NRDC
THE EARTH'S BEST DEFENSE

July 13, 2011

Via Electronic Mail

Mr. Timothy A. Frazier, *Designated Federal Officer*
President's Blue Ribbon Commission on America's Nuclear Future
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

RE: NRDC Comments on the Draft Disposal Subcommittee Report

Dear Mr. Frazier:

The Natural Resources Defense Council (NRDC) writes today to comment on the Draft Disposal Subcommittee Report to the Full Commission prepared for the President's Blue Ribbon Commission for America's Nuclear Future. We apologize for being unable to offer comment until now, but work obligations for all of the relevant NRDC staff in late June made meeting a July 1 deadline impossible. We hope that our views will be considered as you prepare for your August 1 release of the Full Committee Draft Interim Report.

NRDC Statement of Interest

NRDC is a national non-profit membership environmental organization with offices in Washington, D.C., New York City, San Francisco, Chicago, Los Angeles and Beijing. NRDC has a nationwide membership of over one million combined members and activists. NRDC's activities include maintaining and enhancing environmental quality and monitoring federal agency actions to ensure that federal statutes enacted to protect human health and the environment are fully and properly implemented. Since its inception in 1970, NRDC has sought to improve the environmental, health, and safety conditions at the nuclear facilities operated by DOE and the civil nuclear facilities licensed by the NRC and their predecessor agencies.

NRDC Comments

There are several interim observations and proposals in the draft reports we support, some we oppose, and more that need significant elaboration, expansion, or clarity. Our specific comments follow.

Disposal Subcommittee Report to the Full Commission

Recommendation #1

Regarding Recommendation #1, we concur with the Subcommittee's recommendation that the United States should proceed expeditiously to develop one or more permanent deep geological repositories. For the entire 40 year history of NRDC, we have supported deep geologic disposal for nuclear waste as long as any repository relies primarily on geologic isolation and meets protective environmental and public health standards. We have litigated this matter in the past and it has been solely to ensure that the government agencies charged with developing and regulating a geologic repository set strict standards protect public health and complied with the original intentions of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10101 *et seq.* and other applicable laws.[1]

Recommendation #2

Regarding Recommendation #2, at this juncture we do not have enough information to fully articulate a position on the concept of single purpose federally charted corporation focused on the development of a repository, but we have several observations to share. First, of course, the failures of the Atomic Energy Commission and its successor agencies (Energy Research Development Agency, the Department of Energy and the Nuclear Regulatory Commission) make a clear case that other alternatives should be considered if not directly pursued. However, to avoid our explicit opposition to any federally chartered corporation, we note that any such corporation must be clearly subject to full and complete legal and regulatory oversight over all of its, including full compliance with all environmental laws and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

It has long been NRDC's view that independent oversight is critical to safe and environmentally sound operation of DOE nuclear weapons production facilities and commercial nuclear facilities regulated by the NRC. Routine operations from the DOE production reactors, processing facilities, and operations contaminated air, soil, and water and left this nation with the world's most expensive cleanup program. And on the commercial side of the ledger, limitations on state authority and associated federal preemption over the issue of nuclear safety have been a continuing source of controversy, especially as the domestic nuclear fleet ages and problems, such as leaking tritium pipes,

---

[1] See *Natural Resources Defense Council v. Environmental Protection Agency* (*NRDC v. EPA*), 824 F.2d 1258 (1st Cir. 1987) and *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251 (2004).

emerge at more facilities. Any new organization set to the task of disposing of spent nuclear fuel and HLW can avoid many of the problems of the past if at its beginning it must comply with all environmental laws.

Also, it must be clear that any federally chartered corporation responsible for siting, developing, operating and ultimately closing geologic repositories for commercial and defense spent fuel and HLW not be responsible for alternative (i.e., closed) fuel cycle research or other reactor developments. The Subcommittee states as much on page 33, but the separation must be unequivocal and clear. Separating responsibility for waste management/disposal from other fuel cycle functions is key to garnering support and public trust from NRDC and many others.

Recommendation #3

Regarding Recommendation #3, we do not have enough information at this point to come to a conclusion on the matter of a new organization having access to the Nuclear Waste Fund. That said, at first blush we have no initial objection to greater budget independence for the Fund, presuming that there is the clear and unequivocal separation of the waste management/disposal program (under a corporation or any other scenario) from other fuel cycle functions, especially efforts to close the fuel cycle. Also, of course, any and all use of the fund extracted from ratepayers must be subject to continued Congressional oversight and transparent accounting.

Recommendation #4

Regarding Recommendation #4, we concur that a new approach is needed to site nuclear waste management and disposal facilities and we of course have no objection to suggesting such guiding concepts as "consent-based" and "adaptive." The text goes on to recognize that the 1987 amendments to the NWPA were "highly prescriptive" and "widely viewed as being driven too heavily by political considerations." Those observations are kind assessments of what happened. We suggest the Subcommittee be more direct in describing what happened so that we avoid the mistakes of the past. Put bluntly, DOE and then the Congress corrupted the site selection process. The original strategy contemplated DOE choosing the best four or five geologic media, then selecting a best candidate site in each media alternative, then narrowing the choices to the best three alternatives, and then picking a preferred site for the first of two repositories. Such a process, if it had been allowed to play out, was precisely the adaptive, phased, and science-based process to which the Subcommittee alludes.

But instead, first DOE selected sites that they had previously planned to pick. In May of 1986 DOE announced that it was abandoning a search for a second repository, and it had narrowed the candidate sites from nine to three, leaving in the mix the Hanford Reservation in Washington (in basalt), Deaf Smith Co., Texas (in bedded salt) and Yucca Mountain in Nevada (in unsaturated volcanic tuff). Then, all equity in the site selection process was lost in 1987, when the Congress, confronted with cost of characterizing three

sites, amended the NWPA of 1982, directing DOE to abandon the two-repository strategy and to develop only the Yucca Mountain site. At the time, Yucca Mountain was DOE's preferred site. The abandonment of the NWPA site selection process led directly to the loss of support from the State of Nevada, diminished Congressional support (except to ensure that the proposed Yucca site remains the sole site), and less meaningful public support for the Yucca Mountain project.

Instead, we suggest that the Subcommittee be explicit and state that not only the standards for site screening and development criteria be in final form before any sites are considered, but generic radiation and environmental protection standards for any such as site as well. See *Disposal Subcommittee Report*, at 66. The Subcommittee is right to state that the standard and supporting regulatory requirements to license a geologic repository should be generic, applicable to all sites. *Disposal Subcommittee Report*, at 72. Such wide applicability will be difficult to approximate in light of past history, and care must be taken to insulate any site standard, development or regulatory entity from pressure from the Office of Management and Budget, the Department of Justice, DOE and the NRC. Indeed, it is our assessment that past administrations' failures to insulate EPA to just such pressures is why the development of the EPA standard setting process was so problematic.

Recommendation #5

Regarding Recommendation #5, we agree that the current division of regulatory responsibility between the NRC's licensing authority and the EPA's standard setting authority is appropriate, but caution that even here good intentions have gone awry.

Section 121 of the NWPA of 1982 directs EPA to establish generally applicable standards to protect the general environment from offsite releases from radioactive materials in repositories and directs the NRC to issue technical requirements and criteria. Unfortunately, it was clear for years that the projected failures of the geologic isolation at Yucca Mountain were the determining factor in EPA's standards. EPA repeatedly issued standards that are concerned more with licensing the site than establishing protective standards. EPA's original 1985 standards were vacated in part because the EPA had failed to fulfill its separate duty under the Safe Drinking Water Act, 42 U.S.C. §300h, to assure that underground sources of water will not be "endangered" by any underground injection. Natural Resources Defense Council v. Environmental Protection Agency (NRDC v. EPA), 824 F.2d 1258 (1st Cir. 1987). EPA's second attempt to at setting standards that allow for a projected failure of geological isolation was again vacated, this time by the United States Court of Appeals for the D.C. Circuit. The D.C. Circuit found that EPA's Yucca Mountain rule (and the corresponding NRC standard), which ended its period required compliance with the terms of those rules at 10,000 years was not "based upon or consistent with" the recommendations of the National Academy of Sciences ("NAS") as required by the 1992 Energy Policy Act and therefore must be vacated. Nuclear Energy Institute, Inc. v. EPA, 373 F.3d 1251 (2004). Giving significant deference to the agency, the D.C. Circuit did not vacate EPA's strangely configured

compliance boundary for the Yucca Mountain site. See Appendix A to these comments for a map of EPA's compliance boundary (inside the oddly drawn line, the repository need not protect water quality and radiation can leak in any amount). The dramatically irregular line that represents the point of compliance has little precedent in the realm of environmental protection, and its shape is perhaps more reminiscent of gerrymandered political districts. Rather than promulgate protective groundwater standards, EPA pieced together a "controlled area" that both anticipates and allows for a plume of radioactive contamination that will spread several miles from the repository toward existing farming communities that depend solely on groundwater and perhaps through future communities closer to the site.

In any event, as noted previously, the Subcommittee is right to state that the standard and supporting regulatory requirements to license a geologic repository should be generic, applicable to all sites. *Disposal Subcommittee Report*, at 72.

Recommendation #6

Regarding Recommendation #6, the Subcommittee tip toes up to a line that it should boldly walk across. Specifically, we refer to the role of the local, state and tribal governments. The Subcommittee properly notes that "Federal-tribe and federal-state relations have been central to resolving the nation's nuclear waste management challenges from the outset. Indeed, much of the difficulty of finding workable disposal solutions for spent fuel and high-level radioactive waste can be traced to the inherent tensions that exist in these relationships." *Disposal Subcommittee Report*, at vi. We agree. But we believe the BRC is missing the opportunity to finally suggest a decades-overdue change in the law that the Subcommittee itself articulates. The Subcommittee draft states in pertinent part:

> We also recognize that defining a meaningful and appropriate role for states, tribes, and local governments is far from straightforward, given that the Atomic Energy Act of 1954 grants the federal government exclusive authority to regulate the possession and use of all radioactive materials, including wastes.

Disposal Subcommittee Report, at 63.

Specifically, it is time for the Atomic Energy's express exemptions from environmental law to be revoked. The exemptions from the Clean Water Act and RCRA are at the foundation of state and, we submit, even fellow federal agency distrust of both the commercial and government run nuclear complexes. To provide more detail to an issue the Subcommittee expressly acknowledges is "far from straightforward," the Atomic Energy Act (AEA) was drafted in 1954 to grant exclusive authority over all things nuclear to the Atomic Energy Commission. Congress, subsequent to World War II, presumed that exclusive federal control of nuclear materials was necessary to prevent proliferation and states were preempted from regulating nuclear safety. Even with the development of environmental law over the next several decades, this fundamental

"preemption" of state authority has never been meaningfully altered. Indeed, most federal environmental laws expressly exclude "source, special nuclear and byproduct material" from the scope of regulation by EPA or the states, leaving the field to the DOE and the NRC. In the absence of clear language in those statutes authorizing EPA, or states where appropriate, to regulate the environmental and public health impacts of radioactive waste, DOE retains broad authority over its radioactive mess, with EPA and state regulators only able to push for stringent cleanups on the margins. The NRC also retains far reaching safety and environmental regulatory authority over commercial nuclear facilities, with agreement states able to assume NRC authority, but only on the federal agency's terms. An object lesson in this tension is this exchange of letters between NRDC, Greenpeace and other environmental groups and the NRC over the matter of groundwater contamination at dozens of operating nuclear facilities. *See* Attachments B and C. The NRC responded, in pertinent part,

> The NRC has certainly never denied that States have some authority over groundwater. There is, for example, nothing in the 2006 letter that even suggests that Illinois had no authority to take some action against the Braidwood licensee. Indeed, some years ago, when the NRC was considering what form of regulation would be best for in situ leach mining facilities, the NRC initially sought to have the States regulate groundwater at such facilities. *See, e.g.,* Regulatory Issue Summary 2004-09, June 7,2004. <u>But NRC cannot set forth, in writing, just which actions the State could take, and under what circumstances there is no interference with our regulatory authority. As your letter observes, "the ability of the states to enforce these laws against licensed nuclear facilities has not been tested</u>."

Attachment C at 1 (emphasis added). The NRC goes on to note in response to our letter:

> Preemption law is far too complex for easy generalization. The distribution of authorities among Federal and State governmental entities is one thing under the Clean Water Act, another under the Clean Air Act, another under the Atomic Energy Act, and yet another under the Coastal Zone Management Act. Consultations among governments on environmental matters are often essential, and States frequently initiate such consultations.

Id at 2. In its most blunt terms, the letter makes it clear the while states are welcome to consult with the NRC, the agency can, and will, assert preemptive authority where it sees fit. The continuation of the AEA's exemption of radioactivity from environmental laws is at the heart of the distrust that has polluted the federal and state relationships of management and disposal of high-level radioactive waste (HLW) and spent nuclear fuel.

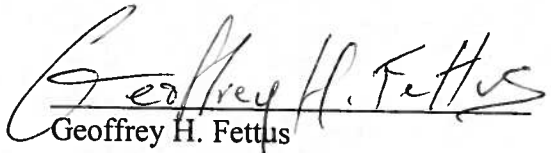
As one example of this history, HLW at the Hanford Nuclear Reservation in Washington, the Idaho National Engineering Laboratory, the Savannah River Site in South Carolina, and the West Valley Site in New York will cost hundreds of billions of dollars and is the

biggest cost-driver in DOE's expensive nuclear weapons cleanup program. The cleanup of the HLW tanks at these sites has been most contentious item. There has been a decade-long dispute between DOE and several states (Washington, Oregon and New York in particular), members of Congress and members of the public over "reclassifying" this high-level radioactive waste in the tanks as "waste incidental to reprocessing." This matter has been to federal court and before the US Congress for controversial changes to law. The disputes over radioactive waste reclassification and its impact on the effectiveness of what little cleanup there has been on the HLW tanks continues to this day.

The AEA preemption of environmental statutes is an unfortunate anachronism. If EPA and the States had clear legal authority and could treat radioactivity as they do other pollutants under environmental law, clear cleanup standards could be promulgated and we could be much farther along in cleaning up the toxic legacy of the Cold War and we could likely avoid some of the ongoing legal and regulatory disputes over operations at commercial nuclear facilities.

If you have questions, please do not hesitate to contact me at (202) 289-2371. Thank you for considering our views on these important matters.

Sincerely,

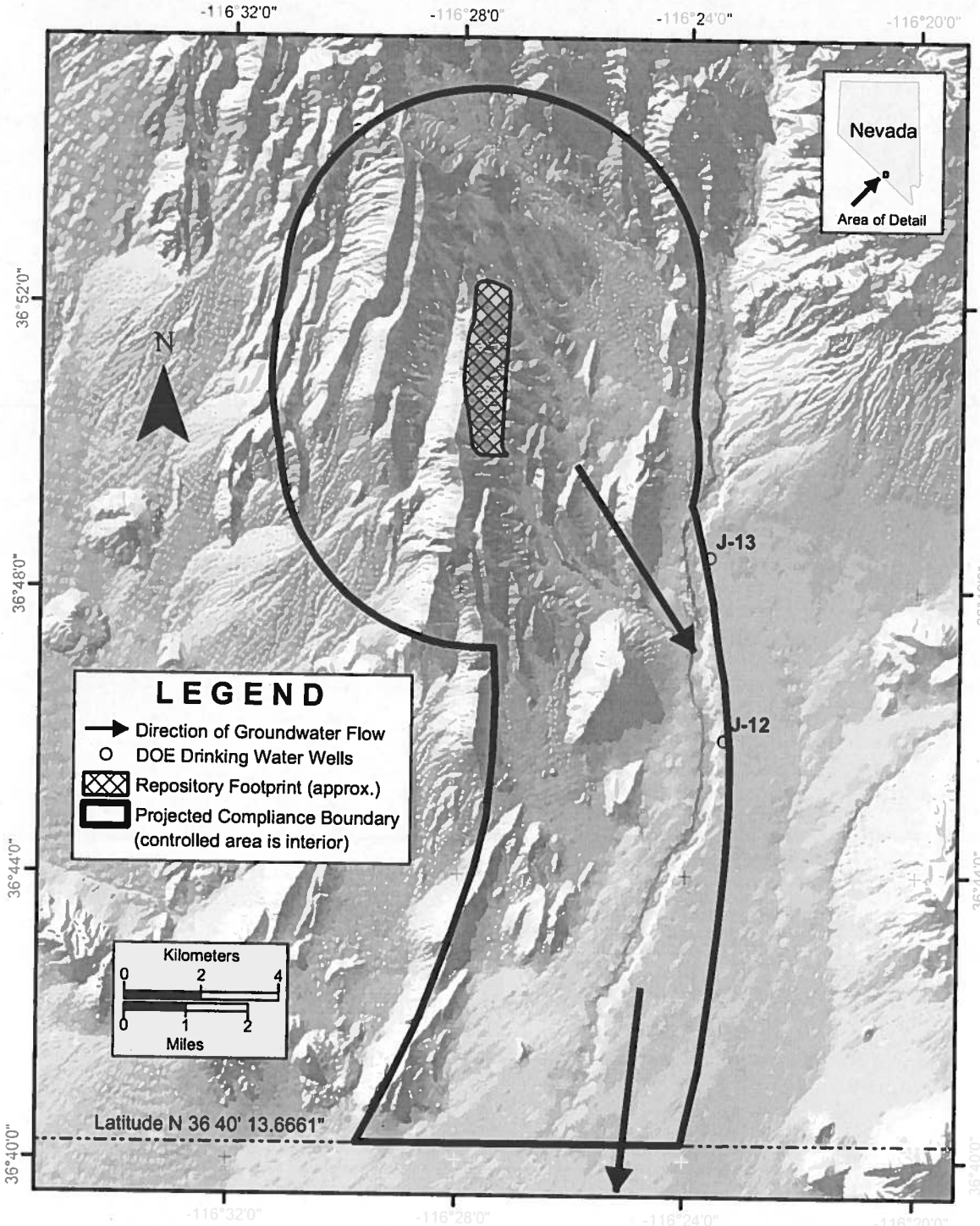


Geoffrey H. Fettus
Senior Project Attorney
Natural Resources Defense Council
1152 15th Street, NW
Suite 300
Washington, DC 20005
(202) 289-6868

Attachment A

Projected Groundwater Standards Compliance Boundary for Spread of Radioactive Contamination at the Yucca Mountain Project

Measurement of Radioactive Contamination Takes Place Outside of Controlled Area



NRDC produced this visual representation from the following information:
"The controlled area may extend no more than 5 km in any direction from the repository footprint, except in the direction of groundwater flow. In the direction of groundwater flow, the controlled area may extend no farther south than latitude 36 40' 13.6661" North ... [T]he size of the controlled area may not exceed 300 square km." 66 Fed Reg. at 32117 (June 13, 2001). The direction of groundwater flow is from FEIS (February 2002) at 5-21, Figure 5-3. The repository footprint is from the Yucca Mountain Science and Engineering Report, DOE/RW-0539, at 1-17, Figure 1-3, and the area is approximately 4.27 square km. The area within the projected compliance boundary, as shown in this map, is about 230 square km. The relief image was created from a 1 arc-second Digital Elevation Model from the USGS National Elevation Dataset, April 2002. This map is based on a Nevada State Plane Central projection, North American Datum 1927.

RH. 15

BEYOND NUCLEAR

eelc eastern environmental law center

GREENPEACE

NRDC NATURAL RESOURCES DEFENSE COUNCIL THE EARTH'S BEST DEFENSE

RIVERKEEPER NY's clean water advocate

Union of Concerned Scientists Citizens and Scientists for Environmental Solutions

May 25, 2010

Chairman Gregory B. Jaczko
Commissioner George Apostolakis
Commissioner William D. Magwood, IV
Commissioner William C. Ostendorff
Commissioner Kristine L. Svinicki

Dear Chairman Jaczko & Commissioners

On April 20th, the U.S. Nuclear Regulatory Commission (NRC) held a meeting seeking public input into the NRC's handling of groundwater contamination at nuclear reactor sites across the United States.

During the meeting, it was brought to our attention that on July 5, 2006, the NRC's Office of General Counsel (OGC) issued a letter to the Illinois Attorney General threatening to intervene in Illinois v Exelon Corp., No. 06 MR 248 (Will County Court) (Attached). The NRC's OGC wrote that, "if the lawsuit moves forward one option for us is to seek leave to participate in the lawsuit to raise the Commission's preemption concerns."

Today we seek further clarification regarding the NRC's intent with respect to similar situations. In situations where States find that their drinking water resources are being affected by inadvertent discharges from licensed nuclear facilities, we hope that the NRC already recognizes that States have an obligation to protect their citizens that is not preempted by the Atomic Energy Act. Although we are gratified that recent comments by the NRC in the press have recognized the "states have a role to play" in such situations, this is somewhat vague. Please confirm in writing that the NRC recognizes that it is both legal and appropriate for the States to take action against licensees when drinking water is under threat.

This recognition of State powers in this area would not deprive the NRC of the means to regulate such situations. Congress has made it clear that the specific language of the AEA expressly prohibits the NRC from licensing source, special nuclear, or byproduct materials if the operation "would be inimical to the common defense and security or the health and safety of the public." 42 USC § 2099; 42 USC § 2034; and 42 USC § 2077(c)(2). Put simply, the NRC may not allow a nuclear facility to operate in an unsafe manner. We presume the Commission would agree with such a characterization of its obligations and takes a broad view of those powers. We also presume the Commission is equally troubled that there have been dozens of instances in the recent past of contaminated groundwater at licensed NRC reactor facilities. If the Commission had been taking sufficient action pursuant to these powers, we believe States would not have felt an obligation to intervene. We believe that the recent trend of increasing State involvement with nuclear facilities can be traced to a lack of adequate action by the NRC.

Rather than enforcing regulations governing the unmonitored and uncontrolled release of radiation into groundwater, the NRC endorsed a voluntary industry initiative run by the industry's trade association, the Nuclear Energy Institute. We think it is time for the Commission to take a different path. At the very least, we urge that the NRC should not try to handcuff states performing the work that the agency should have been doing in the first instance. Indeed, we think it notable and deserving of Congressional attention if the NRC were to exercise its preemptive authority on behalf of the nuclear industry in order to block state regulators from holding nuclear corporations accountable for the contamination of drinking water resources. Indeed, the NRC's actions in the Illinois case referenced above clearly illustrate that clarification of the AEA's apportionment of regulatory authority to protect important economic and environmental resources – such as a State's vital interest in protecting its groundwater – is long overdue. We can assure you that any further attempts to handcuff state governments under the guise of federal preemption will precipitate greater controversy.

When drinking water is not under threat, the regulatory situation is less clear. The nuclear industry has already aggressively exploited this lack of regulatory clarity in what state regulators can and cannot do. And equally important, the industry finds comfort in the assurance that the NRC has, thus far, required little and even threatened to preempt those States that have the temerity to enforce requirements protective of public health and the environment.

This lack of regulatory clarity was illustrated at the April 20th meeting. Even the nuclear industry's advocates admitted "[t]he plants did not have legal authorization to release radioactive material to groundwater." But on the other hand, an industry advocate at the Morgan Lewis firm stated that while "(t)he Clean Water Act requires a permit to discharge any pollutant into a water of the United States," he/she points out that "groundwater is NOT a water of the United States." (Both presentations were provided to NRC by Greenpeace after the April

20th meeting but are still unavailable for public review in the NRC's publicly accessible ADAMS database.) Many states' laws prohibit unpermitted discharges of radioactive substances to groundwater, but the ability of the states to enforce these laws against licensed nuclear facilities has not been tested.

It is evident that the nuclear industry and its attorneys recognize that they lack the legal authority to release radiation or any pollutant into groundwater. We believe such action is clearly "inimical to the health and safety of the public." We are therefore dismayed that the NRC remains reluctant, at best, to act on such matters. Given the lack of NRC action in this area, the public is at a loss to understand why the NRC's OGC would countenance interference with State efforts to protect groundwater.

As a result of the groundwater contamination issues at dozens of operating nuclear reactor sites across the country, NRC's credibility as a regulator of the public heath and safety has been called into question. Since the NRC has chosen not to enforce its mandate to protect human health and safety with respect to the multiple groundwater contamination issues, we strongly urge the NRC to cease any attempts to preempt state governments from exercising their authority to protect important economic and environmental resources within their borders.

Sincerely,

Paul Gunter
Beyond Nuclear

Richard Webster
Eastern Environmental Law Center

Jim Riccio
Greenpeace

Geoffrey H. Fettus
Natural Resources Defense Council

Phillip Musegaas
Riverkeeper

Dave Lochbaum
Union of Concerned Scientists

CC: Senator Bernie Sanders, Senator Patrick Leahy, Senator Charles Schumer, Senator Kirsten Gillibrand, Senator Frank Lautenberg, Senator Robert Menendez, Congressman Edward J. Markey, Congressman John Adler, Congressman John Hall, Congressman Dennis Kucinich, Congressman Christopher H. Smith, Congressman Peter Welch

Att. C

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

GENERAL COUNSEL

July 9, 2010

Jim Riccio
Nuclear Policy Analyst
Greenpeace
702 H Street NW, Suite 300
Washington, D.C. 20001

Dear Mr. Riccio:

I am responding to your letter to the Commission of May 25, 2010, which suggests that the Office of the General Counsel (OGC) has attempted, "under the guise of federal preemption", to "handcuff state governments" in their efforts to protect groundwater. You were prompted to write this letter because it came to your attention during a public meeting the U.S. Nuclear Regulatory Commission (NRC) held recently that OGC had written to the office of the Illinois Attorney General four years ago to express OGC's concerns about actions the State was taking onsite at the Braidwood plant to protect groundwater from unplanned releases of tritium. You ask the agency to "confirm in writing that the NRC recognizes that it is both legal and appropriate for the States to take action against licensees when drinking water is under threat."

The NRC has certainly never denied that States have some authority over groundwater. There is, for example, nothing in the 2006 letter that even suggests that Illinois had no authority to take some action against the Braidwood licensee. Indeed, some years ago, when the NRC was considering what form of regulation would be best for in situ leach mining facilities, the NRC initially sought to have the States regulate groundwater at such facilities. *See*, *e.g.*, Regulatory Issue Summary 2004-09, June 7, 2004. But NRC cannot set forth, in writing, just which actions the State could take, and under what circumstances there is no interference with our regulatory authority. As your letter observes, "the ability of the states to enforce these laws against licensed nuclear facilities has not been tested."

Over the years, the NRC has generally avoided making declarations about what States, or other Federal agencies, can and cannot do. For example, when the Nuclear Energy Institute in 2002 petitioned the agency to restate Federal preemption law, and to provide procedures whereby any person could request an NRC staff determination as to whether a particular State or local requirement was preempted by NRC's requirements, the NRC denied the petition, partly because any opinion the agency issued would be at best only guidance as to how a court might rule when faced with a preemption challenge to a State or local action. *See* 67 Fed. Reg. 66074, 66076 (Oct. 30, 2002). As far as I know, only once, when the City of New York was requiring Columbia University to get a radiological safety permit from the City, has the NRC appeared in court as a plaintiff seeking a ruling that the Atomic Energy Act preempted State or local action. *See U.S. v. City of New York*, 463 F.Supp. 604 (S.D.N.Y., 1978). Even when the controversy has been over releases of tritium from nuclear power plants, the agency has generally avoided statements about what a State can and cannot do.

The exceptions to the NRC's general policy of not making declarations in regard to preemption have arisen in situations that demanded some clarification of lines of authorities. For example, when, in the mid-1990s, the U.S. Environmental Protection Agency (EPA) rescinded its regulation of nuclear power plants under the Clean Air Act, the question arose whether States exercising authority under the same Act retained any authority over those same plants. Both the EPA and the NRC agreed that, yes, the States did retain such authority, even though EPA no longer exercised its own authority. Indeed, the EPA and the NRC said that the States could set more stringent standards for radionuclide air emissions from these plants than did the NRC. 60 Fed. Reg. 46206, 46210 (September 5, 1995). Another case in which lines of authorities demanded clarification was the case, already mentioned, in which New York City sought to require that Columbia have a radiological health and safety permit from the City. The Atomic Energy Act clearly reserves to the NRC the regulation of the radiological health and safety aspects of nuclear reactors. *See, e.g.,* section 274c.(1) of the Act, 42 U.S.C. 2021(c)(1).

The letter OGC sent to Illinois is another such case. Each of the seven specific concerns that the letter raised had to do with actions the State sought to take onsite, for radiological health and safety reasons, sometimes in ways that had safety implications for plant operations. The Atomic Energy Act clearly reserves such actions to the NRC. True, the letter said that the NRC might "seek leave to participate in the [then already existing county] lawsuit to raise the Commission's preemption concerns." But a government agency must be free to request such participation if that agency determines that it needs to convey its views to a court. The alternative is a doctrine that an agency must always depend on private litigants or other governmental entities to seek to draw boundaries of its own authority. OGC's letter did not deny that the State had authority to take some action toward the licensee, and indeed the letter did not assert that the State was entirely without authority to take even action that could affect plant operations. The EPA, for example, has Clean Water Act authority over water intake structures at nuclear power plants, but, for nuclear safety reasons, the EPA exercises such authority only in consultation with the NRC. *See* 69 Fed. Reg. 41576, 41585 (July 9, 2004). The same is reasonably to be expected of States acting in similar circumstances. In the end, as a result of the consultations between OGC and the Illinois Attorney General's Office, the NRC did not intervene in the lawsuit, and Illinois proceeded with its action against the NRC licensee.

Preemption law is far too complex for easy generalization. The distribution of authorities among Federal and State governmental entities is one thing under the Clean Water Act, another under the Clean Air Act, another under the Atomic Energy Act, and yet another under the Coastal Zone Management Act. Consultations among governments on environmental matters are often essential, and States frequently initiate such consultations. You "think it notable and deserving of Congressional attention if the NRC were to exercise its preemptive authority on behalf of the nuclear industry in order to block State regulators from holding nuclear corporations accountable for the contamination of drinking water resources." However, the sentence misses the mark on several grounds -- for example, in its suggestion that the NRC would seek preemption in order to protect the industry, and the implication that the NRC has expansive preemptive authority that it can exercise unilaterally. But the sentence is especially troubling to the extent it suggests that Congress should prevent one government agency from expressing concerns about where the line is between its and another government agency's respective jurisdictions. Such consultations are a necessary part of the attentive implementation of complex statutes enacted in the public interest.

With respect to the general issue of groundwater, I am sure you are now aware that the report of the NRC's Groundwater Task Force has been issued and the Executive Director of Operations has formed a senior management review group to evaluate the report and make recommendations for Commission consideration later this year.

Please do not hesitate to contact me if you have questions about NRC's legal framework.

Sincerely,

Stephen G. Burns
General Counsel