BELOW REGULATORY CONCERN STANDARDS: THE LIMITS OF STATE AND LOCAL AUTHORITY

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ABSTRACT

The paper discusses: (1) the scope of the Nuclear Regulatory Commission's authority to develop and implement "below regulatory concern" or "BRC" standards; and (2) the limitations on the legal authority of states and local governments to create impediments to full implementation of such standards. The paper demonstrates that the NRC is acting well within its statutory authority in developing BRC regulations and guidelines, and that the ability of state and local governments to impede generators' use of those regulations and guidelines on the basis of legal or regulatory initiatives is substantially circumscribed. While some generators may be reluctant, as a result of political factors, to utilize BRC standards, the decision whether or not to use such standards should not be made without careful consideration of the applicable legal and regulatory limitations on state and local authority.

INTRODUCTION

This paper discusses: (1) the scope of the Nuclear Regulatory Commission's authority to develop and implement "below regulatory concern" or "BRC" standards; and (2) the limitations on the legal authority of states and local governments to create impediments to full implementation of such standards. The paper demonstrates that from a legal and regulatory perspective such standards are and will be viable. The ability of state or local authorities to impede the use of BRC standards on the basis of legal or regulatory initiatives is substantially circumscribed by constitutional and statutory limitations. The paper examines the authority of the NRC, the states, and local governments under the Atomic Energy Act, the NRC's Agreement State program, the provisions of the Low-Level Radioactive Waste Policy Amendments Act, and the regional low-level waste disposal compacts.

Some parties have questioned the efficacy of BRC standards from a political perspective. To be sure, political factors will determine in part a particular generator's ability to dispose of waste as BRC. However, it is a mistake simply to assume that political opposition will create insurmountable impediments. Political factors may vary substantially among individual generators, states and compact regions. A discussion of those factors is beyond the scope of this paper.

NRC AUTHORITY TO DEVELOP BRC STANDARDS

There has, to date, been little or no debate over the NRC's basic authority to develop BRC standards. Nothing in the Atomic Energy Act of 1954, as amended, prohibits the NRC from reducing the degree of regulatory control over source, special nuclear or byproduct material so long as the health and safety of the public is adequately protected. Similarly, nothing would prohibit the NRC from concluding, on the basis of adequate technical and scientific evidence, that little or no regulatory control over materials or activities producing low levels of radiation is necessary. In fact, Section 81 of the Atomic Energy Act (42 U.S.C.A. § 2111 (West Supp. 1989)) explicitly authorizes the Commission "to exempt certain classes or quantities of [byproduct] material or kinds of uses or users from the requirements for a license ... when it makes a finding that the exemption ... will not constitute an unreasonable risk ... to the health and safety of the public." NRC regulations currently provide for various exempt quantities and concentrations of radionuclides. Traditionally, the courts have recognized the NRC's broad discretion in determining what technical requirements and regulatory controls are necessary to assure that the public is adequately protected from radiological hazards.

Furthermore, Congress has explicitly directed the NRC to utilize its existing authority to develop BRC standards. In Section 10(a) of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C.A. § 2021j(a) (West Supp. 1989)), Congress <u>directed</u> the Commission "pursuant to existing authority" to establish standards and procedures for exempting the disposal of BRC waste from regulatory control. While Section 10 focuses on standards and procedures for the review of rulemaking petitions, its recognition of the NRC's existing authority reinforces the principle that the NRC has authority beyond the bounds of the Section 10 mandate to develop BRC standards.

CAN AGREEMENT STATES REJECT BRC STANDARDS?

In addition to the authority to develop BRC standards, the NRC also has substantial authority to assure that such standards are implemented in Agreement States. Section 274(b) of the Atomic Energy Act (42 U.S.C.A. § 2021(b) (West 1973)) authorizes the NRC to enter into agreements with the Governor of any state "providing for discontinuance of the regulatory authority of the Commission" and authorizing the state to "regulate the [radioactive] materials covered by the agreement for the protection of the public health and safety from radiation hazards." Under section 274(d), the Commission must find, as a condition of entering

into such an agreement, that the state regulatory program is, among other things, "compatible with the Commission's program for the regulation of such materials. . . ." 42 U.S.C.A. § 2021(d)(2) (West 1973) (emphasis added).

The concept of "compatibility" is not defined in the Atomic Energy Act, and a review of the 1959 Report on the Joint Committee on Atomic Energy concerning the adoption of section 274 provides little guidance, as well, concerning its definition. However, the requirement that Agreement State regulations be "compatible" does not necessarily mean that those regulations must be "identical" or must incorporate an NRC approved BRC standard.

The NRC Staff's internal criteria for evaluating Agreement State programs state that the Commission has "never formally defined compatibility or provided more than minimal guidance as to how the term should be interpreted." State Agreements Program, Division I, Internal Procedures, B.7 "Criteria for Compatibility Determination" (January 25, 1984) at 1. Nevertheless, the Staff criteria specify that there are "degrees" of compatibility which apply depending upon the nature of the regulation in question.

In particular, NRC regulations classified as "Division 1" rules under the Staff criteria "must be adopted, essentially verbatim" by Agreement States. Id. at 2. For Division 2 rules, while States "must address such principles in their regulations, the States may adopt requirements more restrictive than NRC rules. Id. at 2-3. Division 3 rules include those "provisions in NRC regulations which would be appropriate for Agreement States to adopt, but which do not require any degree of uniformity between NRC and States rules." Finally, "Division 4" rules are "reserved to NRC pursuant to the Atomic Energy Act and 10 CFR Part 150." Id at 3.

Whether or not an Agreement State can reject an NRC approved BRC standard or adopt a more stringent one will depend upon the classification which NRC places on the particular standard. NRC has stated on several occasions that it intends to make BRC standards "matters of compatibility." This has been stated in the context of the NRC's August 1986 Policy Statement providing for expedited decisions on BRC rulemaking petitions (51 Fed. Reg. 30839 (1986)),* and again in its December 1988 advance notice of "Policy Statement on Exemptions from Regulatory Control" (53 Fed. Reg. 49886, 49888 (1988)).

More recently, the Commission has specifically directed the NRC General Counsel to determine whether the agency has authority to require Agreement states to adopt "identical" BRC criteria. In a Staff Requirements Memorandum, SECY-89-184 (October 13, 1989), the Commission directed the General Counsel to:

> examine the treatment of ... Agreement State compatibility under the Policy Statement, focusing on the question of whether [NRC has] the authority to require Agreement States to adopt criteria that are identical to those set forth in the Policy Statement (i.e., Agreement State BRC criteria can be neither less stringent nor more stringent than the criteria established by the Commission).

(Emphasis added). The Commission's inquiry itself suggests that it is seriously contemplating that Agreement States be compelled to accept Commission adopted BRC standards.

The General Counsel's written opinion is not publicly available. However, it is my understanding that the conclusion has been reached that the NRC does indeed have adequate legal authority under Section 274 of the Atomic Energy Act to require Agreement States to adopt identical BRC provisions, so long as such provisions have been codified as regulations. This interpretation is consistent with the express language of section 274 of the Atomic Energy Act, with the absence of contrary legislative history, and with the NRC's broad discretion in interpreting its own regulatory requirements. Accordingly, the NRC does have the authority to require Agreement States to adopt equivalent BRC regulations. Exercise of that authority would ensure that Agreement States accept and implement NRC approved BRC standards.

THE ADVANTAGES OF ONSITE DISPOSAL OPTIONS

Section 274(c) of the Atomic Energy Act requires that the NRC "retain authority and responsibility with respect to the regulation of . . . the construction and operation of any production or utilization facility." 42 U.S.C.A. § 2021(c)(1) (West 1973)). 10 C.F.R. § 150.15(a)(1) (1989) also provides for exclusive NRC regulatory authority over the "construction and operation" of a nuclear power plant.**

In the past, the NRC Staff has proceeded on the assumption that only a generator's onsite waste storage, treatment and handling activities were part of the "operation" of a nuclear power plant, and therefore within NRC's exclusive jurisdiction, while onsite disposal activities were not. However, the Commission has proposed a rule that would clarify

* The Commission recognized that "[e]quity...suggests that all waste generators be able to take advantage of below regulatory concern options..." and that "the concept should be applicable nationwide." 51 Fed. Reg. 30840 (1986).

** This provision is among those listed in the Staff's internal guidance as a "Division 4" rule which may not be addressed by an Agreement State regulatory agency.

that the onsite disposal of a generator's own waste is also within the exclusive jurisdiction of NRC and not subject to Agreement State authority.

On August 22, 1988, the Commission issued a proposed rule "Reasserting NRC's Authority for Approving Onsite Low-Level Waste Disposal in Agreement States." 53 Fed. Reg. 31880 (1988). The proposed rule, if adopted, would amend 10 C.F.R. § 150.15 by clarifying that Agreement States may not regulate onsite disposal activities at a reactor site. If the rule is adopted, NRC regulations would clearly prohibit Agreement States from regulating onsite BRC disposal activities.

Even though the Staff has in the past proceeded on the assumption that a reactor licensee's onsite disposal activities are not within the exclusive province of the NRC, it appears that the Commission's original intent in promulgating section 150.15 was to establish Agreement State authority over offsite, commercial disposal activities only, and not over the onsite disposal of a reactor licensee's own waste. As discussed below, despite the Staff's prior interpretation, the onsite disposal of a generator's own waste is and has been within NRC's exclusive jurisdiction.

In 1961 when section 150.15 was first proposed, the Commission made clear that it had not yet determined whether to relinquish to the states its authority to regulate commercial disposal of atomic waste by burial. The NRC indicated that such disposal meant "burial by any person of byproduct, source or special nuclear waste received by such person from any other person for disposal." 26 Fed. Reg. 9174, 9176 (1961) (emphasis added). The Commission sought comment on whether it should retain, or relinquish to the states, its authority to regulate the commercial disposal by burial of atomic wastes.

In finalizing the rule, the Commission decided that "[t]he states will have control over land burial of low level wastes." 27 Fed. Reg. 1351 (1962). The Commission also clarified, presumably in response to public comments received, that "[c]ontrol over the handling and storage of waste at the site of a reactor, including effluent discharge, will be retained by the Commission as a part of the control of reactor operation." Id.

Since the Commission did not explicitly reference "commercial" land burial, it left ambiguous how onsite disposal was to be regulated. However, given the Commission's emphasis in the notice of proposed rulemaking on commercial disposal of waste generated by and received from another party (versus onsite disposal of a licensee's own waste), it appears that the Commission was not relinquishing control over onsite reactor disposal. Instead, it was merely clarifying that, until the waste was transferred out of the possession of the reactor licensee, the Commission retained authority for waste management activities (including disposal) conducted at the reactor site. Issuance of the proposed on-site disposal regulation should clarify this point.

Even if the proposed onsite disposal rule is not adopted, it is important to recognize that, at a minimum, onsite waste handling and treatment activities clearly remain subject to exclusive NRC authority. Requests for authorization to treat or reduce waste volumes at power reactor sites should be directed to the NRC.

DO THE LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OR THE REGIONAL COMPACTS AUTHORIZE THE STATES TO REJECT BRC STANDARDS?

Section 3 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 made each state "responsible for providing, either by itself or in cooperation with other States, for the disposal" of low-level waste generated within the state. 42 U.S.C.A. § 2021c(a)(1) (West Supp. 1989). Under the Amendments Act, states may "enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." 42 U.S.C.A. § 2021d(a)(2)(A) (West Supp. 1989).

The Amendments Act states that:

> [n]othing contained in sections 2021b to 2021j of this title or any compact may be construed to confer any new authority on any compact commission or State -- (A) to regulate the packaging, generation, treatment, storage, disposal, or transportation of low-level radioactive waste in a manner incompatible with the regulations of the Nuclear Regulatory Commission or inconsistent with the regulations of the Department of Transportation; [or] (B) to regulate health, safety, or environmental hazards from source material, byproduct material, or special nuclear material. . . .

42 U.S.C.A. § 2021d(b)(3) (West Supp. 1989). Similarly, except as expressly provided in the Amendments Act, nothing "may be construed to limit the applicability of any Federal law or to diminish or otherwise impair the jurisdiction of any Federal agency. . . ." 42 U.S.C.A. § 2021d(b)(4) (West Supp. 1989).

This language indicates that neither the Amendments Act nor the compacts themselves may be used to regulate low-level waste disposal or treatment in a manner "incompatible" with NRC regulations or to otherwise regulate radiological hazards from source, byproduct or special nuclear materials. Accordingly, to the extent that NRC regulations reserve NRC authority over BRC waste treatment or disposal, or require Agreement States to adopt BRC waste standards "essentially verbatim," neither the Amendments

Act nor the compacts can be used to frustrate those purposes.

On the other hand, except as expressly provided in the Amendments Act, nothing in the Act "expands, diminishes, or otherwise affects State law." 42 U.S.C.A. § 2021d(b)(5) (West Supp. 1989). Thus, state authority under existing state law, presumably including the compacts themselves, is undiminished by the Amendments Act.

It is clear from the language quoted above that the assignment of disposal responsibility to the states does not constitute a grant of authority to regulate the radiological hazards of low-level waste. Unless a state is an Agreement State, any attempt to regulate BRC waste on the basis of its radiological hazards would not be upheld by the courts. This is clear from both the Amendments Act, as well as federal caselaw. Furthermore, even non-radiological state or local regulations that conflict with federal requirements or "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress" would be preempted. Silkwood v. Kerr McGee Corp., 464 U.S. 238, 248 (1984). Of course, the precise basis for state regulation is not always entirely clear, and therefore, the determination of whether a particular state law or regulation is preempted by federal law must be made on a case by case basis.

Therefore, while radiological regulation of BRC waste in the absence of a state agreement pursuant to section 274(b) would be preempted by federal law, there are bases for state regulation of BRC waste that may, under certain circumstances, not be prohibited. The most obvious of these are the provisions of some of the compacts that bar the treatment or other management or disposal of low-level waste from any facility, other than the regional disposal facility, without the approval of the regional disposal authority. These provisions differ from compact to compact. Accordingly, state authority to regulate BRC waste disposal under these provisions will differ from region to region. Individual generators should examine the specific statutory and regulatory provisions that apply in their states and develop a strategy to assure maximum availability of BRC waste standards.

CAN STATES OR LOCALITIES LEGISLATE AGAINST BRC STANDARDS?

To date at least one state and a number of local governments have promulgated laws or ordinances which purport to "prohibit" BRC disposal within their jurisdictions. While all of these provisions have not been evaluated, those that have been reviewed do not prohibit such disposal as a matter of law and would, if implemented, contravene constitutional principles of federal supremacy. Legislation passed in the State of Maine and a proposed local ordinance being circulated by some organizations that oppose BRC standards are discussed below.

The Maine Legislation

On June 26, 1989 the Governor of Maine signed into law a bill entitled "An Act to Protect the People of Maine from Exposure to Radioactive Waste." The Maine legislation "redefines" low-level waste to include "any radioactive material ... generated through the production of nuclear power" which the NRC declares as BRC waste. The legislation also purports to prohibit storage or disposal of such waste in Maine except at a facility licensed by the NRC.

There are numerous serious deficiencies with this legislation. First and foremost, the legislation directly and explicitly violates the supremacy clause of the U.S. Constitution and is preempted by federal law. Federal law clearly provides that the NRC has exclusive preemptive authority over the regulation of radiological hazards from source, special nuclear and byproduct materials. No state (in the absence of a grant of Agreement State authority by the NRC) may regulate such hazards. The Maine legislation by its title and express language attempts to achieve that result. As such it is an unconstitutional encroachment on the authority of the federal government.

Secondly, the legislation singles out waste produced by the nuclear power industry and does not purport to prohibit BRC disposal of identical wastes that may be produced by other NRC licensees. As such, it is without technical basis.

Third, the legislation only prohibits BRC disposal "[t]o the extent permitted under federal law. . . ." As discussed above, since state radiological regulation of BRC wastes is prohibited by the Constitution, the legislation has no legal effect.

The Proposed Local Ordinance

Some organizations that oppose BRC standards have proposed a "Sample Ordinance/Resolution Against Deregulation of Radioactive Waste ('Below Regulatory Concern')." This proposal (or one similar to it) has been adopted in a number of localities. The "Sample Ordinance" suffers from many of the same shortcomings as the Maine legislation.

In particular, it is expressly based upon the radiological hazards of BRC waste and not on any legitimate area in which a local government may legislate. Second, it expressly acknowledges congressional approval of the BRC concept in section 10 of the Amendments Act, thereby recognizing the statutory basis for any NRC standards promulgated

thereunder. With these infirmities, this and similar local initiatives would be unlikely to withstand legal challenge.

CONCLUSIONS

While political factors may adversely affect the ability of some generators to utilize BRC standards, from a legal and regulatory perspective, such standards are viable. The legal authority of state and local governments to impede implementation of BRC standards is considerably circumscribed. Decisions on the use or non-use of BRC standards should be informed not only by political considerations but also by an assessment of applicable legal and regulatory factors.