NRC STAFF RECOMMENDED LETTER

The Honorable Tim Pawlenty
Governor of Minnesota
St. Paul, Minnesota 55155

Dear Governor Pawlenty:

I am pleased to inform you that the U.S. Nuclear Regulatory Commission (NRC) has completed its review of your application for an Agreement submitted on July 6, 2004. Under the proposed Agreement, NRC would discontinue and the State of Minnesota would assume authority over: (1) byproduct materials as defined in Section 11e.(1) of the Atomic Energy Act of 1954, as amended (Act); (2) source materials; and (3) special nuclear materials in quantities not sufficient to form a critical mass.

NRC staff is publishing notice of the proposed Agreement for 30 days public review and comment. A copy of the Federal Register notice is enclosed which provides the Commission's determination that the proposed Minnesota Program is both adequate to protect the public health and safety and compatible with the NRC's regulatory program. Publication of the proposed Agreement and the Commission's findings for public review and comment is required by Section 274 of the Act.

Your request for an Agreement, and the materials over which Minnesota will assume regulatory jurisdiction under the proposed Agreement, are clear and consistent with provisions of the Act. However, NRC staff, during its review of the Minnesota application, became aware of a past action taken by Minnesota State agencies to establish a public radiation dose standard to the Prairie Island Nuclear Power Plant independent spent fuel storage installation. During review of a website provided in the Minnesota application: http://www.leg.state.mn.us/leg/statutes.asp), NRC staff also identified statutes and regulations such as the Radioactive Waste Management Act codified at Mn. Stat. §§ 116C.705 to 116C.76, which, while not applicable to the regulation of materials under the Agreement, could be interpreted as attempting to assert authority in areas reserved to the NRC. Under Section 274 of the Act, the NRC retains authority and responsibility with respect to regulation of the construction and operation of any production or utilization facility from a radiological health and safety standpoint, including the high level waste generated from such facilities.

I want to assure you that NRC shares the interest and commitment of the State of Minnesota to ensure protection of public health and safety, and the Commission looks forward to continuing to work with Minnesota in completing the proposed Agreement. My staff contact is: Mr. Paul H. Lohaus, Director, Office of State and Tribal Programs. He can be reached at (301) 415-3340.

Sincerely,

Nils J. Diaz

ATTACHMENT 3

INFORMATION IN SUPPORT OF TEAM LEADER'S VIEW

The Team Leader determined that historically, the Minnesota Program's actions, statutes and regulations have not been in concert with the provisions of the Atomic Energy Act of 1954, as amended (Act), the NRC's regulatory program, and the 33 other Agreement State Programs. At present, there are existing Minnesota statutes and regulations in areas reserved to the NRC. The Commission by Staff Requirements Memorandum (SRM) dated June 30, 1997, SECY 97-054, Final Recommendations on Statement of Principles and Policy for the Agreement State Program (Statement of Principles and Policy) and Policy Statement on Adequacy and Compatibility of Agreement State Programs (Policy Statement on Adequacy and Compatibility), indicated that States that adopt program elements in areas reserved to the Commission are not compatible with NRC's regulatory program. These program elements are designated "Compatibility Category NRC." The June 30, 1997 SRM also indicated that "Many program elements for compatibility also impact public health and safety; therefore, they may also be considered program elements for adequacy."

In light of the Commission's direction, the Team Leader is of the view that a compatibility determination relative to the Minnesota Program should be made by the Commission as opposed to the staff based upon the significant national policy implications associated with the existing Minnesota statutes and regulations in areas reserved to the NRC. The Team Leader's view is based on the handling of similar Agreement State policy decisions, for example: (1) SECY-04-0130, "Response to State of Texas Request for Comments on a Proposed Rule Establishing Requirements for the Release of Material for Unrestricted Use and for Disposal of Low Activity Material in a Hazardous Waste Disposal Facility, dated July 22, 2004; (2) SECY-04-0128, "Amendment to Section 274b Agreement with the State of Utah and Approval of Alternative Groundwater Standards," dated July 19, 2004; (3) SECY-03-0025, "Utah Alternative Groundwater Protection Standards; Process for Implementation of the Alternative Standards Provision in Section 274o of the Act," dated February 18, 2003; (4) SECY-02-0127, "Proposed Response to State of Ohio on Its Assured Isolation Storage Facility Draft Rules," dated July 11, 2002; (5) SECY-00-0066, "Proposed Response to State of Utah on Re-Examination of the Utah Land Ownership Exemption for the Envirocare Site," dated March 15, 2000; (6) SECY-99-002, "Agreement State Compatibility Designation for NRC Employee Protection Regulations," dated January 5, 1999; (7) SECY-99-049, "Compatibility of Agreement State Programs that Prohibit the Disposal of Mixed Waste," dated February 12, 1999; (8) SECY-98-209, "Proposed Agreement with the State of Ohio and Compatibility Requirements of 10 CFR Part 20, Subpart E," dated September 8, 1998; (9) SECY-97-087, "Oklahoma Agreement State Negotiations: State Requests that Major Facilities Undergoing Site Decommissioning not be Relinquished to the State," dated April 22, 1997; (10) SECY-93-080, "Re-evaluation of the Compatibility Divisions Assigned to the Performance Objectives in 10 CFR 61.41 through 61.44 and Evaluation of the Illinois 1 millirem," dated March 2, 1993; and (11) SECY-91-047, "Draft Proposal from Pennsylvania for a Limited Agreement under Section 274b to regulate Low-Level Waste Disposal;" dated February 21, 1991.

The Team Leader determined that the State has demonstrated a desire to cooperate with the

Commission to eliminate areas of potential concern, including those in Compatibility Category NRC, if they are brought to their attention [ADAMS: ML051740384 and ML0522004240]. The Team Leader further determined that absent communications between the Commission and Minnesota, as indicated in the August 5, 2005 letter, the State may unknowingly promulgate and enforce statutes and regulations that create duplications in areas reserved to the Commission. The Minnesota staff has requested that potential compatibility concerns be provided to them in writing from the NRC so they can be addressed. In an August 15, 2005 teleconference, the State staff also indicated that their commitments in a May 25, 2005 letter [ADAMS: ML051740384] to resolve incompatible definitions, cannot be properly addressed without a letter from the NRC. The staff has determined that the State should not be required to address the compatibility concerns, and specifically omits opening a discussion with the State on the concerns in their proposed letter to the Minnesota Governor in Attachment 3. Whereas, the Team Leader determined that, in accordance with the provisions of the Act and statements from the State staff, communication and coordination with the State would ensure resolution of the potential compatibility concerns.

The Team Leader also determined that there is additional information (Appendices A and B) that the Commission should consider as a part of its decisions regarding the compatibility of the proposed Minnesota Agreement Program: (1) whether to defer action on the Minnesota Agreement application; and (2) whether to send a letter to the Governor to open dialogue with the State on the potential Compatibility Category NRC concerns. This additional information is based on the policy statement "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement."

I. **Criterion 2: Standards**. The State regulatory program shall adopt a set of standards for protection against radiation which shall apply to byproduct, source and special nuclear materials in quantities not sufficient to form a critical mass.

A. According to the above criterion, the Minnesota Program should not adopt radiation standards addressing activities involving critical mass quantities of special nuclear material. The regulation of reactor operations and independent spent fuel storage installations (ISFSIs) involves critical mass quantities and is reserved to the NRC. Thus, Minnesota's actions, statutes, and regulations in these areas conflict with the following past guidance relative to the Agreement State Program.

1. Historically, the application of the term "programs," as used in §274 has been applied to mean all of the State's actions, statutes, and regulations relative to the control of materials subject to the Act. The amendment in §274a.(3) provides for an orderly regulatory pattern between the "Commission and State governments," as opposed to a single State agency. Prior to September 2000, compatibility of Agreement State Programs were determined using the January 25, 1984, State Agreements Program Division I, Internal Procedures, B.7 *Criteria for Compatibility Determinations*, which provided:

   "Sections 274d(2) and 274g. are the only sections of the Act that address the concept of compatibility of 'programs.' It is evident that Congress intended that the Commission address more than just regulations in its review, and since the earliest days of the State Agreements Program, the Commission used the term 'compatibility' in relation to not only regulations, but also to such program areas as licensing and compliance."

* * * * * * * * * * * *

The procedure also indicated:

> "Division 4 rules. There are certain regulatory functions which are reserved to the NRC pursuant to the Atomic Energy Act and 10 CFR Part 150. Rules pertaining to these areas are designated Division 4 rules. Such rules include those concerning reactor regulation, distribution of consumer products, exports and imports, and high level waste disposal. State regulations should not address these areas."

2. Memorandum dated December 28, 1990 to Martin G. Malsch, Deputy General Counsel for Licensing and Regulation, from Jane R. Mapes, Senior Attorney, *Agreement State Compatibility Issues Identified in Topic 5 of Staff Requirements Memorandum of October 5, 1990 (Ref: M900816A*), indicated:

> "As memorialized in section 274a., the purpose of the amendment was to recognize the interests of the States in the peaceful uses of atomic energy, clarify the respective responsibilities of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials, promote an orderly regulatory pattern between the Commission and the State governments respecting radiation hazards and nuclear development and use, and establish procedures for the discontinuance of certain of the Commission's regulatory responsibilities and the assumption thereof by the States. By enacting section 274, Congress made quite clear that the regulation and control of radiation hazards from source, byproduct, and special nuclear materials are preempted by the Federal government and that such preemption would end '. . .in any State only upon the effective date of an agreement between the State and the Commission under subsection b. and only to the extent provided in the agreement.' Unlike an earlier proposal which would have permitted Federal and State governments to exercise dual regulatory authority over these materials, it was not the intent of section 274 '. . .to leave any room for the exercise of concurrent jurisdiction by the States to control radiation hazards from these materials.'"
>
> * * * * * * * * * * * *
>
> > "g. The Commission is authorized and directed to cooperate with the States in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible."
>
> "These provisions make clear that compatibility determinations are not confined to State statutes and regulations but apply more broadly to radiation protection 'programs.'"

3. Additional guidance was provided by memorandum dated November 1, 1990 to William C. Parler, General Counsel from Stuart A. Treby, Assistant General Counsel for Rulemaking and Fuel Cycle, *Remedies of Incompatibility* provides:

> "In the Atomic Energy Act of 1954, Congress provided no explicit statutory language which would have given states the regulatory jurisdiction over source, byproduct, and special nuclear material. The nuclear field was preempted by the federal government

and the states could not regulate radiation protection.[2] However, in 1959, Congress established a statutory framework under which states could assume certain regulatory jurisdiction over source, byproduct and special nuclear material less than a critical mass. According to the new section 274 to the Act of 1954, as amended, the states could assume licensing and related regulatory responsibility over certain nuclear materials only upon entering into an agreement with the Commission whereby the Commission would discontinue its regulatory authority under chapters 6, 7, 8 and section 161of the Act with respect to byproduct, source and limited quantities of special nuclear material. Thus, the states derive their authority to regulate nuclear materials only through the agreement with the Commission and can exercise that authority only to the extent provided in the agreement."

B. Minnesota actions, statutes, and regulations also conflict with the following presently implemented Commission decisions, polices, principles, and/or procedures:

1. The Commission by SRM dated June 30, 1997, SECY 97-054 - Final Recommendations on Statement of Principles and Policy for the Agreement State Program (Statement of Principles and Policy) and Policy Statement on Adequacy and Compatibility of Agreement State Programs (Policy Statement on Adequacy and Compatibility), clarified that States that adopt program elements reserved to the Commission are not compatible with NRC's regulatory program. The SRM provided,

"The 'NRC' compatibility category identifies regulations that are reserved to the NRC but allows states to adopt them for clarity, but the policy omits certain NRC regulations that Agreement States may not adopt because the areas in which they apply are reserved to the NRC. The Policy and procedure should be revised to identify specifically the regulations in the 'NRC' category that the States may adopt for clarity and a separate category ('NRC-X' or some similar designation) created for those regulations, such as 10 CFR Part 70.21 and much of 10 CFR Part 50 that are reserved for the NRC and that States may not adopt and still be found to have compatible regulatory programs. The flow chart in Appendix A to Handbook 5.9 should also be revised to reflect this distinction."

2. The "Policy Statement on Adequacy and Compatibility," and the associated implementing procedures were revised to reflect Commission direction that States which exercise regulatory authority in areas reserved to the Commission are not compatible with NRC's regulatory program, as follows,

---

[2]Case law establishes that Congress has pre-empted the field of nuclear safety. In Pacific Gas & Electric Co. V. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983), the Court concluded that "State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns,…, When the Federal Government completely occupies a given field or an identifiable portion of it, … the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.' Rice v. Santa Fe Elevator Corp., decided June 4, 1990, Slip Opinion No. 89-152, scrutinized the pre-emption theory of the field of nuclear safety concerns, and reaffirmed the holding in Pacific that the field of nuclear safety is pre-empted.

"Areas of Exclusive NRC Regulatory Authority. These are program elements that address areas of regulation that cannot be relinquished to Agreement States pursuant to the Act or provisions of Title 10 of the Code of Federal Regulations. However, an Agreement State may inform its licensees of certain of these NRC provisions through a mechanism that is appropriate under the State's administrative procedure laws as long as the State adopts these provisions solely for the purposes of notification, and does not exercise any regulatory authority pursuant to them." (Emphasis added.)

3. The Statements of Principles provide,

"Coherent Nationwide Effort. The mission of the NRC is to assure that civilian use of nuclear materials in the United States is carried out with adequate protection of public health and safety. NRC acknowledges its responsibility, shared with the Agreement States, to ensure that the regulatory programs of the NRC and the Agreement States collectively establish a coherent nationwide effort for the control of AEA materials.

* * * * * * * * *

NRC and the Agreement States have the responsibility to ensure adequate protection of public health and safety in the administration of their respective regulatory programs controlling the uses of AEA materials.

* * * * * * * * *

Under Section 274 of the Act of 1954, as amended, the Commission retains authority for ensuring that Agreement State Programs continue to provide adequate protection of public health and safety. In fulfilling this statutory responsibility, NRC will provide oversight of Agreement State radiation control programs to ensure that they are adequate and compatible prior to entrance into a Section 274b Agreement and that they continue to be adequate and compatible after an Agreement is effective. (Emphasis added.)

* * * * * * * * *

Levels of Agreement State Program Review Findings . . . If the NRC determines that a State has a program that disrupts the orderly pattern of regulation among the collective regulatory efforts of the NRC and other Agreement States, i.e., creates conflicts, gaps, or duplication in regulation, the program would be found not compatible."

4. The SA-700, Processing an Agreement, Evaluation Criteria 4.1.1.2.b., provides, "State law must not create duplications, gaps or conflicts between the State and NRC, State agencies, or State and local agencies. The law must not seek to regulate materials or activities reserved to NRC." In addition, the SA-700 Evaluation Criteria

4.2.2.2., provides, “If the State adopts the NRC rule by reference, the State rule should disclaim any intent to regulate materials or activities over which NRC has jurisdiction.”

For example, the Wisconsin Agreement Assessment at ADAMS: ML031530264; the Oklahoma Agreement Assessment at ADAMS: ML003736485; and the Ohio Agreement Assessment at ADAMS: ML992290058, all included a verification by staff that the States would not regulate in areas reserved to the Commission, e.g., activities involving critical mass quantities of special nuclear material. In the Wisconsin Agreement Assessment, although the State did not adopt any NRC regulations by reference, the staff assessment indicated that Wisconsin did not attempt to regulate in matters reserved to the Commission and that the State had adopted a statute which specifically limited its authority to areas it could assume under the Section 274 Agreement.

Whereas, in the case of Minnesota, there is no such statute. In fact, the Minnesota Statute 144.12 Regulation, enforcement, licenses, fees, provides, that the State “. . . may control, by rule, by requiring the taking out of licenses or permits, or by other appropriate means . . . . Sources of radiation, and the handling, storage, transportation, use and disposal of radioactive isotopes and fissionable materials . . . .” In accordance with the provisions of 144.12, the State can regulate fissionable materials in critical mass quantities and used this provision to establish the 0.054 millirem ISFSI radiation dose standard for the Prairie Island Nuclear Power Plant (Prairie Island) ISFSI, which is not compatible with the NRC’s standard of 25 millirem per year.

II. **Criterion 3: Uniformity of Radiation Standards.** It is important to strive for uniformity in technical definitions and terminology, particularly as related to such things as units of measurement and radiation dose. There shall be uniformity on maximum permissible doses and levels of radiation and concentrations of radioactivity, as fixed by 10 CFR Part 20 of the NRC regulations based on officially approved radiation protection guides.

Some of Minnesota’s technical definitions and radiation dose standards are not compatible with NRC’s regulatory program. The State’s definitions in Minnesota Statute 116C.71 are not compatible with those of the NRC’s. These terms include byproduct material, disposal, high level waste, radiation and radioactive wastes. The comparison of the Minnesota's and the Commission’s definitions are as follows:

A. Byproduct Material:

The Minnesota definition provides,

> “By-product nuclear material" means any material, except special nuclear material, yielded in or made radioactive by: (a) Exposure to the radiation incident to the process of producing or utilizing special nuclear material; or (b) Exposure to radiation produced or accelerated in an atomic or subatomic particle accelerating machine.”

The Commission definition provides,

> “Byproduct material means– (1) Any radioactive material (except special nuclear material) yielded in, or made radioactive by, exposure to the radiation incident to the

process of producing or utilizing special nuclear material; and (2) The tailings or wastes produced by the extraction or concentration of uranium or thorium from ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by these solution extraction operations do not constitute byproduct material within this definition."

B. Disposal:

The Minnesota definition provides,

"Disposal means the permanent or temporary placement of high level radioactive waste at a site within the state other than a point of generation."

The Commission definition provides,

"Disposal means the isolation of radioactive wastes from the biosphere inhabited by man and containing his food chains by emplacement in a land disposal facility."

C. High Level Waste:

The Minnesota definition provides,

"High level radioactive waste means: (1) irradiated reactor fuel; (2) liquid wastes resulting from reprocessing irradiated reactor fuel; (3) solids into which the liquid wastes have been converted; (4) transuranic wastes, meaning any radioactive waste containing alpha emitting transuranic elements that is not acceptable for near-surface disposal as defined in the Code of Federal Regulations, title 10, section 61.55; (5) any other highly radioactive materials that the Nuclear Regulatory Commission or Department of Energy determines by law to require permanent isolation; or (6) any by-product material as defined in section 11e.(2) of the Atomic Energy Act of 1954, United States Code, title 42, section 2014, as amended."

The Commission's definition provides,

"High level radioactive waste means (1) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and (2) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

D. Radiation:

The Minnesota definition provides,

"Radiation means any or all of the following: alpha rays, beta rays, gamma rays, high energy neutrons or protons or electrons, and other atomic particles; but not X-rays and electromagnetic radiations of wavelengths greater than 2,000 Angstrom units and

sound waves."

The Commission's definition provides,

> "Radiation (ionizing radiation) means alpha particles, beta particles, gamma rays, x-rays, neutrons, high-speed electrons, high-speed protons, and other particles capable of producing ions. Radiation, as used in this part, does not include non-ionizing radiation, such as radio- or microwaves, or visible, infrared, or ultraviolet light."

E. Radioactive Waste:

The Minnesota definition provides,

> "Radioactive waste means: (a) Useless or unwanted capturable radioactive residues produced incidental to the use of radioactive material; or (b) Useless or unwanted radioactive material; or (c) Otherwise nonradioactive material made radioactive by contamination with radioactive material. Radioactive waste does not include discharges of radioactive effluents to air or surface water when subject to applicable federal or state regulations or excreta from persons undergoing medical diagnosis or therapy with radioactive material or naturally occurring radioactive isotopes."

The Commission's definition provides,

> "Waste means those low-level radioactive wastes containing source, special nuclear, or byproduct material that are acceptable for disposal in a land disposal facility. For the purposes of this definition, low-level waste has the same meaning as in the Low-Level Radioactive Waste Policy Act, that is, radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act (uranium or thorium tailings and waste)."

In a letter dated May 25, 2005, the Manager of the Asbestos, Indoor Air, Lead and Radiation Section, responding to NRC staff comments on the definitions, indicated that these definitions do not apply to the Minnesota Department of Health (MDH), that they are used for waste shipments through the State. MDH committed to informing the various State agencies of the inconsistencies with NRC definitions, which are designated a Category A or Category B and should be essentially identical to those of the Commission [letters dated May 25, 2005 and August 5, 2005; ADAMS: ML051740384 and ML0522004240]. However, during an August 15, 2005 conference call, Minnesota representatives indicated that a letter was needed from the NRC to ensure that these incompatible definitions are resolved.

III. **Criterion 10. Regulations Governing Shipment of Radioactive Materials.** The State shall, to the extent of its jurisdiction, promulgate regulations applicable to the shipment of radioactive materials, such regulations to be compatible with those established by the U. S. Department of Transportation and other agencies of the

United States whose jurisdiction over interstate shipment of such materials necessarily continues. State regulations regarding transportation of radioactive materials must be compatible with 10 CFR Part 71.

Minnesota promulgated and enforced the following statutes: Mn. Stat. 116C.705 *Findings*, provides that the Minnesota Legislature will regulate the disposal and transportation of HLW. Mn. Stat. 116C.73 *Transportation of radioactive wastes into state* provides that the Minnesota Legislature must authorize the transport of radioactive wastes into Minnesota for disposal or permanent storage within Minnesota. It also provides the Legislature authority to limit the storage of waste transported into the State to 12 months or less. Mn. Stat. 116C.776 *Alternative cask technology for spent fuel storage* provides that the Minnesota Public Utility Commission (MPUC) determines the casks to be used for the storage and transportation of the spent nuclear fuel at Prairie Island.[3] These Minnesota requirements are not compatible with NRC regulations in 10 CFR Part 71 and Part 72, and U.S. Department of Transportation regulations in 49 CFR . However, the State has demonstrated a willingness to eliminate these conflicting provisions, if they are brought to their attention through written correspondence from the NRC.

IV. **Criterion 21. Conditions Applicable to Special Nuclear Material, Source Material and Tritium.** Nothing in the State's regulatory program shall interfere with the duties imposed on the holder of the materials by the NRC, for example, the duty to report to the NRC, on NRC prescribed forms, (1) transfers of special nuclear material, source material and tritium, and (2) periodic inventory data.

In evaluating this criteria, SA-700 Handbook, Evaluation Criteria 4.1.1.2., paragraph b, provides, "State law must not create duplications, gaps or conflicts between the State and NRC, State agencies, or State and local agencies. The law must not seek to regulate materials or activities reserved to NRC." See the Wisconsin Agreement Assessment at ADAMS: ML031530264; Oklahoma Agreement Assessment at ADAMS: ML003736485; and the Ohio Agreement Assessment at ADAMS: ML992290058. For example, Wisconsin adopted a statute which specifically limited its authority to areas it could assume under the Section 274 Agreement and adopted portions of 10 CFR Part 150 by reference to the Act to inform persons of the exemptions and reservations of NRC authority under their Agreement.

In the past, Minnesota promulgated and enforced requirements that have caused duplication in areas reserved to the Commission. However, the State has demonstrated a willingness to eliminate these conflicting provisions, if they are brought to their attention through written correspondence from the Commission.

V. **Criterion 24. State Agency Designation.** The State should indicate which agency or agencies will have authority for carrying on the program and should provide the NRC with a summary of that legal authority. There should be assurances against duplicate regulation and licensing by State and local authorities, and it may be desirable that there be a single or central regulatory authority**.**

The SA-700 Handbook, Evaluation Criteria 4.1.1.2., paragraph b, provides, "State law must not

[3] IBID.

create duplications, gaps or conflicts between the State and NRC, State agencies, or State and local agencies. The law must not seek to regulate materials or activities reserved to NRC." This Evaluation Criteria cites criteria 21 and 24 as references. See the Wisconsin Agreement Assessment at ADAMS: ML031530264; Oklahoma Agreement Assessment at ADAMS: ML003736485; and the Ohio Agreement Assessment at ADAMS: ML992290058.

The §274,*"Cooperation with States,"* provides for the establishment of an orderly pattern of regulation of AEA materials, while eliminating dual regulation. To achieve this orderly pattern, Congress indicated that there should be no concurrent Commission and State regulation of AEA materials. It is clear that the concept of dual and conflicting regulations was to be considered in determining whether a State's program was adequate to protect public health and safety. Numerous passages from the legislative history indicated a concern by Congress that ambiguous lines of authority between the State and the Federal government in radiation safety matters would diminish effective regulation to the detriment of public health and safety. In fact, the Commission's General Counsel, Mr. Robert Lowenstein, provided the following during the May 1959 hearings on Section 274,

> "We think it (concurrent jurisdiction) leads to divided responsibility and may lead to bad safety controls because you have too many cooks in the broth, so to speak, without any one level of government having a primary responsibility for it to assure that uses of materials are appropriately regulated." (1959 Hearings at page 315)

To further enforce this orderly pattern, the Act and Article VI of the Agreement provides cooperation as the means of assuring that the Commission and State programs are coordinated and compatible. As noted in SECY-97-145, "The Evaluation of Current State Agreements," dated July 11, 1997 (ADAMS: ML0201605470), Agreement documents were revised after the 1965 New York Agreement to provide "cooperation" between the State and the Commission as the means of resolving preemption concerns and facilitating compatible radiation standards. Thus, cooperation has always been an integral component of the Agreement State Program.

The State of Minnesota is supportive of the concept of cooperation as a means to achieve an orderly pattern of regulation of nuclear materials. Minnesota Statute 116D.03 and Minnesota regulation 4410.3900, Subpart 1. *Cooperative processes* both indicate that all Minnesota agencies are to coordinate with the Federal government to eliminate dual regulation. The effectiveness of coordination was demonstrated by Minnesota's handling of the proposed Monticello Nuclear Power Plant (Monticello) ISFSI.

In December 2004, NRC discussed with Minnesota staff the State's plans to impose a public radiation dose standard of 0.054 millirem/yr for the proposed ISFSI, which is more stringent than NRC's 25 millirem per year. After becoming aware of NRC staff's concerns, Minnesota took prompt actions to ensure that its review of the proposed ISFSI would not encroach upon areas reserved to the Commission. The State's willingness to cooperate with the Commission was also expressed in a letter dated August 5, 2005 from MDH [ADAMS: ML0522004240].

RECOMMENDATION

The Team Leader recommends that the Commission defer action on the proposed Minnesota Agreement until the compatibility and potential adequacy concerns are addressed by the State.

The Team Leader recommends that the Commission approve the proposed letter to the Governor in Appendix C to open a dialogue with the State on these issues; and that the Commission provide staff direction on the handling of concerns in areas reserved to the Commission (Compatibility Category NRC), that would be incorporated into NRC policies and procedures.

The Team Leader recommends this approach because:

1. The Minnesota Program conflicts with the terms and purpose of the Act in Chapter 6 and §§ 2; 161; 274a.(1), 274a.(3); and 274b regarding the establishment of an orderly pattern of regulation of AEA materials and facilities based on common defense and security, radiological health and safety, and the elimination of dual regulation. It also conflicts with the provisions on discontinuance and assumption of authority in §274 c, Article II of the Agreement, and 10 CFR Part 150.

2. The Minnesota statutes and regulations in areas reserved to the Commission are not compatible with NRC's regulatory program (e.g., regulations, policies, and procedures) based upon the Commission's guidance. The SRM dated June 30, 1997, "Policy Statement on Adequacy and Compatibility," which provided that States that adopt requirements in areas reserved to the Commission are not compatible with NRC's regulatory program.

3. A letter dated August 5, 2005 from Minnesota staff indicates that the State was unaware that some of their actions were in areas reserved to the Commission and expressed a willingness to resolve concerns if they are brought to their attention [ADAMS: ML0522004240]. The State's view is also reflected in Minnesota Rule 4410.3900 which directs all Minnesota governmental units to cooperate with federal agencies to the fullest extent possible to reduce duplication in regulation.

4. It is consistent with the precedent set by the Commission in the handling of the New York Agreement. Through cooperation and coordination with the State, a moratorium was placed on the State regulations addressing areas reserved to the Commission before the signing of a conditioned Agreement in 1962. The Commission continued negotiations with the State resulting in a second Agreement in 1965 to completely resolve the concerns. The Agreement documents and the criteria for entering an Agreement were revised to reflect the actions relative to the New York Agreement. (ADAMS: ML051670319 and ML051660201).

5. The Commission regulations indicate that States cannot regulate certain materials and facilities. These regulations are: 10 CFR 8.4, "Interpretation by the General Counsel: AEC Jurisdiction Over Nuclear Facilities, and Materials Under the Act," 10 CFR 50, "Domestic Licensing of Production and Utilization Facilities," 10 CFR Part 71, "Packaging and transportation of radioactive material," 10 CFR Part 72, "Licensing requirements for the independent storage of spent nuclear fuel, high level waste, and reactor-related greater than Class C waste," and 10 CFR 150, "Exemptions and Continued Regulatory Authority in Agreement States and in Offshore Waters Under Section 274." In addition, 10 CFR 150.15 specifically indicates that States cannot regulate reactor operations and ISFSIs, and the accompanying *Statement of Considerations* to the rule indicates that these exemptions to State regulation were

issued to carry out Agreements between the Commission and the Governor of any State under §274 of the Act of 1954, as amended.

Appendices:

A. Legislative History in Support of the Team Leader's View
B. Overview of the Minnesota Program in Support of the Team Leader's View
C. Team Leader's Letter to the Governor

APPENDIX A
TO
ATTACHMENT 4

LEGISLATIVE HISTORY IN SUPPORT OF THE TEAM LEADER'S RECOMMENDED APPROACH

A. General Background

The Atomic Energy Act of 1954 (Act), as amended, provided the Commission with broad and far reaching authority for the regulation of nuclear materials. The authority is so pervasive that the Commission was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of these materials. It even allows the Commission to establish the training and qualifications of persons using this material. ADAMS: ML050950152 and ML050950154

Prior to the 1954 Amendment of the Act, nuclear energy activities in the United States were largely confined to the Federal Government because it was created for the World War II defense effort. When the war ended, Congress' paramount concern was the protection of the common defense and security during the development and use of nuclear power because of its military purposes. Congress determined that it was in the national interest to reserve the regulation of nuclear materials to the Federal Government for the following reasons: (1) these materials are vital to common defense and security; (2) the processing and utilization of these materials affect interstate and foreign commerce; and (3) to protect the public health and safety from the hazards associated with these materials.[1] The Atomic Energy Commission (AEC), the predecessor to the Nuclear Regulatory Commission (NRC), was the Federal agency charged with this responsibility. In 1954, the Act was amended to allow commercial firms to enter the field for the first time.

---

[1]Section 2. Findings of the Act:

"The Congress of the United States hereby makes the following findings concerning the development, use and control of atomic energy . . . a. The development, utilization, use and control of atomic energy for military and for all other purposes are vital to the common defense and security . . . c. The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest. d. The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public. e. Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public. f. The necessity for protection against possible interstate damage occurring from the operation of facilities for production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this Act . . ." 2 U.S.C. § 2012.

B. Pre-Section 274 - State Regulation of Nuclear Materials

The 1954 Amendment was silent on the role of States with respect to nuclear materials and production and utilization facilities. The protection of the public's health and safety had traditionally been a State responsibility. In light of this, between 1954 and 1959, many States were independently establishing regulatory programs for the control of nuclear materials. These State programs varied in scope and some times conflicted or duplicated the Federal regulations. There was no recognition by the States of areas reserved to the Federal Government. Minnesota was one of the first States to enact legislation and regulations addressing nuclear materials.

In 1957, the Minnesota Legislature amended Statute 144.12 to authorize the State Board of Health to adopt regulations to address the control of sources of ionizing radiation and adopted regulations in 1958, including requirements for nuclear power reactors. During the Congressional Hearings on the development of Section 274, concerns were raised by the Joint Committee on Atomic Energy (JCAE) regarding the Minnesota statutes and regulations. The hearing record before the JCAE on May 19, 1959 provides that on May 20, 1959, Dr. Hyderman, Co-Director Atomic Energy Research Project, University of Michigan Law School, stated,

> "Approximately 29 States have either legislated on the matter of controlling radiation activities or adopted regulations. Both the legislative actions and the regulations vary considerably in scope and approach . . . . In the case of Minnesota, the regulations specifically provide for licensing of reactors and other major nuclear facilities. In this instance, a complete hazard evaluation is required to be submitted prior to construction of the facility, and the facility cannot be operated without a license from the State agency. In all other cases, the regulations provide that registration of this activity does not constitute approval by the State Agency . . . . No effort is being made to limit the State regulation to activities other than those licensed by the Commission and in a few States a license or permit is required in addition to the AEC license. Moreover, in the reactor and high level waste disposal fields, a potential area of serious conflict exists since definitive standards have not been developed for controlling these activities either at the national or State level. More particularly, such conflict is likely to occur under the Minnesota-type licensing system . . . ." (Federal-State Relations in the Atomic Energy Field, Hearings before the JCAE, May 19, 1959, 86th Congress, 1st Session, pp. 123-131.)

The 1958 Minnesota Regulation 1158. "Nuclear reactors and facilities," provided:

> "b. Before the construction of any nuclear reactor or facility is started within this State a general description thereof shall be submitted to the Board of Health containing such information as may be necessary or appropriate to a determination of any actual or potential hazard to or effect upon the public health . . . c. No part of the construction of a nuclear reactor or facility shall be started within this State without the express approval of the Board of Health until 30 days after the submission to it of such description and information." (Federal-State Relations in the Atomic Energy Field, Hearings before the JCAE, May 19, 1959, 86th Congress, 1st Session, pp. 123-131.)

Representative Durham, who presided over the proceedings responded by indicating,

". . . I think the same thing concerns you concerns us on the committee, the fear of overregulation; the danger of duplication by the State agencies and by the Federal Government . . ." (Federal-State Relations in the Atomic Energy Field, Hearings before the JCAE, May 19, 1959, 86th Congress, 1st Session, pp. 123-131.)

On May 21, 1959, the JCAE continued to discussed the Minnesota regulation of areas reserved to the Commission with representatives from the Commission, Commissioner John S. Graham and General Counsel Robert Lowenstein. The record provides,

"Mr. Toll (Counsel to JCAE Committee): Does this bill do anything to clarify this situation as to the Minnesota regulations for example? Minnesota has no indication from the Federal Government as to whether or not the State of Minnesota has legal authority to license reactors. Does this bill clear the air at all?

Mr. Lowenstein (Commission General Counsel): In this bill, we were not trying to deal with any specific situation. An attempt to legislate generally regarding a specific situation in Minnesota might very well lead us into unanticipated problems.

Mr. Toll (Counsel to JCAE Committee): Minnesota is just an example of the first State that has attempted to license reactors. It is clearly foreseeable, I would think, that other States are going to try to do this. Should this bill attempt to spell out whether or not they are encouraged or whether they have the legal authority to do this?

* * * * * * * * *

Mr. Lowenstein (AEC): We thought that this act without saying in so many words did make clear that there is preemption here, but we have tried to avoid defining the precise extent of that preemption feeling that it is better to leave these kinds of detailed questions perhaps to the courts later to resolve.

Representative Durham (presiding Chair): I don't agree in writing an act like that. I think it should be clearly defined and understood what is our field and what is their field . . .I think that the law should be clear as possible to avoid litigation. I am not a lawyer, but I wonder if that is not a pretty clear statement of what we intended to do, and what we are writing into the Act." (Federal-State Relations in the Atomic Energy Field, Hearings before the JCAE, May 21, 1959, 86th Congress, 1st Session, pp. 306-309.)

When the JCAE resumed hearings on August 26, 1959, additional concerns were raised with representatives from the Commission with respect to Minnesota's regulation of areas reserved to the Commission. The representatives from the Commission included Chairman McCone, Mr. Nelson, Director of Inspection, Robert Lowenstein, General Counsel, and Neil Naiden, the Office of General Counsel. For context, during the August hearings, discussions were being held, on whether language would be included that would provide, "It is the intention of this Act that State laws and regulations concerning the control of radiation hazards from byproduct, source, and special nuclear material shall be applicable except pursuant to an Agreement." The record provides,

"Chairman Anderson: Does any State have a law that gives it control of byproduct,

source, or special nuclear materials?

Mr. Naiden (AEC): We are not aware of any, Mr. Anderson.

* * * * * * * * *

Mr. Toll (Counsel to JCAE Committee): To my knowledge, this would not affect any State law. It might affect the regulations promulgated by the State of Minnesota.

Chairman Anderson: Which requires something about the licensing of a reactor, which I think is just as wrong as it can be.

Mr. Nelson (Commission Office of Inspection): So do I.

Chairman Anderson: I think the State of Minnesota is wrong in this, and you are worried about this striking down some regulation . . . .

* * * * * * * * *

Chairman Anderson: I am only worried about what happens in the Minnesota sort of situation. There they say you cannot locate a reactor no matter how you want to locate it unless the health commissioner of that State approves it. I think that becomes very serious because the Federal Government may decide to license a reactor as in Dresden, in Illinois, and then the State of Illinois says, 'Wait a minute. We ought to know how close this is going to be to population centers and we want to know all these things.' The State probably does not have the experience or the facilities of the Federal agency to do it, yet it seeks control of it . . . .

* * * * * * * * *

Chairman Anderson: . . . Say the Northern States Power Co. or somebody builds a plant in South Dakota, and the legislature says, 'We are not going to pass a single thing for you. We are going to keep full control. We are going to decide all of these things.' Are we then going to say to the Northern States Power people, 'We will not furnish any fuels to run the reactor after putting millions of dollars in it'? I do not think so. After Commonwealth Edison puts $45 million in the plant at Dresden, in the State of Illinois, if the State should pass the regulation that they had to have 50 inspectors on the job at all times, all to be appointed politically by one party or the other, no matter which one, Commonwealth might decide to resist that. Would you say, 'You will comply with the Illinois law or we will not give you a nickel's worth of material and will not let you have it in your plant and we will confiscated your $45 million'? That is all we are trying to protect. I do not ordinarily believe in turning over control to the Federal Government, but I believe the Atomic Energy Commission has exercised its authority sensibly and reasonably . . . ." (Federal-State Relations in the Atomic Energy Field, Hearings before the JCAE, August 26, 1959, 86th Congress, 1st Session, pp. 485-497.)

C. <u>The Amendment of 1959: Section 274</u>

The language of the Amendment, read in light of the Act's history, makes it abundantly clear that the Commission possesses the sole authority to regulate radiation hazards associated with nuclear materials and to regulate the construction and operation of production and utilization facilities. The Amendment merely authorizes the Commission to cede some of its authority through an Agreement to the States. This is why the language of Section 274 repeatedly refers to a "discontinuance" of the Commission's authority in certain areas and to the "retention" or "continuance" of that authority in other areas. If concurrent regulation by the State and the Commission in areas was permissible by the Amendment, it would not have been necessary for Congress to recognize the State's authority through an Agreement; to limit the areas relinquished to the State; to establish an orderly regulatory pattern; and to clarify areas reserved to the Federal Government.

The JCAE Report, which accompanied the final Section 274 bill provided,

> "1. This proposed legislation is intended to clarify the responsibilities of the Federal Government, on the one hand, and State and local governments, on the other, with respect to the regulation of byproduct, source, and special nuclear materials, as defined in the Atomic Energy Act, in order to protect the public health and safety from radiation hazards . . . 2 . . .Licensing and regulation of more dangerous activities–such as nuclear reactors–will remain the exclusive responsibility of the Commission. Thus, a line is drawn between the types of activities deemed appropriate for regulation by individual States at this time, and other activities where continued AEC regulation is necessary . . .(c) . . . 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. The bill is intended to encourage States to increase their knowledge and capacities, and to enter into Agreements to assume regulatory responsibilities over such materials . . . . (5) The Joint Committee believes it important to emphasize that the radiation standards adopted by the State under the Agreements of this bill should either be identical or compatible with those of the Federal Government. For this reason, the Committee removed the language 'to the extent feasible' in subsection b. of the original AEC bill considered at hearings from May 19 to 20, 1959. The Committee recognizes the importance of the testimony before it by numerous witnesses of the dangers of conflicting, overlapping and inconsistent standards in different jurisdictions, to the hindrance of industry and jeopardy of public safety." (Federal-State Relations in the Atomic Energy Field, Hearings before the JCAE, September 2, 1959, 86th Congress, 1st Session, Report No. 1125, pp. 10-12.)

The Amendment provides,

> ".a. It is the purpose of this section-
>
> (1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this Act of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials; (2) to recognize the need, and establish programs for cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials; (3) to promote an orderly regulatory pattern between the

> Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials; (4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States; (5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with States; and (6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable."
> (42 U.S.C 2021)

According to the provisions of Section 274 and its legislative history, the concept of compatibility was essential to the establishment of an orderly regulatory pattern and to public health and safety. The legal basis for compatibility is found in §§ 274d.(2) and g. which provide,

> "d. The Commission shall enter into an Agreement under subsection b. of this section with any State if--
>
> * * * * * * * * *
>
> (2) the Commission finds that the State program is in accordance with the requirements of subsection o. and in all other respects compatible with the Commission's program for regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed Agreement.
>
> * * * * * * * * *
>
> g. The Commission is authorized and directed to cooperate with the State in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible."

The legislative history in the analysis of these sections of the Act provided the following concerning the inclusion of Subsections d. and g. :

> "Subsection g. provides that the Commission is authorized and directed to cooperate with the States in the formulation of standards for the protection of public health and safety from radiation hazards and to assure that State and Commission programs for protection against radiation hazards will be coordinated and compatible. In most cases, it is intended that State and local standards should be the same as Federal standards in order to avoid conflict, duplication, or gaps." JCAE Report to accompany H.R. 8755 (H.R. Report No. 1125, September 2, 1959, 86th Congress, 1st Session) at p. 9.

> "5. The Joint Committee believe it important to emphasize that the radiation standards adopted by States under the Agreements of this bill should either be identical or compatible with those of the Federal Government. For this reason the

> Committee removed the language `to the extent feasible' in subsection g. of the original AEC bill considered at hearings from May 19 to 22, 1959. The Committee recognizes the importance of the testimony before it by numerous witnesses of the dangers of conflicting, overlapping, and inconsistent standards in different jurisdictions, to the hindrance of industry and jeopardy of public safety." JCAE Report to accompany H.R. 8755 (H.R. Report No. 1125, September 2, 1959, 86th Congress, 1st Session) at p. 9.

These provisions make clear that compatibility determinations are not confined to State statutes and regulations but apply more broadly to radiation programs. The legislative history of Section 274 makes clear, the concept of compatibility is closely related to one of the basic purposes of the Act , as amended, namely to provide for the regulation of atomic energy materials, e.g., byproduct, source, and special nuclear, so that the radiological health and safety of the public will be adequately protected. By enacting Section 274, Congress made it quite clear that the regulation and control of radiation hazards from source and special nuclear materials was preempted by the Federal Government and that such preemption would end ". . . in any State only upon the effective date of an Agreement between the State and the Commission under subsection b. and only to the extent provided in the Agreement."[2] (Emphasis added.)

On May 3, 1969, the Commission added section 10 CFR 8.4, *"Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Act*, provides clarity on Section 274 Agreements and preemption issues as follows:

> "(a) By virtue of the Act of 1954, as amended, the individual States may not, in absence of an Agreement with the Atomic Energy Commission (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 Commission 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 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 processing plants) and utilization facilities (nuclear reactors used for the production of power, medical therapy, research and testing) and the possession and use of byproduct material (radioisotopes), source material (thorium and uranium ores), special nuclear material (enriched uranium and plutonium, used as fuel in nuclear reactors), be licensed and regulated by the Commission . . . .(c) The Act of 1954 had the effect of preempting to the Federal Government the field of regulation of nuclear

---

[2]Memorandum dated December 28, 1990 to Martin G. Malsch, Deputy General Counsel for Licensing and Regulation, OGC, from Jane R. Mapes, Senior Attorney, OGC, "Agreement State Compatibility Issues Identified in Topic 5 of Staff Requirements Memorandum of October 5, 1990 (REF: M900816A), Compatibility Determinations: Legal Basis, Scope, Relationship to Public Health and Safety Determinations. In addition, see Memorandum dated November 1, 1990, to William C. Parler, General Counsel, from Stuart A. Treby, Assistant General Counsel for Rulemaking and Fuel Cycle, OGC, "Remedies for Incompatibility."

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 Act of 1954 in 1959. . . . (d) . . . 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 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 with respect to the regulation of: . . . (1) The construction and operation of production or utilization facilities (note: this includes construction and operation of nuclear power plants) . . . (f) The amendment, in providing for the discontinuance of some of the AEC's authority over source, byproduct 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 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.

* * * * * * * * *

(h) In its comments on the bill that was enacted as Section 274, the JCAE 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.

In explaining Section 274k, the JCAE 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.

(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.

(j) Thus, under the pattern of the 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."

D. The New York Agreement Precedent

Minnesota is not the first State seeking Agreement State status which has purported to regulate in areas reserved to the Commission. During the processing of the New York Agreement, Federal preemption concerns arose with respect to the State's proposed regulatory program, which included:

(1) The New York State Department of Health (NYDOH) and the New York State Department of Labor (NYDOL) did not defer any of their authority to areas of exclusive Federal jurisdiction.

(2) The NYDOL asserted jurisdiction to regulate all discharges of wastes to the environment, including discharges of effluents from production and utilization facilities.

(3) The New York City Department of Health (NYCDOH) developed regulations to control the transport of nuclear fuel elements to and from reactors and reprocessing facilities, including Federal shipments.

In order to address the preemption concerns and move forward with the October 15, 1962 New York Agreement, the Commission and State agreed to a plan to resolve their jurisdictional disagreements. The plan included the following: (1) The State assumed regulatory authority where there were no preemption contentions; (2) The State discontinued the application of its regulations to areas of exclusive jurisdiction by the Commission; and (3) Article VII was added to the Agreement document to provide that both parties would work together to define their rights, powers, and responsibilities with respect to the regulation of nuclear materials.

Article VII of the 1962 New York Agreement:

> The Commission and the State recognize that the limits on their respective rights, powers and responsibilities under the Constitution, with respect to protection against radiation hazards arising out of the activities licensed by the Commission within the State, are not precisely clear. The Commission and the State agree to work together to define, within a reasonable time, the limits of, and to provide mechanisms for accommodating, such responsibilities of both parties. Without prejudice to the respective rights, powers and responsibilities of Federal and State authority, the State undertakes to obtain promptly and to maintain in effect while such cooperative endeavors are in progress, a modification of the Health, Sanitary and Industrial Codes which are to become effective within the State as of October 15, 1962, so as to exempt (except for registration; notification; inspection, not including operational testing but including sampling which would not substantially interfere with or interrupt any Commission licensed activities; and routing and scheduling of material in transit) licensees of the Commission from so much of such Codes as pertain to protection against radiation hazards arising out of activities licensed by the Commission within the State. While such cooperative endeavors are in progress, the existence or nonexistence of the exemptions and exceptions referred to above shall not prejudice the exercise by the Commission or the State, in an emergency situation presenting a peril to the public health and safety, of any constitutional rights and powers the Federal Government or the State may have now or in the future. If such cooperative endeavors do not result in a definition, within a reasonable time, of the limits of, and provision of mechanisms for accommodating, the responsibilities of the Commission and the State with respect to protection against radiation hazards arising out of the activities licensed by the Commission within the State, then the existence or nonexistence of the exemptions and exceptions referred to above shall not prejudice the exercise by the Commission or the State of any constitutional rights and powers the Federal Government or the State may have now or in the future.

Article VII was used as an interim measure and provided guidelines for both the Commission and State to operate pending the development of mechanisms for accommodating their respective responsibilities. After the signing of the 1962 Agreement, staff continued to negotiate with the State on the implementation of Article VII of the New York Agreement. To assist in this effort, the Committee on Atomic Energy of the New York State Bar Association Report (ADAMS: ML043490158)**,** conducted a review which is referenced in paragraph (k) of 10 CFR 8.4 as a legal authority supporting the Office of General Counsel interpretation in this regulation.

As a result of the negotiation efforts, a Memorandum of Understanding Implementing Article VII of the New York Agreement was signed on May 13, 1965 (MOU). The MOU, referred to as the New York Agreement of 1965, provided: (1) cooperation as the mechanism of resolving concerns between the States and Commission; (2) the establishment of an exchange of information program between the State and Commission; and (3) that dual regulation of radiation hazards would be avoided. (ADAMS: ML051670319 and ML051660201).