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James R. Fabrizio

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An inherent objective of any program of atomic energy production is that the energy be developed with proper regard for environmental standards. While there can be no reasonable dispute with the stated objective, differences have frequently arisen over where the responsibility for safeguarding against radiation hazards should lie. State governments have expressed a strong desire to regulate the environmental aspects of atomic energy production,[1] but have, as yet, been prevented from assuming any role.

Without question, it is within the power of the Congress to preclude the states from exercising any control over atomic waste disposal,[2] though the power has never been expressly invoked. Until quite recently the posture of the law has been that the states are pre-empted from acting in this area by the implication of congressional intent[3] contained in the Atomic Energy Act of 1954 and the amendments thereto.[4] Doubt as to the validity of this conclusion has been created, however, by the 1972 amendments to the Water Pollution Control Act[5] and a recent interpretation of this legislation by the Tenth Circuit Court of Appeals.[6] By examining the applicable federal legislation and the judicial construction it has received, this note will consider whether the opportunity now exists for the states to assume a more vital role in the regulation of radioactive pollution.

THE PREVAILING DOCTRINE OF FEDERAL PRE-EMPTION

The federal legislation as regards nuclear energy production has changed dramatically within the relatively short period of time during which it has been a subject of national concern. The original Atomic Energy Act established a governmental monopoly by placing the ownership of all production facilities in the Atomic Energy Commission (AEC).[7] In 1954, private ownership was

1. *See* Note, 46 TUL. L. REV. 1016, 1020 (1972).

2. *See* Estep and Adelman, *State Control of Radiation Hazards: An Intergovernmental Problem*, 60 MICH. L. REV. 41 (1961), for an analysis of the constitutional bases for congressional authority in this area.

3. *See* Northern States Power Co. v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U. S. 1035 (1972).

4. 42 U.S.C. § 2021 (1970).

5. 33 U.S.C. § 1251, *et. seq.* (Supp. 1973). (Hereinafter referred to as 1972 amendments).

6. Colorado Public Interest Research Group Inc. v. Train, 507 F.2d 743 (10th Cir. 1974).

7. Atomic Energy Act of 1946, Act. of Aug. 1, 1946, ch. 1073, 60 Stat. 755. [By the provisions of the Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 201(f), 88 Stat.

permitted, though subject to strict regulation.[8] And in 1959, the Act was amended to provide for a limited degree of state participation in the regulation of the atomic energy industry.[9]

It was in light of this background that *Northern States Power Co. v. State of Minnesota* was decided.[10] Minnesota had enacted radioactive waste disposal regulations which set higher standards than the comparable AEC radiation safety requirements. The power company challenged the state's authority to enforce these regulations on the ground that exclusive jurisdiction had been vested in the AEC.[11] The court held that under the doctrine of implied pre-emption the federal government has the sole authority to regulate nuclear power plants, including the regulation of radioactive effluents discharged from such facilities.

At the outset, it was noted that Congress had never expressly precluded state regulation, and since no physical impossibility of dual compliance was presented, the sole issue was whether Congress had implied an intent to displace all concomitant state regulation. The necessary intent was found to be implied by the provisions of the Atomic Energy Act and its legislative history, as well as by the inherent nature of the subject matter being regulated.[12]

The primary statutory provision involved in *Northern States* was section 2021 of the 1959 amendments to the Atomic Energy Act.[13] That section of the Act has the expressed purpose of clarifying the responsibilities of the states and the AEC, and authorizes the AEC to enter into agreements with a state for the transfer of AEC regulatory jurisdiction in certain areas. The same provision prohibits the AEC from discontinuing its authority with respect to certain activities including "the construction and operation of any production and utilization facility".[14] The state argued that this language only prohibited the total relinquishment of federal supervisory authority, and not concurrent regulation by both the AEC and a state.[15]

The majority, however, felt that the statutory language implied that federal legislation was to be exclusive, absent the execution of a compact with the state. This result was considered to be mandated by the history of atomic

1233 (Oct. 11, 1974), the licensing and regulatory functions of the AEC have been transferred to the newly-formed Nuclear Regulatory Commission. In regard to the subject matter of this note the change is in name only, as the statutes discussed remain unchanged and in force.]

8. Atomic Energy Act of 1954, 42 U.S.C. § 2061 (1970).
9. *Id.* § 2021.
10. 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U. S. 1035 (1972).
11. *Id.* at 1144.
12. *Id.* at 1153.
13. 42 U.S.C. § 2021 (1970).
14. *Id.* § 2021 (c) (1).
15. The same argument was advanced in *In Re* Dresden Nuclear Power Station, 2 ERC 1302 (1971), where the Illinois Pollution Control Board held that it had the jurisdiction to regulate nuclear waste disposals, despite the holding of the district court in *Northern States.*

energy regulation[16] and by a reading of the statutory provisions as a whole. In the latter regard it was stated:

> Finally, we are of the firm opinion that the mere enactment of elaborate and detailed legislation authorizing turnover agreements to effect a cession to the states of regulatory authority over some activities associated with radiation hazards, and specifically prohibiting the relinquishment of authority over others, in itself evinces an inescapable implication that the federal government possessed exclusive authority absent the agreements authorized by the 1959 amendments.[17]

The foregoing interpretation of section 2021 is essential to the *Northern States* decision, and is the strongest foundation for the majority's holding. The legislative history of the amendment was also relied upon,[18] though portions of the legislative background would seem to be more consistent with the interpretation argued by the state.[19] The court also determined that the nature of atomic energy production required uniform regulation at the federal level in order to prevent overprotective state health laws from hindering the industrial development of atomic energy as a power source.[20]

A dissent was filed in *Northern States* which disputed each of the conclusions relied upon in the majority opinion. The dissent noted the lack of express pre-emption, and did not find that the Act, as a whole, clearly implied that AEC jurisdiction was to be exclusive.[21] Nor was the failure to exclude state participation in unmistakable terms considered a mere oversight in light of the legislative history.[22]

The dissenting opinion in *Northern States* demonstrated a reluctance to overturn the state regulations in question. In general, the courts have been disinclined to find state laws concerning public health and safety pre-empted by federal regulation absent a clear and unmistakable manifestation of Congressional intent.[23] An illustration is *Huron Portland Cement Co. v. City of Detroit*,[24] in which the Supreme Court held that the city could enforce an anti-smoke pollution ordinance against a shipowner whose equipment had been inspected and licensed under extensive federal regulations.[25] The Court refused to hold the city ordinance pre-empted though the vessel was engaged

16. 447 F.2d at 1150.
17. *Id.*
18. The *Northern States* court relied primarily upon the Senate Report; *see* S. Rep. No. 870, 86d Cong., 1st Sess. (1959).
19. *See* the testimony of Mr. Lowenstein of the Office of the General Counsel, AEC, reported in Note, 68 MICH. L. REV. 1294 (1970), and set forth at 447 F.2d at 1155-56.
20. 447 F.2d at 1154.
21. *Id.* at 1156.
22. In this regard, it should be noted that the Office of the General Counsel, AEC, specifically declined to request an express pre-emption provision when questioned before the Joint Committee. *See* sources cited *supra* note 19.
23. *See, e.g.*, Maurer v. Hamilton, 309 U.S. 598, 614 (1940).
24. 362 U.S. 440 (1960).
25. *Id.* at 441-42.

in interstate commerce, and despite the fact that the ordinance imposed criminal sanctions on the shipowner who had fully complied with all applicable federal regulations.[26]

The *Huron* decision clearly indicates an unwillingness to interfere with state health measures which is lacking in *Northern States*. And the dissent demonstrates that the statutory language and legislative history of section 2021 is susceptible to varying interpretations. Nonetheless, *Northern States* has remained an effective bar to state assertions of authority to regulate radioactive pollution in the face of the Atomic Energy Act.[27] For this authority, the states must look to subsequent legislation.

The Water Pollution Control Act Amendments Of 1972

In 1972, Congress amended the Water Pollution Control Act to include provisions which, on their face, appear to express the intent necessary to abrogate the *Northern States* doctrine. Under the Act, the administrator of the Environmental Protection Agency [EPA] is charged with the responsibility of regulating pollution in navigable waters.[28] Section 1362 defines pollutant to include "radioactive materials," and a separate provision allows the states to impose stricter performance standards than those set by the EPA.[29] The literal terms of the statutes thus suggest a departure from the holding of *Northern States*, since the EPA, rather than the AEC, is made responsible for the control of "radioactive materials," and the states are authorized to regulate more stringently than the EPA.

26. *Id.* at 449 (Douglas, J., dissenting).

27. *See, e.g.*, Commonwealth Edison Co. v. Pollution Control Board, 5 Ill.App.3d 800, 284 N.E.2d 342 (1972), where the court relied upon *Northern States* to reverse the decision of *In re* Dresden, 2 ERC 1302 (1971).

28. 33 U.S.C. § 1342 (Supp. 1973).

29. 33 U.S.C. § 1362 (6) (Supp. 1973), provides:

> The term "pollutant" means dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

And 33 U.S.C. § 1370 (Supp. 1973), provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the water (including boundary water) of such States.

In 1973, however, the administrator issued regulations which severely limited the scope of the phrase radioactive materials on the ground that Congress did not intend the words to carry a broad meaning. The regulation states that the only radioactive wastes encompassed by the definition of pollutant are those which were not being regulated by the AEC prior to the time the amendments were enacted.[30] Thus, source, by-product and special nuclear materials, which constitute the vast majority of the waste materials created by power plants, are not included in the EPA definition.[31] The EPA position would therefore be that the 1972 amendments have no effect upon the established doctrine of *Northern States* and that the states remain pre-empted.

JUDICIAL INTERPRETATION OF THE 1972 AMENDMENTS

In *Colorado Public Interest Research Group Inc. v. Train*,[32] the validity of the EPA interpretation was directly challenged. A citizen suit was brought against the EPA administrator seeking to compel that agency to exercise control over discharges of radioactive materials into navigable waters.[33] Two atomic plants were involved, one of which was owned by the AEC. Both facilities had applied to the EPA for discharge permits, but in each case the administrator denied that he had the authority to regulate their operations.

The sole issue presented was whether the Water Pollution Control Act amendments conferred jurisdiction upon the EPA. The district court held for the defendant and accepted the interpretation of the 1972 amendments contained in the regulation issued by the EPA. The legislative history was found to support the contention that Congress had never intended to displace AEC jurisdiction, and it was noted that dual regulation of atomic energy producers would lead to undesirable results.[34]

> Perhaps it is possible for both the EPA and the AEC to regulate wastes of 'source', 'by-product' and 'special' nuclear materials, but for both to try to do so would be likely to create not only wasted effort, but, worse, confusion, and possible danger to the public.[35]

30. 40 C.F.R. § 125.1 (x) (1973), provides in pertinent part:
COMMENT.—The legislative history of the Federal Water Pollution Control Act Amendments of 1972 reflects that the term 'radioactive materials' as included within the definition of 'pollutant' in section 502 of the Act covers only radioactive materials which are not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act, and therefore, included within the term 'pollutant' are radium and accelerator produced isotopes.

31. *See* text of regulation *supra* note 30 for the limited type of radiation pollutants included in the EPA interpretation of section 1362(6).

32. 507 F.2d 743 (10th Cir. 1974).

33. Citizen suits to enforce the provisions of the Water Pollution Control Act are authorized by 33 U.S.C. § 1365 (a)(2) (Supp. 1973).

34. 373 F. Supp. 991, 994-96 (D. Colo. 1974).

35. *Id.* at 994.

Additionally, the energy crisis was mentioned as a persuasive, though non-controlling, factor in the decision.[36]

The Court of Appeals for the Tenth Circuit reversed the lower court, and held that the 1972 amendments charged the EPA and its administrator with the duty of regulating the discharge of all radioactive waste materials into navigable waters.[37] In effect, the court held that the 1972 amendments mean exactly what they say. In reaching the decision, reliance was placed upon several basic rules of statutory construction. These rules included that "an unambiguous statute must be given effect according to its plain and obvious meaning;" and that when "the legislature has excepted certain categories from the operation of a particular law . . . additional exceptions are not warranted."[38] The latter rule is relevant to an interpretation of section 1362 (6), since the statute does except certain materials from its coverage without mentioning the exception embodied in the EPA regulation.[39] A final rule which was cited is that the legislative history of an enactment cannot be used to alter its clear and plain meaning.[40]

Under these rules of construction the statute was found to be plain, unambiguous, and entitled to be given its obvious meaning. As the court stated in discussing the statutory language:

> The statute does not say 'some' radioactive materials, or radioactive materials 'except for', just radioactive materials. So it would seem to us that if we give the words thus used in the statute their plain and obvious meaning, the EPA Administrator is charged with the duty of regulating the discharge of radioactive materials into navigable waters. No exceptions having been set forth in the statute as concerns radioactive material, it would follow that the term 'radioactive materials' means all radioactive materials, and we so hold.[41]

Since the statute was found to be unambiguous, the legislative history of the act was not considered, as it would be immaterial under the rule of construction previously noted.[42]

A similar interpretation of the 1972 amendments is found in *Scenic Hudson Preservation Conference v. Callaway*,[43] which, though not concerned with radioactive pollution regulation, did involve analogous questions of statutory construction. In *Scenic Hudson* the argument that the 1972

36. *Id.* at 995.
37. 507 F.2d at 749.
38. *Id.* at 746-47.
39. *See* text of statute *supra* note 29.
40. 507 F.2d at 747. For this rule of construction the court cited United States v. Oregon, 366 U.S. 643 (1961), and *Ex Parte* Collett, 377 U.S. 55 (1949). Both authorities support the proposition that the plain meaning of a statute may not be overcome by the legislative history, but it should be noted that in each case the Court went on to state that its decision was in line with the intent manifested by the legislative history.
41. 507 F.2d at 747.
42. *See supra* note 40.
43. 370 F. Supp. 162 (S.D.N.Y. 1973).

amendments were not intended to displace certain licensing powers of the Federal Power Commission was rejected. Section 1344 of the Water Pollution Control Act[44] requires that a permit to discharge dredged or fill material is to be obtained from the Secretary of the Army rather than the EPA administrator. The court held that this section applied to an electric power company, and that no exception could be inferred from the fact that this would be an interference with the long-established jurisdiction of the Federal Power Commission.[45] As in *Colorado Public Interest Group*, the terms of the statute were given a literal meaning.

An analysis of the statutory language interpreted in *Colorado Public Interest Group* supports the decision of the circuit court. The provisions in question are, in fact, clear and unambiguous. If Congress had intended to create a major exception in the class of pollutants which radioactive materials represent, it is reasonable to assume that the exception would have been expressed. This assumption is also justified by the fact that the statute in question does clearly list certain materials which are exempt from its coverage. As the opinion noted, "[h]ere, the statute declares not only what the term pollutant 'means', but what it 'does not mean'."[46] To accept the definition put forth by the EPA, the court would have had to step beyond the boundaries of interpretation and engage in a rewriting of the statute involved. The strength of the decision is that these limits were not crossed.

Legislative History

The legislative history of the 1972 amendments is, in part, inconsistent with the clear language of the statutes finally enacted. As previously noted, *Colorado Public Interest Group* did not consider the legislative history of the act, since such a consideration was foreclosed by the principles of statutory construction which were held to be controlling.[47] It was parenthetically noted, however, that the legislative history was conflicting and inconclusive.[48] The district court also found some support for the plaintiff's position in the legislative record, but concluded that the history overwhelmingly favored the defendant's interpretation.[49] On the whole, the report of the House Committee and the floor debate demonstrate that the committee members did not believe that section 1362 (6) would interfere with AEC regulatory authority over atomic waste disposal.[50] Similar evidence can be found in the records of

44. 33 U.S.C. § 1344 (Supp. 1973).
45. 370 F. Supp. at 170.
46. 507 F.2d at 747.
47. *See* text preceding note 42 *supra*.
48. 507 F.2d at 748.
49. 373 F. Supp. at 994.
50. *See* H.R. Rep. 92-911, 92d Cong., 2d Sess. (1972), and 117 Cong. Rec. 17,401 (daily ed. Nov. 2, 1971). *See also* 118 Cong. Rec. 10,666 (1972) (remarks of Mr. Harsha, a manager of the bill, in response to an inquiry concerning the meaning of "radioactive materials"):

> As I said earlier in the debate on the Wolf amendment, we intended to leave the jurisdiction of radioactive material that came within the Atomic Energy Act up to the

the Senate proceedings.[51]

While the above portions of the legislative history lend some support to the EPA contentions, which were rejected in *Colorado Public Interest Group*, they are not compelling when contrasted with the clear language of section 1362 (6). The legislative background is more damaging, however, to the validity of the proposition that the states are now free to regulate radioactive water pollution.

In the House debate, which preceded the enactment of the 1972 amendments, an amendment was proposed which would have directly abolished the *Northern States* doctrine. After discussion, during which *Northern States* was mentioned, the amendment to the bill was rejected.[52] If a state is to contend that the 1972 amendments are a grant of authority over a previously foreclosed subject, it will surely be met with this expression of adverse congressional intent, and must be prepared to confront it.

ANALYSIS

The effect which *Colorado Public Interest Group* will have upon the regulation of the atomic energy industry is as yet unclear. It has, however, undeniably opened an avenue for the reassertion of state's rights in the field. Though the holding of the court was specifically limited to the question of jurisdiction between the EPA and the AEC, the implications of the decision are far reaching. *Northern States* was cited by the EPA in *Colorado Public Interest Group*, and was relied upon in the district opinion which was

> Atomic Energy Commission. The language applied only to everything outside the jurisdiction of AEC. That is definitely the intent of the wording of the bill and the intent of the committee.

But see 118 Cong. Rec. 10,802 (1972) (remarks of Mr. Frenzel in response to the above statement and the discussion preceding it):

> The intent of the discussion was to establish that H.R. 11896 did not apply to pollution, radioactive or thermal, from nuclear power plants controlled or regulated by the Atomic Energy Commission. A discussion on the floor of this House may or may not be helpful in determining lesiglative intent. More often than not it simply determines the intent or purposes of the few people engaging in that particular discussion. In the case of H.R. 11896, the bill clearly applies to various kinds of pollutants which the gentlemen referred to above are trying to cut out of the bill by their discussions yesterday . . . No matter what kinds of discussions may take place on the floor of this House, it seems to me quite obvious in the legislation itself that it was the clear intent to include all kinds of pollution except the four specified exemptions . . . No matter what some of our Members would like to be the intent of the bill, the bill is quite obvious and needs no amplification. As long as the bill has stipulated what is to be exempted and what is to be controlled, nothing that is said on the floor of the House can change the language of this bill.

51. 117 Cong. Rec. 38,802-03 (1971) (remarks of Senators Muskie and Pastore concerning the *Northern States* decision then on appeal to the United States Supreme Court):

> *Mr. Pastore.* Yes. As a matter of fact, that decision held that the Federal Government did preempt in this field under existing law. That is the opinion, and we hope this legislation does not change that opinion in any way, and does not affect existing law. That is all I am concerned with.
>
> *Mr. Muskie.* The Senator is correct in his evaluation of the legislation on that point.

52. 118 Cong. Rec. 10,654 (1972) (amendment offered by Mr. Wolf).

ultimately reversed.[53] The circuit court noted the proposition for which *Northern States* stands, but added:

> Assuming the correctness of this proposition, such does not mean that Congress is thereafter foreclosed from later deciding, as we believe it did, to vest the Environmental Protection Agency with the duty of regulating the discharge of all radioactive materials into navigable waters.[54]

The validity of the *Northern States* doctrine rests upon the statutory language of the Atomic Energy Act, which raises the inference that the states are pre-empted from regulating atomic waste disposal. According to *Colorado Public Interest Group*, this statutory foundation no longer exists, and the operative law is now to be deduced from the provisions of the 1972 amendments.

When the *Colorado Public Interest Group* decision is considered in conjunction with section 1370 of the Water Pollution Control Act,[55] a rationale is created to justify the imposition of state regulations on the discharge of radioactive water pollutants. For section 1370 only prohibits a state from adopting performance standards less stringent than the comparable EPA standards. The authority of a state to adopt stricter regulations stems not only from the language of the provision, but from the legislative intent behind section 1370[56] as well; and such has been the judicial interpretation.[57] The 1972 amendments are not pre-emptive in nature, and in those areas where federal pre-emption was desired, Congress explicitly manifested its intent.[58] Thus, it can be argued that if radioactive pollution is to be regulated by the EPA under standards established pursuant to the Water Pollution Control Act, then the states may enact and enforce stricter regulations under section 1370 of the same governing act.

While a line of reasoning favoring state regulation flows from the express language of the 1972 amendments, the legislative history raises doubts as to whether this reasoning will meet with success. To enact regulations to control nuclear water pollution, the states must rely not only upon *Colorado Public Interest Group* being accepted by other courts, but also upon the rationale that its holding, when combined with section 1370 of the 1972 amendments, eliminates all vestiges of the *Northern States* doctrine.

Though it has previously been submitted that *Colorado Public Interest Group* properly interpreted the 1972 amendments,[59] this conclusion merits further discussion at this point. The legislative history creates a basic

53. 373 F. Supp. at 994-95.
54. 507 F.2d at 749.
55. 33 U.S.C. § 1370 (Supp. 1973). *See* text of statute *supra* note 29.
56. *See* Joint Explanatory Statement of the Committee of Conferences, 92d Cong., 2d Sess. (1972), 1972 U.S. CODE CONG & AD. NEWS 3825.
57. People of State of Ill. *ex rel.* Scott v. City of Milwaukee, Wis., 366 F. Supp. 298, 301 (N.D. Ill. 1973).
58. *See* 33 U.S.C. § 1322 (f)(1) (Supp. 1973).
59. *See* text following note 45 *supra*.

ambiguity which it fails to resolve. If the mood of Congress was to avoid interference with the authority of the AEC, why was this not expressly stated? Section 1362 (6) defines pollutant to include "sewage ", but subpart (a) expressly states that "sewage from vessels within section 1322 of this title" is not included.[60] Similarly, material injected into wells in order to facilitate gas or oil production is excluded from the scope of the definition, and thus from the coverage of the act.

When a legislature has created exceptions to a statute's coverage, the presumption arises that it intended to go only as far as it did. This principle has been referred to as a cardinal rule of statutory construction.[61] Given the terms of section 1362 (6) and the foregoing rule, it is difficult to conceive how the Tenth Circuit could have accepted the contentions of the EPA without exceeding the bounds of judicial discretion. Though Congress may have, in fact, intended to limit the scope of the term "radioactive materials," it neither expressed nor implied this intent within the statute. Whether this was the result of legislative stratagem or mere oversight, it would have been beyond the province of the *Colorado Public Interest Group* court to write a major exception into an unambiguous provision. To borrow from an expression of the late Justice Frankfurter, Congress did not enact a speech, they enacted a statute.[62] And the judicial function should be limited to the interpretation of the latter.

The recognition of *Colorado Public Interest Group* as the definitive statement on the meaning of section 1362 (6) is not alone sufficient to carry the day for state regulation. The legislative history of the 1972 amendments, and the contention that atomic energy inherently requires federal regulation, may both be raised against attempted state control. It is not inconceivable that a decision could be rendered which accepted the narrow holding of *Colorado Public Interest Group* , that jurisdiction has been shifted from the AEC to the EPA, while rejecting that state regulation was therefore permissible.

The district court in *Colorado Public Interest Group* was apparently of the opinion that if the EPA interpretation of section 1362 (6) was rejected both the AEC and the EPA would be required to regulate radioactive wastes.[63] The appellate opinion, however, does not suggest that dual regulation by the AEC and the EPA is required by its holding. On the contrary, the circuit court construed the 1972 amendments so as to supersede the Atomic Energy Act, thus eliminating all AEC authority over radioactive water pollutants.

This aspect of the decision is illustrated by the manner in which the defendant's argument that section 1371[64] of the 1972 amendments prohibits

60. *See* text of statute *supra* note 29.
61. *See e.g.*, Knapczyk v. Ribicoff, 201 F. Supp. 283 (N.D. Ill. 1962).
62. *See* Adamson v. California, 332 U.S. 46,64 (1947), (Frankfurter, J., concurring).
63. 373 F. Supp. at 994.
64. 33 U.S.C. § 1371 (Supp. 1973).

EPA jurisdiction was rejected. In essence, section 1371 states that the 1972 amendments do not limit the functions of any agency, acting under any other law, not inconsistent with the Water Pollution Control Act. The short reply given to defendant's reliance upon this section was "that the 1972 Amendments are inconsistent, in the particulars indicated, with the Atomic Energy Act of 1954."[65] And in conclusion, the court stated; "In sum, then, the 1972 Amendments charge the EPA Administrator with the duty of regulating the discharge of all radioactive materials into the Nation's waters . . . ." [66]

The thrust of *Colorado Public Interest Group* is clearly away from any notion of dual AEC-EPA regulation. The intent of Congress is there construed to be that radioactive water pollution, like other forms of water pollution, is to be regulated by the EPA. If *Colorado Public Interest Group* is followed, the possiblity of overlapping regulation at the federal level does not arise. The most plausible approach would thus be that regulation is to be carried out within the framework of the Water Pollution Control Act, the vehicle which was devised to control water pollution, and the vehicle which, as previously noted, allows for the enforcement of more stringent local standards.

The position of the *Northern States'* court, that atomic energy production inherently requires federal regulation, is also rendered immaterial by the logical consequences of the *Colorado Public Interest Group* holding. Whether or not a particular subject is by nature fit for only uniform, national regulation is a question for the legislative branch. Issues of pre-emption are, in essence, searches for manifestations of the intent of Congress, and the judgment of that body as to the need for regulation, and its scope, is conclusive. [67] It would thus follow that when Congress expressed the intent to place the control of all radioactive pollution under the EPA, to be regulated within the legislative framework established for that agency, it also concluded that the need for solely federal regulation of radioactive water pollution no longer exists.

When the provisions of the 1972 amendments are given their clear and literal meaning, as was done in *Colorado Public Interest Group*, the states are granted the authority to enforce radioactive water pollution controls which set higher standards than required by the federal government. Yet, the fact remains that Congress, while enacting the legislation on which the states must rely, voted down a proposal embodying the same result which the express terms of the legislation appear to mandate.

Thus, while the states now have a legal basis on which to initiate regulation of radioactive pollutants, it cannot be safely predicted that these regulations will be allowed to stand. A court might choose to disagree with *Colorado Public Interest Group*, and reject the literal terms of the statutes in

65. 507 F.2d at 748.
66. *Id.* at 749.
67. *See, e.g.*, Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

reliance upon intent perceived from the legislative history. Another might choose to accept the narrow holding of the decision, but reject the thesis that it authorizes state participation. And beyond the judicial reception with which state regulations might be greeted, the possibility also exists that Congress could invoke its power to pre-empt the field in clear and unmistakable terms.

CONCLUSION

At the outset it was noted that until recently the state of the law concerning atomic energy pollution was settled and certain. The only valid conclusion that can now be stated is that the certainty has been dispelled. As a result of the 1972 amendments to the federal Water Pollution Control Act, and the decision in *Colorado Public Interest Group*, a door has been opened through which the states may attempt to enter the field of regulation of atomic energy water pollution. The opening is, however, only a crack, capable of being closed by the courts or the Congress. Nonetheless, the opportunity for the states is present.

It is possible that the time has now come to re-evaluate the desirability of federal pre-emption of state control over nuclear power plants from a pragmatic, as well as a legal, viewpoint.[68] It might be found that the fears which led the *Northern States* court to determine that the inherent nature of atomic energy production precludes state regulation have failed to materialize and that it is time for new directions.[69] In any event, as a result of the recent developments discussed, the question is likely to arise as to whether the states are to have a role in this area of pollution control. The present state of uncertainty indicates that inconsistent legal responses to the question may be forthcoming, and suggests that a congressional resolution of the issue is desirable.

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68. *See* Coggins, G., *The Environmentalist's View of AEC's Judicial Function: A Reply to Messrs. Doub et al*, 15 ATOMIC ENERGY L.J. 176, 179-85 (1975), where the author strongly suggests that the AEC is disregarding the environmental aspects of atomic energy production.

69. In regard to time, it has been noted that 42 U.S.C. § 2021, was not originally intended to be permanent legislation. *See* Note, 46 TUL. L. REV. 1016, 1019 (1972), wherein it is stated:

> Legislation that granted the AEC preclusive authority over licensing did not contemplate that the AEC would retain that authority for an extended time. The Senate report accompanying the bill stated it was merely 'interim legislation' and that the states were expected to assume increasing responsibilities. The nuclear industry is 26 years old, and this 'interim legislation' was passed 13 years ago—half the lifetime of the nuclear industry.