

DECISION ITEM: SECY-99-277

TITLE: CONCURRENT JURISDICTION OF NON-RADIOLOGICAL HAZARDS OF URANIUM MILL TAILINGS

The Commission (with Chairman Meserve and Commissioners Dicus and Diaz agreeing) disapproved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of August 11, 2000.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

/RA/

Annette Vietti-Cook
Secretary of the Commission

- Attachments: 1. Voting Summary
2. Commissioner Vote Sheets

- cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

VOTING SUMMARY - SECY-99-0277

RECORDED VOTES

| | APRVD | DISAPRVD | ABSTAIN | NOT PARTICIP | COMMENTS | DATE |
|------------------|-------|----------|---------|--------------|----------|---------|
| CHRM. MESERVE | | X | | | X | 6/8/00 |
| COMR. DICUS | | X | | | X | 7/25/00 |
| COMR. DIAZ | | X | | | X | 7/25/00 |
| COMR. McGAFFIGAN | X | | | | X | 6/16/00 |
| COMR. MERRIFIELD | X | | | | X | 4/25/00 |

COMMENT RESOLUTION

In their vote sheets, Chairman Meserve and Commissioners Dicus and Diaz disapproved the staff's recommendation and provided some additional comments. Commissioners McGaffigan and Merrifield approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on August 11, 2000.

Commissioner Comments on SECY-99-0277

Chairman Meserve

The Atomic Energy Act has long been understood to preempt state programs to control the radiological hazards of materials within the NRC's jurisdiction (in the absence of an Agreement under Section 274). The staff seeks guidance as to whether Congress, by explicitly directing the NRC to regulate both the radiological and non-radiological hazards of 11e.(2) byproduct material, similarly intended to preempt state jurisdiction over the non-radiological

hazards of this class of materials. I conclude that Congress intended exactly this result and, as a result, I find that concurrent state jurisdiction over the non-radiological hazards of 11e.(2) byproduct material is preempted.⁽¹⁾

The NRC staff addressed this issue in 1980, shortly after the passage of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). UMTRCA served in part to amend the Atomic Energy Act so as to expand the definition of byproduct material in section 11e to include uranium and thorium mill tailings, and to provide authority for the NRC to establish a regulatory program for such materials. Although finding that the preemption question was "very close," the staff concluded that the states could exercise concurrent jurisdiction over the non-radiological hazards arising from mill tailings.⁽²⁾ Although the Commission presumably should be seen to have acquiesced in this conclusion, the issue addressed by the memorandum has apparently never before been formally presented to the Commission for its consideration. The issue is now presented as a result of a "white paper" submitted by the National Mining Association (NMA) arguing, among other points, that UMTRCA forecloses concurrent state jurisdiction.⁽³⁾

I shall address the matter by first examining the various aspects of the UMTRCA that, in my view, provide powerful evidence that concurrent state jurisdiction is preempted. I then shall examine the considerations that guided the contrary conclusion that was reached in the OELD Memorandum and in certain litigation before the Seventh Circuit. Finally, I shall address various other considerations that bear on our decision.

THE EVIDENCE FOR PREEMPTION

All agree that there is no language in UMTRCA that explicitly provides for the preemption of state authority. Nonetheless, as observed by the Supreme Court in considering the preemptive effect of the Atomic Energy Act (AEA) over radiological matters:

Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "'scheme of federal regulation. . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'"

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 203-04 (1982) (quoting *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Guided by these considerations, the Court concluded that Congress intended for the federal government to have exclusive authority to regulate the radiological safety aspects involved in the construction and operation of a nuclear plant. *Id.* at 212. The Court has subsequently reaffirmed the preemptive effect of the AEA in this respect on several occasions. See *English v. General Elec. Co.*, 496 U.S. 72 (1990); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

In my view, there is abundant evidence that Congress intended exactly this same result with respect to the non-radiological hazards associated with 11e.(2) byproduct material. The starting point, of course, is the statute. In enacting UMTRCA, Congress for the first time explicitly directed that federal jurisdiction under the AEA should encompass non-radiological hazards. Congress provided authority for the Environmental Protection Agency (EPA EXIT) to establish standards "for the protection of the public health, safety, and the environment from the radiological and non-radiological hazards associated with processing and with the possession, transfer, and disposal of byproduct material . . .," 42 U.S.C. 2022(b)(1) (emphasis added). And, similarly, Congress directed the NRC to insure management of 11e.(2) byproduct material that both conforms with the EPA standards and serves "to protect the public health and safety and the environment from radiological and nonradiological hazards . . .," 42 U.S.C. 2114(a) (emphasis added). Because Congress placed radiological and nonradiological hazards on the same footing, a natural reading of the statute would suggest that Congress intended the same sweeping federal preemption to cover both types of hazards.⁽⁴⁾

Exactly this conclusion is reinforced by considering the Congressional purpose. Guided by a review of the statute and the legislative history, the D.C. Circuit has found that UMTRCA was intended "to provide a comprehensive remedial program for the safe stabilization and disposal of uranium and thorium mill tailings." *Kerr-McGee Chemical Corp. v. NRC*, 903 F.2d 1, 8 (D.C. Cir. 1990).⁽⁵⁾ The pervasive nature of the federal scheme of regulation is powerful evidence of preemption. See *Pacific Gas & Elec. Co.*, 461 U.S. at 204. Moreover, it was logical for Congress to link radiological and nonradiological hazards together because both hazards arise from the same material and are "inextricably intermixed." See *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1241 (7th Cir. 1985), cert. denied, 475 U.S. 1066 (1986).⁽⁶⁾ This fact reinforces the conclusion that radiological and nonradiological hazards should be treated in a parallel fashion.

Other aspects of the amendment of the AEA provided by UMTRCA reinforce the same point. Section 84a.(1) of the AEA specifically provides that the NRC shall undertake "due consideration of the economic costs" in exercising its authority over 11e.(2) byproduct material. 42 U.S.C. 2114(a)(1). In explaining this language on behalf of the conference committee, Senator Simpson, the floor manager for the bill, stated:

[T]he conferees have agreed to include specific references in the appropriate sections of the Atomic Energy Act directing EPA and NRC, in promulgating such standards and regulations, to consider the risk to public health and safety, and the environment, the economic costs of such standards or regulations. . . . Essentially, we intend by this requirement that these agencies must balance the costs of compliance against the projected benefits to assure that there is a reasonable relationship between the two.

128 Cong. Rec. S13052 (daily ed. Oct. 1, 1982); see also *id.* at 13055. As a result, the Tenth Circuit has interpreted section 84a.(1) to require the NRC to assure that costs and benefits stand in reasonable relationship to each other. *Quivira Mining Company v. NRC*, 866 F.2d 1246, 1250-52 (10th Cir. 1989); see also *American Mining Congress v. Thomas*, 772 F.2d 617, 630-32 (10th Cir. 1985) (EPA UMTRCA standards must also provide reasonable relationship of costs and benefits). This fundamental obligation bears on the preemption issue because acceptance of concurrent jurisdiction implies that the states have the authority to impose obligations that are in addition to those that have been determined by the NRC to be adequate to protect the public health, safety and the environment. Because such state-imposed obligations would inevitably entail additional costs, concurrent jurisdiction would serve to frustrate the Congressional purpose of assuring that the management of tailings reflects an appropriate balancing of costs and benefits.

Other aspects of the amendments to the AEA provided by UMTRCA lead to the same conclusion. Section 274, while authorizing Agreement States to assume regulatory jurisdiction over 11e.(2) byproduct material, imposes various conditions and constraints on the exercise of that power. For example, Agreement States are required to provide certain procedures in licensing cases (an opportunity for written comments, a public hearing, a transcript, cross-examination, and a written decision subject to judicial review), to undertake notice-and-comment rulemaking subject to judicial review, and to prepare a written analysis that is akin to a NEPA environmental impact statement.⁽⁷⁾ 42 U.S.C. 2021(o). Similarly, Section 274o. includes an important constraint on the substantive power of Agreement States: it allows Agreement States to adopt alternatives to the requirements established by the NRC only if, "after notice and opportunity for public hearing, the Commission determines that such alternatives will achieve . . . a level of protection for public health, safety and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, to the extent practicable, or more stringent than the level which be achieved by the standards and requirements adopted and enforced by the Commission for the same purpose" 42 U.S.C. 2021(o)(emphasis added).⁽⁸⁾ It would seem anomalous in the extreme for Congress to require Agreement States to comply with these various requirements and constraints and yet to allow non-Agreement states to regulate nonradiological impacts without any such limitations.

In sum, there is pervasive evidence that Congress intended to establish a comprehensive regulatory regime over the nonradiological hazards of mill tailings that is exactly parallel to the NRC's jurisdiction over radiological hazards.

THE OELD OPINION

The 1980 OELD Memorandum concluded nonetheless that concurrent jurisdiction should be recognized. As it happens, one of the provisions discussed above (the cost-benefit provision in Section 84) was added after the after the Memorandum was prepared and could not be reflected in it. The additional provision certainly provides a justification to consider the matter anew, particularly since the OELD Memorandum considered the question of concurrent jurisdiction to be "very close." Moreover, none of the considerations cited by the OELD Memorandum in support of concurrent jurisdiction is persuasive.

First, it is argued that concurrent jurisdiction should be accepted because only radiological matters had previously been held to be preempted and because the legislative history of UMTRCA indicates that radiological hazards were of primary concern to the Congress. OELD Mem. at 33-34. But this argument is undercut, as noted above, by the pervasive linkage of radiological and non-radiological hazards in the amendment to the AEA that was provided by UMTRCA. Congress clearly and directly indicated that the non-radiological hazards of 11e.(2) byproduct material were to be regulated by the NRC in language that exactly parallels the NRC's authority over the radiological hazards of such material.

Second, the OELD Memorandum observes that the State retains authority over materials that are similar to 11e.(2) byproduct material. OELD Mem. at 34. But this argument, if accepted, proves too much. The same argument would lead to the conclusion that the federal government should not exercise exclusive control over even the radiological hazards of materials regulated by the AEA -- a conclusion that has been rejected on several occasions. See *English*, 496 U.S. 72; *Silkwood*, 464 U.S. 238; *Pacific Gas & Elec. Co.*, 461 U.S. 190. There are numerous anomalies in the NRC's jurisdiction because of the limited scope of the materials covered by the AEA, but this fact has not elsewhere been construed to limit the NRC's exclusive authority of materials that clearly fall within the scope of the AEA.

Third, the OELD Memorandum observes that states are allowed by UMTRCA to exercise certain authority, principally including the authority of a state to take custody of a tailings site after the completion of stabilization. OELD Mem. at 20; see 42 U.S.C. 2113(b)(1). But this is a weak foundation on which to build concurrent jurisdiction, particularly since the section provides that the long-term custodian is to maintain the property pursuant to a license issued by the Commission. 42 U.S.C. 2113(b)(1)(A). Thus, rather than suggesting concurrent state power, this provision, if anything, suggests that states should be subject to NRC supervision and control.

Finally, the OELD Memorandum notes that the states may have continuing authority to exercise some jurisdiction over mill tailings as a result of certain provisions of the Clean Air Act and the Federal Water Pollution Control Act (FWPCA). OELD Mem. at 34-35. But this argument also proves too much. Any power exercised by the states pursuant to these statutes is delegated federal power. Although EPA shares federal power with the NRC over radiological matters, this hardly suggests that there is a limit to the preemptive effect of the AEA on radiological matters. Moreover, contrary to the assumption in the OELD Memorandum, the case law shows that the FWPCA does not encompass the regulation of 11e.(2) byproduct material. See *Waste Action Project v. Dawn Mining Corp.*, 137 F.2d 1426 (9th Cir. 1998).

In short, none of the arguments presented in the OELD memorandum in support of concurrent jurisdiction can bear the weight that is attached to them. None, in my view, is sufficient to overcome the abundant evidence that Congress intended UMTRCA to provide for exclusive federal power over both the radiological and nonradiological hazards of mill tailings.

SEVENTH CIRCUIT DECISIONS

Perhaps the most troubling aspect of the matter now before us is that in several decisions the Seventh Circuit has found that the federal government does not exercise exclusive jurisdiction over the non-radiological hazards of mill tailings. See *Kerr-McGee Chemical Corp v. City of West Chicago*, 914 F.2d 820 (1990); *Brown*, 767 F.2d at 1240; *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.) cert. denied 459 U.S. 1049 (1982). The Seventh Circuit did not rely on any of the arguments that were cited in the OELD Memorandum, but rather based its conclusions solely on section 274(k). See, e.g., *Illinois*, 677 F.2d at 579-81. That provision provides:

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. 2021(k). The court interpreted the section as a general savings provision for state and local authority over nonradiological hazards.

It is noteworthy that the OELD Memorandum, although seeking to marshal all the arguments in favor of (and against) concurrent jurisdiction, completely dismissed any reliance on section 274(k). OELD Memorandum at 21-22. The reason is that section 274(k) is limited by its terms to "this section" -- the

provision governing the recognition of Agreement States.⁽⁹⁾ The section serves a common-sense purpose in that context of establishing that, by becoming an Agreement State, a state does not give up any authority that it otherwise would have the power to exercise. See Northern States, 447 F.2d at 1150. Indeed, an expansive interpretation of the section 274(k) not only is contrary to the limitation to "this section," but also undercuts the express powers provided in other sections of the AEA for the NRC to exercise comprehensive regulatory authority over the non-radiological hazards of 11e.(2) byproduct material. Moreover, because Section 274(k) predates UMTRCA, any implications drawn from section 274(k) about state powers should properly be seen to have been superseded by the explicit expansion of federal jurisdiction over the non-radiological hazards of 11e.(2) byproduct material that was provided by UMTRCA.

Nonetheless, I do not lightly reject an interpretation of statute that has been adopted to a court of appeals and that has been affirmed by that court on several occasions. In none of the decisions, however, is there any indication that the Seventh Circuit gave consideration to the various aspects of UMTRCA, discussed above, that clearly point to exclusive federal jurisdiction. And because the court's exclusive reliance on section 274(k) cannot withstand examination, I conclude that the Commission should not be constrained to adopt the flawed interpretation of our governing statute that was divined by that court. Indeed, the Supreme Court has taught that an administrative agency is free to choose among reasonable interpretations of its governing statutes and, at times, may depart from its prior view and policies. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 863-64 (1984). Because it is reasonable to interpret UMTRCA to provide for exclusive federal jurisdiction -- and unreasonable in my view not to do so -- I conclude that we are compelled to reject the Seventh Circuit's interpretation.

OTHER CONSIDERATIONS

I am conscious of the fact that, if the Commission were to find there is exclusive federal jurisdiction over 11e.(2) byproduct material, it would upset an interpretation of UMTRCA that has guided actions by the staff, our licensees, and the states for a period of over 20 years. We should not lightly overturn a settled area of the law. But, unfortunately, it appears that the preemptive effect of UMTRCA has remained a contentious issue. The matter has been litigated on three occasions in the court of appeals. And, although many licensees no doubt have found ways to accommodate the friction that can arise from concurrent jurisdiction, it is apparent that our licensees are troubled by the issue. The fact that the NMA White Paper devotes some 60 pages to the issue is suggestive that the OELD Memorandum remains controversial and covers an issue that is of continuous and substantial importance to our licensees.

I am also conscious of the fact that the Congress has never seen fit to correct the interpretation of UMTRCA that is reflected in the OELD Memorandum. This might be seen to reflect Congress' agreement with the OELD interpretation of UMTRCA. But I am reluctant to attach much significance to Congressional inaction. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."). Although state power to exercise concurrent jurisdiction over the nonradiological hazards of 11e.(2) byproduct material may loom as a large issue to some of our licensees, this is not likely to be the sort of issue that would attract focused attention in the Congress. Indeed, in light of the fact that the Commission has never before addressed the matter, it perhaps should not be surprising that Congress has similarly failed to act.

CONCLUSION

In light of the foregoing, I disapprove the staff's conclusion that non-Agreement States may regulate the non-radiological hazards of 11e.(2) byproduct material. For the reasons discussed above, I conclude that any such exercise of such authority by non-Agreement States (or by local governments) is preempted.

Commissioner Dicus

Based on reconsideration of the issues presented in SECY-99-277, I have decided to revise my original vote on SECY-99-277. While, as noted in my previous vote, there have been no notable issues to date created by the existence of the current dual jurisdictional arrangement, NMA has raised several potential issues and the NRC staff concurred in the existence of these potential problems. In other votes, discussions, and presentations since my arrival on the Commission I have consistently expressed my belief that dual regulation in general is problematic both for the regulators involved and for the entities subject to dual jurisdictions. I have decided to remain consistent with my philosophy as expressed in my previous statements and I disapprove the staff's proposal in SECY-99-277 and we should proceed to establish clearly that NRC has exclusive jurisdiction over these issues.

Commissioner Diaz

The question as to whether Congress intended preemption of non-Agreement State jurisdiction over the nonradiological hazards of 11.e(2) byproduct material has long been understood to be a close question of statutory interpretation. As the attached legal analysis demonstrates, it can be concluded that the past agency recognition of concurrent jurisdiction with non-Agreement States could be changed. I believe that the public, government agencies, and licensees now deserve our taking a hard look at the NRC's current position on concurrent jurisdiction. For me, then, this decision is a question of balance and the practical effects of now changing the agency's long-held position, *i.e.*, what are the benefits for the American people?

The agency has been following the recommended position in the 1980 opinion of the Office of Executive Legal Director (OELD Memorandum). Yet this opinion noted that proposed implementing standards did not focus heavily on nonradiological environmental concerns. This was understandable at that time since the agency had neither the experience nor the practical need to do so. Indeed, the opinion was provided during the infancy of the implementation of UMTRCA, well before November 8, 1981, the statutory expiration date of UMTRCA's three-year preservation of prior State authority (see UMTRCA, section 204(h)(1)). However, in the intervening years the agency's program matured through the promulgation of Appendix A to Part 40 and the development of other aspects of the coverage of nonradiological and radiological hazards of 11.e(2) material. Therefore, now that the Commission has been asked by staff and by licensees for direction relating to the milling industry, we can rely on NRC's accumulated experience. Moreover, the practical significance of the jurisdictional question is highlighted by the issuance, in 1998, of the NRC/DOE "Working Protocol for Long-Term Licensing of Commercial Uranium Mills," which provides that NRC "will not terminate any site-specific license until the site licensee has demonstrated that all issues with State regulatory authorities have been resolved." Therefore, I find it persuasive, once we acknowledge that the NRC

will need to review and approve license terminations for these sites, that preemption is the clearer and more practical option for the NRC.

I strongly believe that State and local governments are, in most instances, the most appropriate regulators of health and safety problems that affect their citizens. I also feel that the discretion of the States and local governments should not be limited in the absence of an overriding national concern. However, since the commercial milling industry was initiated under contract to the Federal Government for purposes of meeting the needs of the common defense and security, and UMRCA establishes a sound program for the uniform regulation of 11e.(2) material, I believe it is in the best interests of the American people, and even the States to have Federal preemption. The Federal Government should not burden the States with problems initiated by national considerations and amenable to centralized jurisdiction. This is especially salient now that many licensed milling sites are inactive or struggling. In addition, preemption avoids the regulatory uncertainty and diversion of resources that are associated with dual regulation, and that have the potential to hasten the abandonment of sites and/or bankruptcy of licensees, leaving the States with great burden and expense. To me, effective and efficient Federal regulatory control for this issue is, on balance, the fairest approach, for the States and for their citizens.

Given the fairness, effectiveness and efficiency of preemption in these circumstances, I conclude that a finding of concurrent jurisdiction for the nonradiological hazards of 11e.(2) material is inappropriate. Therefore, I disapprove the staff's recommendation.

Commissioner McGaffigan

I have carefully considered Chairman Meserve's vote on this paper, and I acknowledge that he presents a strong and well reasoned argument for his position that the Uranium Mill Tailings Radiation Control Act intended "field" preemption of state regulation in the area of non-radiological hazards of 11e.(2) byproduct material. If NRC were just beginning to formulate its position on this issue, instead of reconsidering a 20-year old practice that has been endorsed by several circuit court of appeals decisions, this could be a much harder decision. As both the 1980 Executive Legal Director's memo and the General Counsel's 1999 memo acknowledge, the question of concurrent jurisdiction is a close call.

But, we are dealing with a long history that is consistently contrary to Chairman Meserve's position. This agency, in consultation with the Department of Justice, adopted the opposite position in court and the court agreed with that position, in the third of three decisions on this issue out of the Seventh Circuit Court of Appeals. In addition, unlike Chairman Meserve, I do attach some significance to Congress' failure to act on this subject. Congress legislates on many issues of similar or smaller scope than this, especially when a strong position is taken by an organization such as the National Mining Association. Given the history of court interpretations and NRC practice, and that there has been no explicit legislative direction or other new development, I do not find a convincing reason for changing interpretations now.

Therefore, I approve the staff's recommendation that the Commission formally adopt the staff's 20-year old practice of acknowledging concurrent jurisdiction with non-Agreement States over the non-radiological hazards associated with 11e.(2) byproduct material at mill tailings sites. I am sensitive to the National Mining Association's concerns that concurrent jurisdiction can lead to impediments to the timely closure and subsequent transfer to government custodial care of mill tailings sites, as well as an inconsistent and inefficient regulatory scheme for such sites. However, this position does still allow NRC to assert conflict preemption on a case-by-case basis if State actions inhibit implementation of the Uranium Mill Tailings Radiation Control Act as intended by Congress. The Seventh Circuit Court of Appeals has supported such conflict preemption in *Brown v. Kerr-McGee Corporation*.

Commissioner Merrifield

I approve formally adopting the long-standing staff practice of acknowledging concurrent jurisdiction (involving NRC and States) of non-radiological hazards associated with uranium mill tailings. While the question of concurrent jurisdiction is extremely close and the arguments on both sides have merit, the Commission, for twenty years, has held that the better legal view is to allow concurrent jurisdiction.

The industry argues that NRC should preempt non-Agreement State authority to regulate the non-radiological aspects of uranium mill tailings. The industry is basing their argument for preemption on the potential that a non-Agreement State could, at some point in the future, impact the decommissioning of an uranium mill tailings site based on passing more stringent regulations than NRC standards. The argument concludes that more stringent state regulations could create a financial burden for DOE when it assumes long-term custody of the site. Despite this position, the industry does not appear to be concerned about Agreement States having regulatory control over the site (particular since the Agreement State authority is derived directly from the Atomic Energy Act of 1954, as amended).

There are several factors that are relevant in my decision. First, Agreement States have the ability under the current regulations to implement controls over non-radiological hazards that are more stringent than NRC regulations. Second, there is little evidence that state laws regarding non-radiological hazards are significantly in conflict with federal laws. Third, the argument that DOE will bear the financial burden is spurious given that the site owner is responsible for providing DOE with sufficient funds to maintain the site in long-term custody.

I am not inclined to overturn long-standing Commission policy without a careful analysis that convincingly demonstrates that the reversal is prudent. The policy being considered here is nearly twenty years old. I am not suggesting that the Commission ignore factors that might warrant a change; but I do not see such factors here. First, the petitioners have not shown that the present policy is legally impermissible. Second, there are valid reasons for maintaining the present policy which include consistency in dealing with the States, both Agreement States and Non-Agreement States. Third, the arguments presented to date are not convincing that actual harm has occurred or is imminent. Finally, because I do not see an overwhelming justification to change the policy, I would need to see a clear Congressional instruction to preempt States from exercising authority in an area in which they have been allowed to exercise authority for twenty years. I do not sense a clear Congressional mandate for such a change. Indeed, over the last twenty years there has been a growing movement in Congress for increasing State involvement and responsibility for areas such as this. For these reasons, I vote to reject the request to overturn our long standing position in this area.

1. As will be discussed herein, this issue has been addressed in litigation before the United States Court of Appeals for the Seventh Circuit. I participated

in that litigation as counsel urging that the court recognize exclusive federal jurisdiction.

2. Memorandum from H.K. Shapar, Executive Legal Director, to Chairman Ahearne (Apr. 28, 1980) (hereinafter "OELD Memorandum").

3. K. Sweeney, et. al., Recommendations for a Coordinated Approach to Regulating the Uranium Recovery Industry: A White Paper Presented By National Mining Association, 37-96 (undated) (hereinafter "NMA White Paper").

4. Exclusive federal jurisdiction over radiological matters was recognized before UMTRCA was enacted in Northern States Power v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972).

5. The Court overturned a decision by the NRC that sought to confine the jurisdiction that was provided by UMTRCA. We are presented with a variant of the same issue in this matter.

6. The court nonetheless concluded that UMTRCA did not provide for exclusive federal authority. Brown, 767 F.2d at 1241. This case is discussed subsequently.

7. The written analysis is to include an assessment of the "radiological and nonradiological impacts to the public health." 42 U.S.C. 2021(o)(3)(C)(i). Congress thus clearly and explicitly intended to constrain the actions of Agreement States in exercising authority over nonradiological risks.

8. Any obligations imposed by a non-Agreement State pursuant to its concurrent jurisdiction would obviously serve to supplement requirements imposed by the NRC. Because such additional requirements could compromise or frustrate the achievement of other regulatory objectives, the net effect of the additional requirements might be a reduction of the protection of public health and safety. See State of Illinois, CLI-90-9, 32 NRC 210, 216 (1990) ("it is not infrequent in the law that a body of general standards each of which is sound in the abstract may, when applied singly or together to a particular case, yield unsound results"). The acceptance of concurrent jurisdiction by non-Agreement States would thus serve to undermine the overall supervision of public health and safety that Congress clearly intended to be exercised by the NRC.

9. See Pacific Gas & Elec. Co., 461 U.S. at 210 ("Section 274(k), by itself, limits only the pre-emptive effect of 'this section,' that is, 274, and does not represent an affirmative grant of power to the States.").

The words basing the salary of State's Attorneys upon the fraction of 1,000 population over a certain population figure has been a part of South Dakota Law since the early years of statehood. The wording remained the same through several amendments giving pay increases, and several code revisions.

Since the fractional theory was used for so long and was replaced after its omission in Chapter 34 of the 1961 Session Laws by Chapter 45 of the 1963 Session Laws, it must be interpreted as an inadvertant omission.

Therefore, it is my opinion that the payment of the State's Attorney of "X" County for the period July 1, 1961 to July 1, 1963 should be based upon the population of 10,000. I am supported in this by the fact that all other salary statutes contain the fractional theory. This also concurs with a memorandum opinion issued by my predecessor.

HEALTH DEPARTMENT

Control of Radiation hazards from atomic energy.

July 23, 1964

Dr. G. J. Van Heuvelen, M. D.
State Health Officer
Pierre, South Dakota

You have requested an opinion relative to the responsibility of the Health Department to provide protection from radiation exposures. You ask the following questions:

"1. Has the federal government preempted the field of protection of public health from the radiation hazards associated with atomic energy by passage of the Atomic Energy Act of 1954 as amended?

"2. If the federal government has not preempted the radiation protection responsibility in South Dakota in regard to atomic energy or if this preemption is still subject to decision would the signing of an agreement as provided for by Section 274 of the Atomic Energy Act of 1954 as amended in effect constitute a recognition by the state that such preemption exists?

"3. Does authority presently exist in South Dakota whereby this state can, upon obtainment of the Governor's signature, enter into an agreement with the Atomic Energy Commission regarding the control of certain radiation sources located in South Dakota under the conditions described in Section 274 of the 1954 Atomic Energy Commission Act?

"4. In the event that an agreement regarding the control of the specified atomic energy sources is presently possible in South Dakota without further state legislation and in the event that such an agreement is consummated, what would be the relationship of the terms of this agreement as to carrying out radiation protection responsibilities delegated within existing State laws pertaining to several types of radiation sources, including those for which the Atomic Energy Commission will retain authority?

"5. In the event that an agreement between the Atomic Energy Commission and South Dakota was possible and completed and then

terminated at a later date, would total authority for control of radiation protection involved with atomic energy sources located in South Dakota then revert back to the Atomic Energy Commission and thereby constitute a preemption in this area of radiation control?"

Your first question is answered in the affirmative. It is my opinion that the federal government has preempted the field of protection of public health from the radiation hazards associated with atomic energy. 42 USCA § 2012, 2014 (c).

Because of the answer to your first question, an answer to your second question is not necessary.

In answer to your question number three, you are advised that the Governor has implied power to enter into an executive agreement. However, it is my opinion that should the State of South Dakota decide to enter into an agreement with the Atomic Energy Commission, specific enabling legislation should be enacted.

In answer to your question number four you are advised that the authority extended to the Atomic Energy Commission by the Atomic Energy Act of 1954 to regulate and control radiation from atomic energy will take precedence over existing South Dakota Law on this subject. 42 USCA 2012, 2014 (c).

Likewise, any agreement between the Atomic Energy Commission and the State of South Dakota, whereby the State would be delegated radiation protection responsibilities must be in conformity with the Atomic Energy Act of 1954 as amended. 42 USCA 2021 (d).

Your question number five is answered in the affirmative. 42 USCA 2021 (j) provides:

"The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) has become effective, or upon request of the Governor of such State may terminate or suspend its agreement with the State and reassert the licensing and regulatory authority vested in it under this Act, if the Commission finds that such termination or suspension is required to protect the public health and safety."

BOARD OF BARBER EXAMINERS

Water and sewerage connections to mobile barber shop.

July 27, 1964

G. E. Thoreson
Secretary-Treasurer, State Board of Barber Examiners
Pierre, South Dakota

You have requested an official opinion of this office asking the following questions:

"(1) Does a mobile barber shop have to connect to sewer and water in a town that has these utilities?"

"(2) If a mobile barber shop does not have to connect to existing



Home > NRC Library > Document Collections > NRC Regulations (10 CFR) > Part Index > § 8.4 Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Atomic Energy Act.

§ 8.4 Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Atomic Energy Act.

(a) By virtue of the Atomic Energy Act of 1954, as amended,¹¹ the individual States may not, in the absence of an agreement with the Atomic Energy Commission, regulate the materials described in the Act from the standpoint of radiological health and safety. Even States which have entered into agreements with the AEC lack authority to regulate the facilities described in the Act, including nuclear power plants and the discharge of effluents from such facilities, from the standpoint of radiological health and safety.

(b) The Atomic Energy Act of 1954 sets out a pattern for licensing and regulation of certain nuclear materials and facilities on the basis of the common defense and security and radiological health and safety. The regulatory pattern requires, in general, that the construction and operation of production facilities (nuclear reactors used for production and separation of plutonium or uranium-233 or fuel reprocessing plants) and utilization facilities (nuclear reactors used for production of power, medical therapy, research, and testing) and the possession and use of byproduct material (radioisotopes), source material (thorium and uranium ores), and special nuclear material (enriched uranium and plutonium, used as fuel in nuclear reactors), be licensed and regulated by the Commission.¹² In carrying out its statutory responsibilities for the protection of the public health and safety from radiation hazards and for the promotion of the common defense and security, the AEC has promulgated regulations which establish requirements for the issuance of licenses (Parts 30-36, 40, 50, 70, 71, and 100 of this chapter) and specify standards for radiation protection (Part 20 of this chapter).

(c) The Atomic Energy Act of 1954 had the effect of preempting to the Federal Government the field of regulation of nuclear facilities and byproduct, source, and special nuclear material. Whatever doubts may have existed as to that preemption were settled by the passage of the Federal-State amendment to the Atomic Energy Act of 1954 in 1959.¹³

(d) Prior to 1954, all nuclear facilities and the special nuclear material produced by or used in them were owned by the AEC.¹⁴ This Federal monopoly of atomic energy activities was due in large part to the use of atomic energy materials and facilities in our national weapons program, and the large capital investment required for their development. The Atomic Energy Act of 1954 permitted private ownership of nuclear facilities for the first time, but only under a comprehensive, pervasive system of Federal regulation and licensing. That Act recognized no State responsibility or authority over such facilities and materials except the States' traditional regulatory authority over generation, sale, and transmission of electric power produced through the use of nuclear facilities.¹⁵ As interest grew in the private construction of facilities and the use of atomic energy materials, and the numbers of persons qualified in the field increased, questions arose as to the role State authorities should play with regard to the public

health and safety aspects of such activities. Several bills were introduced with respect to Federal-State cooperation in 1956 and 1957.¹⁶ An AEC proposed bill which would have authorized concurrent radiation safety standards to be enforced by the States was forwarded to the Joint Committee on Atomic Energy in 1957, but was never reported out. Finally, in 1959, legislation was enacted whose purpose was to promote an orderly regulatory pattern between the Federal and State governments with respect to regulation of byproduct, source, and special nuclear material, while avoiding dual regulation (see section 274a). That legislation added section 274, the so-called Federal-State amendment, to the Atomic Energy Act.

(e) Section 274 (42 U.S.C. 2021) authorizes the Commission to enter into an agreement with the Governor of any State providing for the discontinuance of regulatory authority of the Commission with respect to byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a "critical mass." However, section 274c (42 U.S.C. 2021(c)) provides that the Commission shall retain authority and responsibility with respect to the regulation of:

- (1) The construction and operation of production or utilization facilities (note: this includes construction and operation of nuclear powerplants);
- (2) The export and import of by-product, source or special nuclear material or production or utilization facilities;
- (3) The disposal into the ocean of waste byproduct, source or special nuclear materials; and
- (4) The disposal of such other byproduct, source or special nuclear material as the Commission determines should, because of the hazards or potential hazards thereof, not be so disposed of without a Commission license.

(f) The amendment, in providing for the discontinuance of some of the AEC's regulatory authority over source, by-product and special nuclear material in States which entered into agreements with the AEC, made clear that there should be no "dual regulation" with respect to those materials for the purpose of protection of the public health and safety from radiation hazards.

(g) Section 274b of the Atomic Energy Act (42 U.S.C. 2021(b)) states that:

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.

Section 274k (42 U.S.C. 2021(k)) states:

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

(h) In its comments on the bill that was enacted as section 274, the Joint Committee on Atomic Energy commented that:

It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, 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.¹⁷

In explaining section 274k, the Joint Committee said:

As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility.¹⁸

(i) It seems completely clear that the Congress, in enacting section 274, intended to preempt to the Federal Government the total responsibility and authority for regulating, from the standpoint of radiological health and safety, the specified nuclear facilities and materials; that it stated that intent unequivocally; and that the enactment of section 274 effectively carried out the Congressional intent, subject to the arrangement for limited relinquishment of AEC's regulatory authority and assumption thereof by states in areas permitted, and subject to conditions imposed, by section 274.¹⁹

(j) Thus, under the pattern of the Atomic Energy Act, as amended by section 274, States which have not entered into a section 274 agreement with the AEC are without authority to license or regulate, from the standpoint of radiological health and safety, byproduct, source, and special nuclear material or production and utilization facilities. Even those States which have entered into a section 274 agreement with the AEC (Agreement States) lack authority to license or regulate, from the standpoint of radiological health and safety, the construction and operation of production and utilization facilities (including nuclear power plants) and other activities reserved to the AEC by section 274c. (To the extent that Agreement States have authority to regulate byproduct, source, and special nuclear material, their section 274 Agreements require them to use their best efforts to assure that their regulatory programs for protection against radiation hazards will continue to be compatible with the AEC's program for the regulation of byproduct, source and special nuclear material.)

(k) The following judicial precedents and legal authorities support the foregoing conclusions: Northern California Ass'n, Etc. v. Public Utilities Commission, 37 Cal. Rep. 432, 390 P. 2d 200 (1964); Boswell v. City of Long Beach, CCH Atomic Energy Law Reports, par. 4045 (1960); Opinion of the Attorney General of Michigan (Oct. 31, 1962); Opinion of the Attorney General of South Dakota (July 23, 1964); New York State Bar Association, Committee on Atomic Energy, State Jurisdiction to Regulate Atomic Activities (July 12, 1963). No precedents or authorities to the contrary have come to our attention.

[34 FR 7273, May 3, 1969]

¹¹ Pub. L. 83-703, 68 Stat. 919.

¹² The terms "byproduct material," "source material," and "special nuclear material" are defined in the Atomic Energy Act, sections 11e, 11z, and 11aa, respectively. The terms "production facility" and "utilization facility" are defined in sections 11v and 11cc of the Act, respectively.

¹³ Pub. L. 86-373, 73 Stat. 688.

¹⁴ Atomic Energy Act of 1946, Pub. L. 79-585, 60 Stat. 755.

¹⁵ Sec. 271, 42 U.S.C. 2018.

¹⁶ S. 4298 and H.R. 8676, 84th Cong., second session; S. 53, 85th Cong., first session.

¹⁷ 1959 U.S. Code Congressional and Administrative News, v. 2, p. 2879.

¹⁸ Id. at pp. 2882-3.

¹⁹ As noted above, regulation of construction and operation of production or utilization facilities was one of the areas reserved to the AEC. It is clear from the legislative history of section 274 that control of “operation” of such facilities includes the regulation of the radiological effects of the discharge of effluents from the facilities. (Hearings before the Joint Committee on Atomic Energy on Federal-State Relationships in the Atomic Energy Field, 86th Cong., first session, 1959, p. 306.) AEC regulations implementing section 274 recognize that intent by defining facility operation to include the discharge of radioactive effluents from the facility site (10 CFR 150.15).

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MINERALS & MINING PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF POWERTECH)
(USA), INC. APPLICATION FOR)
LARGE SCALE MINING PERMIT) CERTIFICATE OF SERVICE
PERMIT NO. 480)
(Dewey-Burdock Project))

The undersigned hereby certifies that true and correct copies of the Mineral and Mining Program's Brief filed at the request of the hearing chair, including attachments, were served upon the following persons by United States mail, first class, postage prepaid:

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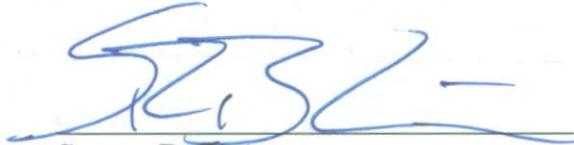
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And the original of the same was filed on the same date with Michael Cepak,

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Dated at Pierre, South Dakota, on this 4th day of November, 2013



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