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RADIOACTIVE WASTE DISPOSAL: THE EMERGING ISSUE OF STATES' RIGHTS

HON. JOHN F. SEIBERLING*

MARCH 28, 1979, marked the beginning of a new public awareness and attitude toward nuclear power. On that day, what some scientists, industry officials and government spokesmen said would never happen did happen—a serious accident of critical magnitude crippled a nuclear power facility, releasing undetermined amounts of radiation into the atmosphere. Communities within a fifty mile radius were threatened with unimaginable chaos and disruption in the event a core meltdown forced mass evacuation.

The events of Three Mile Island forced industry, government and the public to reassess the vision of nuclear power as a key solution to the energy crisis. As an outgrowth of this reassessment, the public began to demand a greater role in determining the development of nuclear power within their communities, and the public began to demand greater protection from the radiation hazards of nuclear waste transported through their communities. When the city of Cuyahoga Falls, Ohio for example, heard that radioactive waste from Three Mile Island was being trucked through the state, the city council passed an ordinance to place safety and security conditions on any such transports through city boundaries,¹ thus showing the concern which had already been expressed by officials in larger communities where accidents resulting in radiation leakage could result in a disaster of tragic proportions.²

States also have become increasingly responsive to public demands to prevent nuclear waste from being stored near their communities. State activity to prevent, limit, or prohibit outright the creation of nuclear waste facilities within the states' jurisdiction is not solely an outgrowth of Three Mile Island. Prior to March 28, 1979, sixteen states had approved legislation giving themselves either an equal role or a final say in federal decisions to store or dispose of radioactive waste within their boundaries.³ Subsequent to March 28, 1979, the New Mexico legislature enacted a law prohibiting storage or disposal of radioactive waste in the state until and unless the state shall have concurred through a process to be established by a joint interim legislative committee. On May 30, 1979, the

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¹ CUYAHOGA FALLS, OHIO, CODE § 17 (1979).

² NEW YORK, N.Y., HEALTH CODE, § 175.111 (1976).

³ Alaska, California, Colorado, Delaware, Hawaii, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, North Dakota, Oregon, South Dakota, Texas and Vermont.

Ohio Senate approved legislation^{3a} to prohibit the federal government from storing radioactive waste within the state at least through 1983.

If Ohio's bill is enacted into law, eighteen states will have claimed for themselves the authority to block federal decisions which may not adequately safeguard against accidents, leakage, spills or operational failures involving the transportation, storage and use of nuclear materials. Since radiation hazards which result from nuclear waste are not only potentially fatal but can endure literally for thousands of years, and with no national program of radioactive waste disposal on the horizon, this concern is well founded.

However, the laws passed by these states may run afoul of the Supremacy Clause of the Constitution. Regardless of the dimensions of the problem of disposing and safeguarding radioactive waste, the states' rights to impose conditions, or require prior consultation on potential waste disposal sites within their jurisdiction can be challenged in court, even in the absence of a federal solution, and have been challenged successfully. The purpose of this article is to examine the issue of the state role in federal nuclear programs and the need for Congressional action to insure that states will have an active role in federal decisions to dispose of radioactive waste within their jurisdictions.

I. THE ATOMIC ENERGY ACT

The Manhattan project brought a terrifying end to World War II and a hopeful beginning to the age of nuclear energy. However, since nuclear power was inexorably linked to weapons systems and national security, the federal government retained exclusive control over the development of atomic energy. In 1946, the Atomic Energy Act created the Atomic Energy Commission as the controlling federal agency, and restricted all private activity to fulfilling contractual obligations for the federal government.⁴ Gradually, as nuclear power was developed to produce energy, and a domestic, peacetime application of the science became possible, the federal government invited industry to participate in making this application a reality. In 1954, Congress amended the Atomic Energy Act to allow increased participation by private industry through the establishment of a regulatory and licensing system.⁵ It was later still that Congress approved legislation which gave states limited authority over certain kinds of nuclear materials, based on the recognition of state interest in "peaceful uses of atomic energy."⁶ However, the policy Congress had established is based on the conclusion

^{3a} S.B. 11, 113th Ohio Gen. Assemb., (1979). At the time of this writing (Feb. 1980) the bill is pending before the Ohio House Committee on Agriculture and Natural Resources.

⁴ Atomic Energy Act of 1946, ch. 724, 60 Stat. 755.

⁵ Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919, as amended by 42 U.S.C. § 2011 *et seq.* (1976).

⁶ Atomic Energy Act of 1959, 42 U.S.C. § 2021 (a) (1976).

that the processing and use of nuclear materials is "vital to the common defense and security."⁷ Thus, a federal agency (the Atomic Energy Commission, which in 1974, was designated the Nuclear Regulatory Commission) has been assigned full regulatory authority over the use of nuclear materials for commercial, peacetime purposes.

While the federal pre-emption over nuclear weapons development is a logical and defensible policy, it may be argued that continued federal pre-emption in uses of nuclear power for domestic purposes is an outdated application of the policy, especially in light of the expanded role of private industry. The nuclear industry asserts that excessive regulation by the federal government serves to impede the development of nuclear power as a major energy source in this country while states and citizen groups are more concerned about the dangers of nuclear power than ever before. From one side the federal government is being encouraged to smooth the way for the increased use of nuclear power for domestic energy needs, while from the other side the states are trying to cut from the federal regulatory fabric, on a state-by-state basis, a role for them to play, in partnership with the federal government, to represent the concerns of their citizens about the dangers of nuclear power and nuclear materials—including spent fuel—to public health and safety.

II. FAILURES OF FEDERAL REGULATORY SYSTEM

The problems of nuclear waste disposal are enormous. Currently, we have about seventy-four million gallons of radioactive waste in this country, all in temporary storage at plant-sited "pools"; and there are an additional eighty million gallons of defense nuclear waste which has accumulated since the military began producing nuclear weapons in the 1940's. The military high-level waste have been stored at the Hanford Reservation in Washington State, the Savannah River reserve in South Carolina, and the Idaho National Engineering Laboratory in Idaho.⁸

The fission products contained in this waste are highly toxic elements, including the so-called transuranic elements; radioactive atoms heavier than uranium, which remain radioactive for extremely long periods of time. Plutonium-239, for example, has a half-life of almost twenty-five thousand years.⁹ In human terms, the continued radioactive hazard is infinite. Even if radioactive waste storage could guarantee that no human exposure would occur for the life of the toxicity of the material, reactor waste must be isolated from the rest of the environment to prevent penetration and contamination of the biosphere, including food chains leading to man.

⁷ *Id.* at § 2021 (a) (1) (1976).

⁸ UNITED STATES DEPARTMENT OF ENERGY, REPORT TO THE PRESIDENT BY THE INTERAGENCY REVIEW GROUP ON NUCLEAR WASTE MANAGEMENT (App. D) (1979) [Hereinafter cited as REPORT TO THE PRESIDENT].

⁹ A. Kudo & D. Ross, *Disposal of Nuclear Wastes*, 182 SCIENCE 1205-1211 (1973).

This is a monumental problem, and even experts admit that no proven solutions to this problem exist at the present time.

The federal government, through the Department of Energy, has the prime responsibility for nuclear waste management.¹⁰ However, the history of federal management of radioactive waste does not inspire public confidence in the existence of any long-term solutions to the problems of disposing nuclear waste, and the doubts expressed by the federal government itself through various agencies about current technological solutions to the radioactive waste problem point to the need for a thorough and public examination of all issues related to nuclear waste disposal.

The experience at the Hanford Reservation in Washington provides the best example of faulty assessments and planning by federal agencies for nuclear waste disposal. Millions of gallons of high-level waste were stored in liquid form in single-shell stainless steel and carbon tanks, which were originally expected to have a life expectancy of about fifty years. However, unexpected stresses resulted in failures before twenty years had passed, leaking over 423,500 gallons of high level wastes from sixteen tanks. The largest leak was discovered on June 8, 1973 when one tank was found to have leaked a total of 115,000 gallons amounting to 54,000 curies of radioactivity. The leak occurred over a period of months. (The extent of the leak was attributable in part to the absence of a key employee, whose substitute ignored signals from the monitoring system that something had gone wrong.)¹¹ The deficiencies in the storage technology at Hanford were previously known. In 1969, the General Accounting Office had warned that corrosion problems would exist with single-shell tanks,¹² but these warnings were ignored. Moreover, intermediate level radioactive wastes (up to 1 curie per gallon) were at first merely dumped in open trenches and absorbed into the sandy ground at Hanford.

The Department of Energy, which has authority to manage military as well as commercial radioactive waste, has embarked on a program to solidify the Hanford waste to prevent future leaks. Originally, as a part of the program, the Department of Energy proposed to store the military waste at a Waste Isolation Pilot Plant (WIPP) now being developed in New Mexico. The proposal has been modified since its initiation to use WIPP as a storage facility for transuranic wastes, such as contaminated clothing. While WIPP may be based on more advanced technology than was originally used at Hanford, past experience indicates that even technical

¹⁰ Department of Energy Organization Act of 1977, 42 U.S.C. § 7133 (a) (8) (1976).

¹¹ NATIONAL ACADEMY OF SCIENCES, UNITED STATES ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION, RADIOACTIVE WASTES AT THE HANFORD RESERVATION (1978).

¹² UNITED STATES GOVERNMENT ACCOUNTING OFFICE, REPORT TO THE JOINT COMMITTEE ON ATOMIC ENERGY, PROGRESS AND PROBLEMS IN PROGRAMS FOR MANAGING HIGH-LEVEL RADIOACTIVE WASTE (1971).

experts have no confidence that their favored method of storing radioactive waste can be safely and surely implemented. Moreover, any disposal efforts would be subject to the hazards of accidents in transport, leaks of liquids pending solidification, or breakup or leaching into groundwater. (If the Administration lifts its current moratorium on reprocessing, additional hazards would be added to the problems of temporary and long term storage.)

Faulty selection criteria have further obstructed the government search for an "ideal" waste disposal site. In 1955, the National Academy of Science Research Council (NASRC) was directed by the Atomic Energy Commission to examine the possibility of developing waste disposal facilities for radioactive materials. NASRC tentatively concluded in a 1957 research proposal that the best possibility was deep disposal in a geologic repository.¹³ As a result of this initial conclusion, more engineering knowledge is available on salt mines than for any other method of radioactive waste disposal.¹⁴ Some of the knowledge points to the potential instability of salt because of its plasticity and variable solubility.¹⁵ Nonetheless, by 1970, the Atomic Energy Commission had spent one hundred million dollars and fifteen years to identify what they determined would be the final solution to the problem of disposing radioactive waste; an abandoned salt mine in Lyons, Kansas which would isolate radioactive waste permanently. The Kansas Geological Society, in an independent assessment of the selected site, raised questions about the site's safety, which was pockmarked with old oil and gas wells that penetrated the salt, providing an entrance for water from nearby operating mines. The Atomic Energy Commission later abandoned the site, admitting that the potential of water intrusion could leach out radioactive waste stored at the site.

These experiences point to the faulty technology and criteria which have been employed by the federal government to develop a radioactive waste disposal program. In fact, the government no longer claims to possess solutions to the safety and security problems of long-term radioactive waste disposal. The most recent report on this issue, the Interagency Review Group report on Nuclear Waste Management¹⁶ (a Presidential Commission which completed a report in March, 1979), had these conclusions concerning existing technology for preventing the potential exposure of humans to radioactive waste disposed of on a "permanent" basis:

¹³ THE NATIONAL ACADEMY OF SCIENCE NATIONAL RESEARCH COUNCIL, *THE DISPOSAL OF RADIOACTIVE WASTE ON LAND* (1957).

¹⁴ D. JOHNSON & S. GONZALES, UNITED STATES DEPARTMENT OF ENERGY, *SALT DEPOSITS IN THE UNITED STATES AND REGIONAL GEOLOGIC CHARACTERISTICS IMPORTANT FOR STORAGE OF RADIOACTIVE WASTE* (1978); REPORT TO THE PRESIDENT, *supra* note 8, at 60.

¹⁵ A. Kubo & D. Rose, *supra* note 9, at 1207; DEPARTMENT OF ENERGY, *SUBGROUP REPORT ON ALTERNATIVE TECHNOLOGY STRATEGIES FOR THE ISOLATION OF NUCLEAR WASTE* (1978).

¹⁶ H.R. REP. NO. 95-1090, 95th Cong., 2d Sess. 8 (1978).

The risk assessments performed to date . . . have, with few exceptions, been based on idealized repository characteristics and are subject to significant uncertainties . . . Uncertainties associated with risk assessment derive from lack of data, lack of experience, inability to identify all release mechanisms for radionuclides, the natural variability in physical properties of geologic media, and the inability to predict long-term geologic and climatic process and social evolution. All of these uncertain ties are neither additive nor of equal significance. An important aspect of the research remaining to be done is to understand how each enters into the overall uncertainty of the calculation of risk.¹⁷

The absence of federal solutions, following past failures, gives rise to another problem, which the Government Accounting Office described in a 1977 report:

When it publicly announced its waste repository program objectives and goals the Department (of Energy) may have promised more than it can deliver. There are, we believe, formidable social, geological and regulatory problems which must be solved. Foremost among them is opposition of public and some political leaders. The Department may not be successful in gaining their acceptance unless it can convince the public that it has a sound waste management program and that geological disposal risks to man's environment are acceptably low.¹⁸

It is in this context—the absence of a federal program which promotes confidence—that seventeen states have already institutionalized their opposition to unilateral efforts by the federal government to bury radioactive wastes.

III. FEDERAL PRE-EMPTION

The states' laws giving them a role in federal radioactive waste management programs vary in the method, but essentially all achieve the purpose of reviewing and overriding a proposed federal action within their jurisdiction. However, in the absence of clear Congressional directive authorizing the states to have a role in such decisions, these state laws may be pre-empted by federal authority established under the Atomic Act as amended.¹⁹

In any inquiry into federal pre-emption it must first be established that the area is subject to federal regulation pursuant to authority designated by the Constitution. The findings of the Atomic Energy Act, as amended, clearly base the regulation of nuclear materials on constitutional powers over the common defense and security, interstate and foreign commerce and promotion of the general welfare.²⁰ As observed by the Eighth Circuit Court

¹⁷ REPORT TO THE PRESIDENT, *supra* note 8, at 45-46.

¹⁸ UNITED STATES GOVERNMENT ACCOUNTING OFFICE, REPORT TO THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, NUCLEAR ENERGY'S DILEMMA: *Disposing of Hazardous Radioactive Waste Safely* (1977).

¹⁹ U.S.C. § 2011 *et seq.* (1976).

²⁰ *Id.* at § 2012 (1976).

of Appeals in *North States Power Company v. Minnesota*, “. . . there can be no doubt but that Congress was acting within its constitutionally delegated authority in establishing a system of regulation over the entire spectrum of atomic energy, including the imposition of federal controls over health and safety standards.”²¹

Once it has been established that the Constitution empowers the federal government to regulate the subject under question, it must be determined whether Congress intended or designed federal authority to pre-empt states from asserting their authority over the same subject.

“The doctrine of Federal pre-emption is based on Article VI, Clause 2 of the United States Constitution, the Supremacy Clause, which elevates federal law above that of the States.”²² The Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

The Atomic Energy Act does provide for a state role in regulating health hazards of certain radioactive materials. In 1959, Congress approved provisions which recognized state interest in peaceful uses of nuclear energy, and 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.²³ The provision still requires the Commission to retain control over certain activities, including the management and disposal of such nuclear waste which, in the Commission's determination, cannot be disposed of without a license. Another provision states that no restrictions on state activity will prevent state or local authorities from regulating activities for purposes other than “protection against radiation hazards.”²⁴ (As will be shown, these provisions have been interpreted by the courts not to be relinquishing federal authority to the states, but to narrowly define a subject over which the state can regulate.)

Federal pre-emption can be assumed if it is physically impossible to comply with both federal and state regulations. In such a situation “a holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design.”²⁵ However, in the absence of a direct

²¹ 447 F.2d 1143, 1147 (8th Cir. 1971).

²² *Id.* at 1145.

²³ 42 U.S.C. § 2021 (b) (1976).

²⁴ *Id.* at § 2021 (k) (1976).

²⁵ *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-143 (1963).

collision between the two regulatory systems, it must be determined whether Congress intended the federal regulatory scheme to be exclusive. This must be assessed on a case by case basis since, "there is not — and from the very nature of the problem there cannot be — any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress."²⁶ Where this intent is express, states cannot exert authority over the same area.²⁷ Otherwise, Congressional intent may be gleaned by examining the statute, or its legislative history.²⁸

For example, "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,"²⁹ or if "the state policy produces a result inconsistent with the objectives of the federal statute,"³⁰ or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"³¹ then the state law and regulation is pre-empted by federal law. For where the federal government has, pursuant to its constitutional authority, enacted a system of regulation "States cannot, inconsistently with the purposes of Congress, conflict or interfere with, curtail, or complement, the federal law, or enforce law, or enforce additional or auxilliary regulations."³²

The pre-emption of the Atomic Energy Act was challenged by the state of Minnesota in *Northern States Power Company*. In this case Northern was licensed by the Atomic Energy Commission to build a nuclear power plant in Minnesota. Northern applied to the state for a waste disposal permit. The state granted the permit upon the condition that Northern institute a program at the nuclear plant to detect and measure radiation releases, both liquid and gaseous. Since Northern was in compliance with federal law and with the radiation safety regulations required by the Atomic Energy Commission as a condition to licensing, Northern argued that Congress (in passing the Atomic Energy Act) intended for the Commission to have exclusive authority and control of nuclear plants, and therefore pre-empted enforcement of the state regulation. Minnesota argued, on the other hand, that it could regulate radioactive releases pursuant to the authority under section 2021 (b) of the Atomic Energy Act, which defines the conditions under which states could enter into cooperative agreements with the Commission for the regulation of radiation hazards associated with by-products, source and special nuclear material.

²⁶ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²⁷ 447 F.2d at 1146.

²⁸ 373 U.S. at 146-152.

²⁹ *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³⁰ *Id.*

³¹ 312 U.S. at 67.

³² *Id.*

The court examined this provision, and noted that the category of radioactive material under question—liquid and gaseous releases from operating nuclear plants—was not among the categories of material over which the state could assume control under section 2021 (b). The court further examined the provision which specifically prohibited the Atomic Energy Commission, in transferring certain authority to the states, from relinquishing its authority over the construction and operation of any production or utilization facility.³³ Finding that the discharge of radioactive effluents fell under the regulation of production and utilization facilities, the court determined that the Minnesota law provided for dual control by state and federal authority in an area where the sole authority rested with the federal government.

The court found further indication that the federal act pre-empted Minnesota's law in the legislative history of section 2021, to provide for cooperative agreements between the Commission and states with respect to state assumption of regulation over certain materials. The court noted that, prior to the 1959 amendments, the regulation of all radioactive materials, including those for which regulation by agreement could be assumed by the state (pursuant to section 2021), was solely under the regulatory authority of the federal government:

While the 1959 amendment does not use the term 'exclusive' or 'sole' in describing existing regulatory responsibilities of the Commission we think it abundantly clear that the whole tone of the 1959 amendment, upon examination of the statutory language alone, demonstrates Congressional recognition that the AEC at that time possessed the sole authority to regulate radiation hazards associated with by-product, source and special nuclear materials and with production and utilization facilities . . . If the States at that time possessed concurrent jurisdiction to regulate radiation hazards associated with these materials, it would have been unnecessary for Congress affirmatively to recognize their regulatory authority by virtue of a state-federal compact and to limit their authority for the duration of and subject to the provisions of such agreement.³⁴

Thus the court concluded that the states' right to regulate radiation hazards is specifically limited to those materials defined in section 2021 (b) and does not extend to any other areas.

The court also examined the legislative intent of section 2021 (k) which states that "nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazard." Since the radiation hazards which can be regulated by the states are clearly defined, the court interpreted

³³ 42 U.S.C. § 2021 (c) (1976).

³⁴ 447 F.2d at 1149.

this as restating the restriction against any other state regulation of radiation hazards of radioactive material.³⁵

Finally, the court found that the Minnesota law was preempted by the Atomic Energy Act³⁶ because Minnesota's law obstructed the achievement of the Act's goals "to encourage the development, use and control of atomic energy so as to make the maximum contribution to the general welfare and to increase the standard of living."³⁷ However, the Atomic Energy Act provided that these objectives were to be effectuated "to the maximum extent consistent with the common defense and security and with the health and safety of the public."³⁸ Congress determined that the achievement of these goals required a comprehensive Federal regulatory program which, the court concluded, prevented states from imposing stricter standards which may impede the development and use of nuclear power. The court held that "the federal government has exclusive authority under the doctrine of preemption to regulate the construction and operation of nuclear power plants which necessarily includes regulation of the levels of radioactive effluents discharged from the plants."³⁹

In a more recent case, *Pacific Legal Foundation v. California Energy Commission*,⁴⁰ the United States District Court for Southern California held that the Atomic Energy Act pre-empted a state law which set conditions on the future licensing of nuclear power plants in the state.

California Public Resources Code section 25524.2 prohibited the State Energy Commission from licensing a nuclear power plant pending the designation by the Nuclear Regulatory Commission of an approved technology for disposing of nuclear by-products of plant operation. Under this section, the NRC was required to submit a report approving the designated radioactive waste disposal technology to the state legislature, which was empowered to "disaffirm" any recommendation or finding in the report.

In *Pacific Legal Foundation*, San Diego Gas and Electric Company terminated the proposed construction of the Sundesert nuclear power project in Southern California. Plaintiffs argued that the project had been terminated because the California Energy Commission had determined that the required findings on a radioactive waste disposal technology were not available, resulting, at least for the time being, in a moratorium on nuclear power plant licensing in the state.

The court, in examining the effect of California Public Resources

³⁵ *Id.* at 1150.

³⁶ 42 U.S.C. §§ 2011 & 2012 (1976).

³⁷ 447 F.2d at 1154.

³⁸ 42 U.S.C. § 2013 (1976).

³⁹ 447 F.2d at 1154.

⁴⁰ Civil No. 78-711-E (S.D. Cal. filed March 6, 1979).

Code section 25524.2, observed that the result of the requirements made on the NRC was to obstruct Congressional purpose in passage of the Atomic Energy Act.

Congress' policy to encourage the development and utilization of nuclear energy would decidedly be frustrated if all fifty states had statutes similar to California Public Resources Code section 25524.2. Although the Atomic Energy Act certainly leaves room for the states to regulate on the subject of nuclear energy within the confines of section 2021 (k) and 2021 (b), the power to regulate is not necessarily the power to prohibit. There seems little point in enacting an Atomic Energy Act and establishing a federal agency to promulgate extensive and pervasive regulations on the subject of construction and operation of nuclear reactors and the disposal of nuclear waste if it is within the prerogative of the states to outlaw the use of atomic energy within their borders.⁴¹

In *Pacific Legal Foundation*, the court further elaborated on the arguments forwarded in *Northern States Power Company* concerning the limited application of section 2021 (k), the provision which reserves to the states the right to regulate "activities for purposes other than protection against radiation hazards." The defendants relied upon this section as delegating authority to the states to regulate for purposes other than radiation control. They argued that the provision allowed the state of California to enact a law which would insure that state citizens would not be forced to bear the financial risk of financing nuclear power plant construction if these plants were later closed because inadequate waste disposal facilities existed.⁴² This broad interpretation of section 2021 (k) was rejected by the court based on an examination of legislative intent, since a wide scope for state authority would effectively undermine the regulatory scheme established by Congress in the Atomic Energy Act.

Rather, the court found that an examination of legislative history led to the conclusion that Congress commanded the courts to interpret section 2021 (k) in a manner consistent with section 2021 (c). To buttress this interpretation, the court referred to a letter sent in 1959 by the General Manager of the AEC by the Chairman of the Congressional Joint Committee on Atomic Energy. Regarding AEC's recommended language for section 2021 (k) the letter said: "[w]e did not intend to leave any room for the exercise of concurrent jurisdiction by the States to control radiation from those materials. Our sole purpose was to leave room for the courts to determine the applicability of particular State laws and regulations dealing with matters on the fringe of the preempted area in the light of all the provisions and purposes of the Atomic Energy Act, rather than in the

⁴¹ *Id.*

⁴² *Id.*

light of a single sentence."⁴³ Since this interpretation was accepted by the Joint Committee, the court in *Pacific Legal Foundation* concluded that this indicated "Congressional approval of the position that the precise extent of preemption under the section is to be determined by the courts in the light of all the provisions and purposes of the Atomic Energy Act."⁴⁴

In light of the fact that the opportunity for states to regulate nuclear materials under section 2021 (b) was clearly defined and concerned subject matter previously under the sole authority of a federal agent,⁴⁵ the court held that section 2021 (k) did not extend authority to the state to protect its citizens against nuclear plants which may lack adequate disposal facilities, since the effect of such protection would be to obstruct the use of nuclear power in the state contrary to the express purpose of the Atomic Energy Act. Further, because authority to regulate use of radioactive materials which present sufficient hazards to require licensing was retained by the Atomic Energy Commission by virtue of section 2021 (c) of the Act, the court held that "the state regulation on this subject is displaced. Accordingly, the court holds California Public Resources Code section 25524.2 impliedly pre-empted."⁴⁶

These decisions certainly can be used as precedent to challenge state laws which would require state concurrence in decisions on radioactive waste disposal on the grounds that the Atomic Energy Act and regulation made pursuant thereto preempt state laws and regulations on the subject of the use and disposal of radioactive waste material.

In addition to the Atomic Energy Act, the Department of Energy Organization Act of August 4, 1977⁴⁷ gives specific authority to the Department of Energy over nuclear waste management, with the exception of those functions under the authority of the Nuclear Regulatory Commission. This means that DOE's authority does not cover the licensing of radioactive waste for permanent disposal or any functions covered by NRC-state agreements.

The Department of Energy Organization Act authorizes the federal agency to provide for:

- (C) the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes;
- (D) the establishment of facilities for the treatment of nuclear wastes;
- (E) the establishment of programs for the treatment, management, storage, and disposal of nuclear wastes.⁴⁸

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 447 F.2d at 1149.

⁴⁶ Civil No. 78-711-E.

⁴⁷ The Department of Energy Organization Act of 1977, 42 U.S.C. § 7101 *et seq.* (Supp. I 1977).

⁴⁸ 42 U.S.C. § 7311 (A) (8) (1977).

While a provision in the Act does require the Department to give "due consideration" to the needs of states where conflicts exist in the development of national energy plans,⁴⁹ there is no authority in this Act which gives the states a statutory basis for participating in the process of establishing nuclear waste facilities within their boundaries. In fact, the comprehensive and specific DOE authority defined in section 7311 (8) over nuclear waste management would probably give considerable weight to arguments that the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."⁵⁰ Any state law which regulated the disposal of radioactive waste could be challenged on the basis that such state action was preempted by federal authority under the Atomic Energy Act and the Department of Energy Organization Act.

III. STATES' RIGHTS AND NATIONAL GOALS

These ponderous legal obstacles do not seem to have dampened the efforts of the states to participate in radioactive waste disposal decisions to the extent of exercising authority to "veto" the selection of sites within their jurisdictions. Considering the risk assessments associated with disposal of radioactive waste, the duration of the hazard to public health and environment inherent in radioactive waste, the past failures in the federal government's efforts to manage radioactive waste and the growing public concern about the dangers associated with nuclear power in general, the states' interest is understandable. It also presents serious problems for the implementation of a national radioactive waste disposal management program, since without the cooperation of state and local officials, it could be politically impossible for the federal government to develop a radioactive waste disposal facility within a given state.

There is general agreement among federal officials that states must have some role in decisions to store radioactive waste if such facilities are to become a reality. In 1977, hearings before the House Interior Subcommittee on Energy and the Environment, then-Chairman of the Nuclear Regulatory Commission Marcus A. Rowden said: "The matter of where a repository is located is not simply a legal question. It is not simply a technological question. It is a political question, and a political decision is going to have to be made . . . My own view remains that the basic problems with regard to waste management are national scope. They will have to be addressed at the national level. Ultimately, it is going to be the Congress through legislation which makes the final determination."⁵¹

In 1979 hearings before the same Subcommittee, John M. Deutch,

⁴⁹ 42 U.S.C. § 7113 (1977).

⁵⁰ 331 U.S. at 230.

⁵¹ *Hearings before the Subcomm. on Energy and the Environment of the Comm. on Interior and Insular Affairs of the House on HR 18 et al.*, 95th Cong., 1st Sess. 55 (1977).

Director of Energy Research for the Department of Energy and Chairman of the President's Interagency Review Group on Nuclear Waste, in an exchange with the Chairman of the Subcommittee, Congressman Morris Udall, talked about the problems of providing a state role without authorizing a state veto:

Deutch: The position of the administration has been against a legislative veto right for States. On the other hand, we understand as a practical matter and as a matter of public interest, that when you are actually considering a specific facility in a specific State and locality, you must have the State and local officials supporting your program in terms of technical merit and consequences for their areas.

Udall: It has been my own view, and maybe you will comment on this, that as a practical matter, whether you give it to them or not — if the Governor or the legislature or a large body of citizens in any State do not want an installation in their State, it is going to be extremely difficult for the federal government to force it upon them.

Would you agree that that is a practical statement?

Deutch: Absolutely, yes, sir.⁵²

The final report of the Interagency Review Group on Nuclear Waste Management, issued in March 1979, reiterated the point that the federal government was bound in its development of a federal radioactive waste disposal program to work with the states. The final recommendations read: "The IRG believes that the technical and socio-political success of any federal waste management program is largely dependent on the States; and in particular the extent to which the states are involved early-on in program planning research and development, site identification, site characterization, (and) development of regional programs."⁵³ However, the report stopped short of recommending a state veto authority, finding that a state veto had the potential of allowing the state "at one specific moment — by one of several possible mechanisms — to approve or disapprove of federal site investigation activities or a proposal to site a repository or other facility."⁵⁴ Rather, the IRG recommended the establishment of a "consultation and concurrence" process whereby the state could participate on a continuing basis in all activities and "if it deems appropriate to prevent the continuance of federal activities."⁵⁵

The Department of Energy currently follows an internal policy which

⁵² *Oversight hearings before the Subcomm. on Energy and the Environment of the Comm. of Interior and Insular Affairs on the House on Nuclear Waste Management, 96th Cong., 1st Sess. 11 (1979).*

⁵³ REPORT TO THE PRESIDENT, *supra* note 8, at 95.

⁵⁴ *Id.*

⁵⁵ *Id.*

subjects the approval of proposed locations for radioactive waste disposal facilities to state concurrence—in effect allowing the states to “veto” potential sites within their jurisdiction. In a letter dated June 19, 1978 from the Comptroller General of the United States to Congressman John D. Dingell, the Comptroller made reference to an agreement signed by the Governor of Louisiana and the Deputy Secretary of DOE which stated that, with respect to nuclear storage: “the Department of Energy will not construct any nuclear waste depository for long-term disposal in Louisiana if the State objects.”⁵⁶ Since the legislative history of the Department of Energy Organization Act contained nothing to support a conclusion that the states could be given such a “veto” power by DOE, the Comptroller consulted an internal memorandum from the Department of Energy’s Office of General Counsel which concluded that “the Secretary of Energy under existing law does not have the legal authority to enter into a binding agreement with a state pursuant to which the state would have the power to veto or forbid the establishment of a proposed nuclear waste repository in the state.” The Comptroller further held that without statutory authority permitting such action, any agreements between officials of the Department of Energy and states giving the state the power to reject a potential disposal site selected by the Department would be legally unenforceable.

In further correspondence from the Department of Energy to Congressman Dingell, the Secretary of Energy James Schlesinger indicated that the Department was trying to develop a process for affected states to participate in the selection of potential sites for the disposal of radioactive waste. However, given the traditional Federal preemption of the states on all issues related to nuclear materials, as interpreted by the courts, DOE may require additional authority to implement a process for involving states in nuclear waste management decisions. It is unlikely that the courts would uphold the authority of DOE to create a role for the states if such a role could be construed to obstruct the implementation of a federal radioactive waste disposal program.

Several bills have been introduced in the 96th Congress to authorize a role for the states to participate in or veto decisions by the Federal government to create radioactive waste disposal facilities within their jurisdiction.⁵⁷

⁵⁶ Letter from R.F. Keller to John D. Dingell (June 19, 1978).

⁵⁷ At this writing, the bills are H.R. 1071, 96th Cong., 1st Sess., 125 CONG. REC. H 188 (1979), introduced by Rep. Joseph Moakley, which would authorize state legislative actions or state referenda on storage proposal; H.R. 1791, 96th Cong., 1st Sess., 125 CONG. REC. H 436 (1979), introduced by Rep. James M. Hanley, which would subject federal proposals to store radioactive waste to state legislature’s review; S.1443, 96th Cong., 1st Sess., 125 CONG. REC. S8711 (1979), introduced by Senator John Durkin, to authorize approval by state legislatures or Indian tribes of proposal radioactive waste disposal facilities; and H.R. 2762, 96th Cong., 1st Sess., 125 CONG. REC. S2408 (1979), to create a process for states to participate in proposed radioactive disposal facilities decisions, and to approve or disapprove of final disposal decisions.

Although the House Interior Subcommittee on Energy and the Environment held a day of hearings on H.R. 2762 in June, 1979, it is uncertain whether Congress will take any action to provide states an opportunity to participate meaningfully in federal decisions on nuclear waste facility siting. Opponents to state participation argue that enactment of such legislation would result in all fifty states objecting to radioactive disposal facilities proposed for their jurisdictions. However, the states are rejecting radioactive waste even in the absence of statutory authority, and this trend will, at the very least, delay the development and implementation of a national radioactive waste management plan. The courts may, and in the absence of a legislative solution, will dispose of the issue on the basis of legal considerations. But the problem is essentially technical and political. A final decision by Congress on nuclear waste disposal policy must accommodate both the national interest in solving the problem of radioactive waste disposal and the responsibilities of the states for health and safety of their citizens.