August 11, 2000

COMMISSION VOTING RECORD

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/

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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 UMTRCA 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.

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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 (8 th 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.").